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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 68/2019 concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández and Evelyn Beatriz Hernández Cruz (El Salvador)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 9 August 2019 the Working Group transmitted to the Government of El Salvador a communication concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández and Evelyn Beatriz Hernández Cruz. The Government submitted a late response, on 5 November 2019. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,



disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Ms. Rogel is Salvadoran, born on 23 October 1991 and a resident of El Calvario, Santa Cruz Analquito, Cuscatlán. At the time of her arrest, she was a student and was 22 years old.
5. According to the information received, on 7 October 2012, Ms. Rogel slipped and had an accident in the laundry room of her house, suffering a severe blow. Her relatives called for an ambulance to take her to Nuestra Señora de Fátima National Hospital in Cojutepeque.
6. On 8 October 2012, the prosecutor's office received a call from the hospital's social work service, reporting that Ms. Rogel had been admitted for a fall and had suffered an incomplete abortion. In response, an assistant prosecutor went to the hospital and began an investigation, asking the National Police to arrest Ms. Rogel, on the grounds that she had committed a crime and was in flagrante delicto. A police officer made the arrest at around 4 p.m. on suspicion of voluntary, self-induced abortion.
7. The office of the assistant prosecutor instructed the operational division of the National Civil Police to request a search warrant for the house from the Santa Cruz Analquito municipal judge. The authorities went to the residence, where they were given the clothes that Ms. Rogel had been wearing on the day of the obstetric emergency and were shown where the fetus had allegedly been buried after the abortion. On finding the body, the forensic doctors concluded that there was no external injury and sent it to a forensic medicine laboratory for an autopsy. The autopsy established that the cause of death was head trauma.
8. On 11 October 2012, the assistant prosecutor requested a formal investigation with pretrial detention in respect of Ms. Rogel, accusing her of aggravated homicide and arguing that the crime is serious and she might evade or obstruct justice.
9. On 11 October 2012, the Santa Cruz Analquito Municipal Court ordered the detention, considering that there was a likelihood of involvement in the crime. Ms. Rogel was transferred to the cells of the 911 system of the National Police.
10. On 12 October 2012, the Municipal Court ordered the launch of the investigation. The Court stated that, as the crime was serious and punishable by 30 years' imprisonment, the defendant might seek to evade prosecution. It also established that it was possible that Ms. Rogel might "obstruct a specific act of investigation". On 19 October 2012, Cojutepeque Court of Investigation No. 1 confirmed the pretrial detention on the same grounds as those put forward by the Municipal Court.
11. On 6 December 2012, at a special hearing to review the precautionary measure, Cojutepeque Court of Investigation No. 1 decided to maintain the detention measure, considering it "necessary to achieve the aims of the proceedings and ensure that the young woman stands trial". On 17 December 2012, the Chamber of the Second Section of the Central Court denied an appeal against the decision of Court of Investigation No. 1.
12. On 2 May 2013, at a preliminary hearing, the Court of Investigation No. 1 ordered the opening of the trial with pretrial detention, determining that the conditions under which the measure had been imposed had not changed. Ms. Rogel was transferred to the pretrial detention and sentence enforcement centre in Ilopango.
13. On 12 September 2013, the Cojutepeque Trial Court sentenced Ms. Rogel to 30 years' imprisonment for aggravated homicide.
14. On 6 November 2013, the Chamber of the Second Section of the Central Court granted a writ of habeas corpus in favour of Ms. Rogel on the grounds that "the rights of defence and of appeal were infringed by the failure to draw up and give notice of the

sentence within a reasonable time”. Nevertheless, it ordered the continuation of the detention.

15. On 3 February 2014, the Chamber of the Second Section of the Central Court upheld Ms. Rogel’s conviction and rejected the defence’s arguments. On 19 May 2015, the Criminal Division of the Supreme Court found an appeal against the sentence of 3 February 2014 to be inadmissible.

16. According to the source, the legal basis for the detention was article 133 of the Criminal Code, which covers the crime of voluntary, self-induced abortion; article 323 of the Code of Criminal Procedure, which governs arrest in flagrante delicto; and articles 128 and 129 of the Criminal Code, which establish the crime of aggravated homicide. The pretrial detention was based on articles 329, 330 and 334 of the Code of Criminal Procedure.

17. On 20 March 2019, Ms. Rogel was transferred to Izalco Prison.

18. Ms. Arana is of Salvadoran and Guatemalan nationality and was born on 27 March 1993. In September 2013, she was 20 years old, 39 weeks pregnant, with no schooling, and was employed as a domestic worker. She was living in a remote rural area of San Lorenzo, Ahuachapán.

19. On 23 September 2013, at approximately 10.30 p.m., Ms. Arana suffered an obstetric emergency at home, was experiencing labour pains and bleeding, and had no medical support. Her family called the emergency number and requested urgent medical attention.

20. Police officers went to Ms. Arana’s home, by which time she had already given birth in an outside toilet located 30 metres from her house, without anyone assisting or being with her at the time. The officers found that she was seriously ill and unconscious, and that there was a newborn baby inside the toilet.

21. The officers reportedly assumed that Ms. Arana had thrown her daughter into the toilet in an attempt to kill her. On 24 September 2013, she was transferred to Francisco Menéndez National Hospital and placed under police surveillance for the attempted aggravated homicide that she was alleged to have committed. Ms. Arana stated that she could not afford to pay for a lawyer; the State did not appoint one.

22. On 25 September 2013, the Institute of Forensic Medicine conducted a forensic examination of the newborn and determined that she had been born out-of-hospital in a self-assisted delivery.

23. On 26 September 2013, the prosecutor’s office filed an application for prosecution against Ms. Arana for attempted aggravated homicide, arguing that she had attempted to kill her daughter. The San Lorenzo municipal judge decreed that Ms. Arana should be detained pending inquiries, while she was still receiving care in the hospital for the obstetric emergency.

24. On 26 September 2013, at 3.30 p.m., Ms. Arana was brought before the municipal judge, who informed her that she was being charged with attempted aggravated homicide. She was told that she would receive legal assistance from a public defender. Ms. Arana stated that she did not have an identity document.

25. On 27 September 2013, an initial hearing was held before the San Lorenzo municipal judge, who ordered a formal investigation with pretrial detention. None of the prosecution’s evidence demonstrated that Ms. Arana had committed a crime; it proved only that an obstetric emergency had occurred. Ms. Arana was represented by a different public defender to the one originally assigned.

26. Ms. Arana was detained at the National Civil Police station in Apaneca, Ahuachapán, until 2 October 2013, when she was transferred to the pretrial detention and sentence enforcement centre in Ilopango.

27. On 14 January 2014, the prosecutor’s office brought charges. On 3 April 2014, at a preliminary hearing, the Court of First Instance ordered the continuation of pretrial

detention. Once again, there was a change in the public defender and Ms. Arana was represented by a different lawyer.

28. On 2 July 2014, Ahuachapán Trial Court sentenced Ms. Arana to 15 years' imprisonment. In the judgment, it was concluded that the accused "carried out a series of acts whose final aim was to kill her newborn daughter".

29. On 9 July 2014, the Court gave notice of the decision, without Ms. Arana or her defence counsel being present. Consequently, the judgment was not appealed and became final and enforceable on 24 July 2014.

30. The source states that Ms. Arana meets the requirements of the 1997 Prisons Act for entering the trust stage of the execution of her sentence. This would entitle her to leaves of absence, access to jobs with greater responsibility, an increase in the number of visits by family and friends, and greater freedom of movement. However, she will not be able to obtain any prison privileges because she must have an identity document and would need to process her birth certificate in Guatemala. Ms. Arana was investigated, charged, prosecuted and convicted without documentation, but will not be able to access even minimal privileges during her detention.

31. The legal basis for the detention was, firstly, articles 24, 128 and 129 of the Criminal Code, which cover the criminal offence of attempted aggravated homicide. Subsequently, the San Lorenzo municipal judge reportedly ordered the detention pending inquiries under article 323 of the Code of Criminal Procedure. The pretrial detention was apparently ordered under article 329 of the Code of Criminal Procedure. Lastly, the sentence was reportedly handed down on the basis of articles 128 and 129 of the Criminal Code.

32. On 20 March 2019, Ms. Arana was allegedly transferred to Izalco Prison.

33. Ms. Hernández is Salvadoran, born on 18 October 1997 and a resident of El Carmen, Los Vásquez, Cuscatlán. At the time of her arrest, she was a student and was 18 years old.

34. On 6 April 2016, at approximately 10 a.m., Ms. Hernández, unaware that she was pregnant, felt severe abdominal pain and went to a latrine, where she gave birth. When she left the latrine, in a state of serious ill health, her family took her to the emergency department of the Nuestra Señora de Fátima National Hospital in Cojutepeque.

35. The source states that a social worker on duty informed the authorities of Ms. Hernández's admission, and the head of the Unit for Offences against Minors and Women requested a forensic doctor to implement the abortion investigation protocol. In her report, the doctor concluded that Ms. Hernández was displaying signs of pregnancy and confirmed that the patient had given birth out-of-hospital.

36. The authorities visited the young woman's home, where they found a lifeless fetus. Consequently, the prosecutor's office and a forensic doctor collected evidence from the scene and sent the body to a forensic medicine laboratory for an autopsy. Although no one had witnessed the birth, the police officers presumed the existence of a crime and, at approximately 6.30 p.m., arrested Ms. Hernández on the premises of Nuestra Señora de Fátima National Hospital, despite her state of serious ill health, without an arrest warrant and alleging that she was in flagrante delicto.

37. The source states that the forensic autopsy of 6 April 2016 revealed that the cause of death was "undetermined pending histopathological samples". The conclusion drawn from that examination was that the cause of death was "aspiration pneumonia".

38. On 9 April 2016, the prosecutor's office requested a formal investigation with pretrial detention in respect of Ms. Hernández. The assistant prosecutor charged her with aggravated homicide. The municipal judge ordered her detention on the grounds that "the procedural conditions of there being a prima facie case and danger in delay" had been met. The source claims that this was done without considering the facts of the case, by determining:

The criminal intent with which the defendant acted, firstly by concealing her pregnancy and then, when she was admitted to hospital, by not reporting it and instead claiming not to [know] that she was pregnant, since it is not credible and

even absurd that a student in the third year of her baccalaureate in health care would not recognize or feel the changes in her body during pregnancy.

39. According to the information received, the municipal judge asserted at a public hearing on 12 April 2016 that the defendant “must have known that she was expecting a baby” and concluded that there was “a latent flight risk”. The judge ordered the transfer of Ms. Hernández to the facilities of the 911 system of the National Police, where she was allegedly held in inadequate conditions.

40. On 20 April 2016, Court of Investigation No. 2, in an appeal judgment, ruled that:

Since aggravated homicide is classified as a serious crime, defendants, faced with a possible penalty of imprisonment for such a crime, generally try to evade justice ... in view of the penalty that may be imposed, so the precautionary measure of pretrial detention becomes necessary and is considered appropriate.

41. On 25 April 2016, the Chamber of the Second Section of the Central Court upheld the pretrial detention, finding that:

There is an obvious and natural risk of flight and of obstruction of the proceedings, since the crime is punishable by very high minimum and maximum penalties, and thus, objectively speaking, there is a high risk that the defendant will seek to evade justice and, consequently, that the investigation will be hindered, among other factors.

42. Ms. Hernández was placed in pretrial detention at the pretrial detention and sentence enforcement centre in Ilopango on 13 May 2016.

43. On 6 July 2016, Court of Investigation No. 2 rejected a request for a hearing to review the precautionary measure, arguing that it would be inappropriate owing to “the ban on granting alternative or substitute measures in place of pretrial detention for this category of crime”.

44. On 24 October 2016, the assistant prosecutor charged Ms. Hernández with aggravated homicide before Court of Investigation No. 2. On 7 March 2017, that Court ordered the opening of the criminal trial and upheld the pretrial detention on the grounds that:

The defendant’s conduct amounts to an intentional criminal act, since, on realizing that she was pregnant, she was obliged to care for and protect the unborn child and to seek professional help to enable her child to be born in optimal conditions. At no point did she mention to her mother that she was pregnant. Rather, it is alleged that, when the time came for her to give birth, she went to the toilet, which was a septic tank. Despite knowing her condition, she told her mother that all she had was diarrhoea. Given that pregnancy is a condition of which it is difficult to claim ignorance, especially for someone with the defendant’s level of education, it is to be assumed that she intended to murder her own child.

45. On 5 July 2017, the Cojutepeque Trial Court sentenced Ms. Hernández to 30 years’ imprisonment, finding it impossible that she could have given birth in the latrine and concluding, therefore, that she had thrown the baby into the septic tank to end its life. The ruling allegedly overlooked fundamental facts and evidence, and was based:

On the circumstantial, hearsay evidence ... that the accused, after giving birth in the early hours of the morning of 6 April 2016, threw the baby into the septic tank and thus committed an act liable to cause the death of this defenceless person.

46. On 20 December 2018, the First Criminal Chamber of the First Section of the Central Court overturned the conviction of 5 July 2017, arguing that:

In the first-instance decision, the rules of sound judgment were not observed, since no account was taken of the rules of common experience. Specifically, the defendant’s physical, mental, emotional and social states at the time of the delivery were overlooked.

47. On 7 February 2019, the Cojutepeque Trial Court ordered alternative measures in place of pretrial detention, as:

The time limit for pretrial detention set out in article 8 of the Code of Criminal Procedure has been reached, and thus it would be illegal to exceed this limit since it would violate the right to physical freedom and the principle of legal certainty in a democratic State governed by the rule of law, which is why Ms. Hernández Cruz cannot remain in pretrial detention, as it would become unconstitutional.

48. The authorities claim that articles 128 and 129 of the Criminal Code and articles 323 and 329 of the Code of Criminal Procedure were the legal basis for the detention.

Background information

49. The source indicates that the legislation on abortion in El Salvador is one of the most restrictive in the world. In 1998, a criminal code establishing its absolute prohibition came into force and, since 1999, the Constitution has recognized “every human being as a person from the moment of conception” (art. 1). These changes increased the risks of maternal mortality and morbidity from unsafe abortions. Between 2005 and 2008, 19,290 clandestine abortions were recorded, of which 27.6 per cent occurred among adolescents. In addition, it was reported that about 11 per cent of women who undergo a clandestine abortion die.

50. The ban on abortion has led to the systematic criminalization of women who suffer an obstetric emergency, the great majority of whom are living in poverty. The information received indicates that, between 2000 and 2011, 129 women were prosecuted for abortion or aggravated homicide.

51. Common characteristics of the women who have been criminalized include their age, education level, income and place of origin. A total of 68 per cent were sentenced when they were between 18 and 25 years old, 22 per cent have a low level of schooling, 82 per cent have little or no income and most come from rural or marginalized urban areas.

52. In addition, the legislation on abortion has encouraged health-care personnel to report medical complications during pregnancy or childbirth. Between 2002 and 2010, 57.36 per cent of the recorded reports of abortion came from health-care professionals. The practice of handcuffing women to hospital beds while they are still receiving medical treatment has become widespread. This situation is thought to discourage women from seeking help for their pregnancies.

53. It is argued that these trials tend to violate international standards: (a) the women prosecuted are interrogated without their lawyer being present; (b) the Institute of Forensic Medicine uses discredited methods of collecting evidence; (c) evidence is weighed from a stereotypical perspective of women’s role in society, according to which maternity and reproduction is their sole function, taking priority over the preservation of their own life or health; (d) between 1998 and 2011, there were no criminal courts of second instance. Although appeals have been possible since the 2011 reform of the Code of Criminal Procedure, in practice this remedy does not exist, given the low quality of State-appointed legal representation and the fact that an appeal is heard by the same court that handed down the conviction; (e) the extraordinary remedies of judicial review, pardon and commutation of the sentence are neither adequate nor effective for the protection of rights; and (f) the women prosecuted for suffering an obstetric emergency are deprived of their liberty in extremely overcrowded and unhealthy conditions characterized by a lack of care.

Legal analysis

Category I

54. The source alleges that the deprivation of liberty of Ms. Rogel, Ms. Arana and Ms. Hernández had no legal basis and was contrary to articles 9, 10 and 11 of the Universal Declaration of Human Rights and article 9 of the Covenant.

55. Ms. Rogel, Ms. Arana and Ms. Hernández were arrested without a warrant and two of them were alleged to be in flagrante delicto. The source specifies that a person is in

flagrante delicto when he or she is caught in the act of committing an allegedly unlawful act. In this case, the arrests were made in hospital, several hours after an obstetric emergency. It was through a report filed by hospital staff that a possible unlawful act was identified. As a result, the concept of being in flagrante delicto does not apply and a warrant was thus required in order to make an arrest.

56. The source also argues that the rules applied are incompatible with international law, asserting that aggravated homicide should not be used to criminalize obstetric emergencies. It is incompatible with international law as it violates sexual and reproductive health rights.

57. In addition, national legislation on pretrial detention is incompatible with international law in that it provides that such detention is appropriate even in cases in which there is no flight risk or possibility that the proceedings will be hindered. In all cases, the possibility of adopting less detrimental measures must be considered. It is up to the State to prove that such detention is proportionate.

58. The source argues that Ms. Arana did not have access to legal assistance as she was put in contact with a public defender only at 3.30 p.m. on 26 September 2013. Furthermore, she was assisted during the initial hearing by a different person. This is contrary to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

Category III

59. The source claims that the trials violated the rights and guarantees enshrined in articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

60. The source alleges that the authorities disregarded the fact that Ms. Rogel was admitted to hospital with an incomplete abortion and in a poor state of health, which shows how defenceless she was. It is claimed that she was treated as guilty, as her pretrial detention was ordered from the outset and it was determined that she might obstruct justice. The source alleges that the stigma surrounding abortion in El Salvador owing to its criminalization led to an assumption of guilt. The burden of proof was no longer on the prosecution, in violation of the presumption of innocence and principles of criminal law.

61. The source indicates that the psychosocial report that has been taken as valid evidence is based on testimonies from people (allegedly neighbours) who are not fully identified, preventing the defence from disputing the report and verifying the statements made by those witnesses.

62. For the source, the judicial authorities involved in Ms. Rogel's trial violated due process guarantees and the right to be presumed innocent by convicting her on the basis of a biased and stigmatizing interpretation of the facts, ignoring evidence that made it impossible to establish her guilt.

63. The only proven facts are that Ms. Rogel had a serious obstetric emergency owing to a heavy fall and was therefore admitted to hospital in a state of serious ill health. However, the medical staff, the prosecutor's office and the National Police assumed that she was guilty from the outset by distrusting her testimony, ordering her detention and determining that she acted with criminal intent, without considering her version of the events.

64. In the case of Ms. Arana, the authorities violated her right to be presumed innocent, since she was deprived of her liberty and convicted in the absence of any evidence that she had committed a crime. The only established fact is that she suffered an obstetric emergency and did not receive the timely health care that she required to have a safe delivery. The police officers, who arrived almost an hour after their support had been requested, immediately presumed that she had attempted to kill her daughter and that she was a dangerous person who might obstruct justice.

65. Furthermore, it is argued that Ms. Arana's right to a fair trial was not guaranteed, since, during the criminal proceedings, she was represented by more than four defenders, each of whom was appointed immediately before a hearing or was not present at the relevant proceedings. This led to a failure to guarantee her right to effective legal

assistance, bearing in mind that she lacked the financial means to appoint a defence counsel of her choice.

66. Regarding Ms. Hernández's detention, the source claims that, from the beginning of the proceedings, the authorities made a biased assessment of the facts, by assuming that she was guilty of aggravated homicide. The judge interpreted the evidence in the case without objectivity, concluding that "she concealed her pregnancy and threw the newborn into the latrine". By sentencing her to 30 years in prison, based on a biased interpretation of the facts and omitting evidence that made it impossible to establish her guilt, the authorities violated due process guarantees and the right to be presumed innocent.

67. For the source, the only facts that are proven in the court case are that Ms. Hernández had an unassisted out-of-hospital birth, which caused her to be in a state of serious ill health. However, the police officers, the prosecutor's office and the judicial authorities presumed that she was guilty and that she was a dangerous person who might obstruct justice.

68. The source concludes that actions of this kind affect the fairness of the trials in a manner that renders the detentions arbitrary under category III.

Categories II and V

69. The source alleges that the detention of Ms. Rogel, Ms. Arana and Ms. Hernández constitutes a violation of international law, as it is based on discrimination on the grounds of sex or gender and socioeconomic status, in breach of articles 2 and 26 of the Covenant and articles 2 and 7 of the Universal Declaration of Human Rights.

70. The source argues that, while there is a possibility that access to health care might not be interpreted as a right under category II, the prohibition of discrimination and the right to equality certainly are rights under that category. In that connection, access to sexual and reproductive health services and the non-criminalization of women who have out-of-hospital births or obstetric emergencies are rights that stem from the right to equality and the right not to be subject to gender discrimination. Consequently, the source considers it necessary also to protect access to health care, particularly sexual and reproductive health care, as a right whose exercise must not result in deprivation of liberty under category II.

71. It is alleged that the detentions were based on sex and gender discrimination, since they stemmed from the widespread practices of the authorities, who consider that women, even when in a state of serious ill health and defenceless owing to an obstetric emergency, must assume the role of a mother and put the life potentially resulting from their pregnancy above their own life, even when they are unconscious.

72. In Ms. Rogel's case, it is indicated that the indictment filed by the prosecutor's office is evidence of discrimination, as it determines that:

There was an expulsion during childbirth that began pulmonary expiration autonomously, in other words, with its own lungs, demonstrating the criminal intent with which the accused acted, firstly by concealing her pregnancy and then, when she was admitted to hospital, by not reporting the being that she had expelled in the toilet, and it is obvious that a newborn, who is extremely weak and defenceless, will manage to survive only with the prompt and tender care of its mother, which was not provided in this case.

73. In Ms. Hernández's case, the prosecutor's office indicated the following:

Demonstrating also the criminal intent with which the defendant acted, firstly by concealing her pregnancy and then, when she was admitted to hospital, by not reporting it and instead claiming not to know that she was pregnant, since it is not credible and even absurd that a student in the third year of her baccalaureate in health care would not recognize or feel the changes in her body during pregnancy.

74. The source refers to a set of decisions on the matter by international human rights mechanisms. These include general recommendation No. 33 (2015) of the Committee on the Elimination of Discrimination against Women on women's access to justice, the concluding observations of that Committee on the eighth and ninth periodic reports of El

Salvador and its Views in *O.G. v. Russian Federation* (CEDAW/C/68/D/91/2015); general comment No. 28 (2000) of the Human Rights Committee on the equality of rights between men and women, and the concluding observations of that Committee on the seventh periodic report of El Salvador; the concluding observations of the Committee on Economic, Social and Cultural Rights on the combined third, fourth and fifth periodic reports of El Salvador; the statement issued by the United Nations High Commissioner for Human Rights at the end of his mission to El Salvador on 17 November 2017; and the conclusions and observations of the Inter-American Commission on Human Rights on its visit to El Salvador in 2018.

75. The source claims that, in addition to sex and gender discrimination, there are other factors affecting access to justice, such as socioeconomic status and living in a rural area. The Committee on the Elimination of Discrimination against Women has recognized that rural women face particular obstacles in accessing justice, which aggravates the discrimination against them. This implies that State authorities must take into consideration the fact that access to health care, including sexual and reproductive health services, is extremely limited for rural women. In its general recommendation No. 34 (2016) on the rights of rural women, that Committee recognized that this is a result of prevailing social norms and patriarchal attitudes, insufficient budget allocations to rural health services, lack of infrastructure and trained personnel, lack of information on modern methods of contraception, remoteness and lack of transport. This was the case for Ms. Rogel, Ms. Arana and Ms. Hernández, who lacked even minimal access to health care during pregnancy. The source stresses that the women's deprivation of liberty was directly related to obstetric emergencies, putting their lives at risk.

Response from the Government

76. On 9 August 2019, the Working Group transmitted to the Government the communication sent by the source and set a time limit for reply of 60 days. The Government requested an extension of the time limit, which was granted on 11 October, setting 1 November as the new time limit for replying. The Working Group finds it regrettable that the Government did not submit its response within the time limit set. In accordance with paragraph 16 of its methods of work, the Working Group will render its opinion based on all the information it has obtained.

Discussion

77. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international standards constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. A mere assertion that lawful procedures have been followed is not sufficient to rebut the allegations made in a particular case.¹ In the present case, in the absence of a reply from the Government within the time limit set, the allegations made by the source are considered reliable in principle, having been corroborated by all the information to which the Working Group had access, including the late reply from the Government.

78. The Working Group is convinced that Ms. Rogel had an accident on 7 October 2012 while in the laundry room of her house, when she slipped and suffered a severe blow. Her relatives called for a municipal ambulance to take her to Nuestra Señora de Fátima National Hospital, where she was admitted for having had a presumed incomplete abortion.

79. The following day, on 8 October 2018, the prosecutor's office was contacted by the hospital to report an abortion, after which the police arrested Ms. Rogel for the alleged commission of the crime. The judiciary authorized a search of her home. On finding the body of the fetus, the forensic doctors concluded that it had no external injuries and the body was transferred for an autopsy, which showed that the cause of death was head trauma.

¹ A/HRC/19/57, para. 68.

80. The Working Group is convinced that, at approximately 10 a.m. on 6 April 2016, Ms. Hernández, who at the time of her arrest was a student, 18 years old and unaware of her pregnancy, felt severe abdominal pain and subsequently gave birth. Her family took her, in a state of serious ill health, to the emergency department of a hospital, where she was admitted for having given birth out-of-hospital. Upon learning this, the authorities went to her home, where they found a lifeless fetus. The body was referred to the forensic services for an autopsy to determine the cause of death.

81. Ms. Hernández was unaware of her pregnancy and no one witnessed the birth. However, the police officers presumed the existence of a crime and, that same afternoon, proceeded to arrest her in hospital, in a state of serious ill health, without an arrest warrant and alleging that she was in flagrante delicto. The autopsy revealed that the newborn had “meconium in the bronchi” and that the cause of death was “undetermined pending histopathological samples”. That examination concluded that the newborn had died of “aspiration pneumonia”, without determining the substance that had been aspirated.

82. The Working Group received convincing information that Ms. Arana, aged 20 years and with no schooling at all, was employed as a domestic worker and living in a remote rural area. In September 2013, she was 39 weeks pregnant, and on 23 September, while at home, she suffered an obstetric emergency, was experiencing labour pains and bleeding, and had no medical support. Her family asked a neighbour to call the emergency number and request urgent medical attention. National Police officers went to Ms. Arana’s home, by which time she had already given birth in an outside toilet located 30 metres from her house, without anyone assisting or being with her at the time. They found Ms. Arana unconscious and in a state of serious ill health, and the newborn baby girl inside the toilet.

83. On 24 September 2013, Ms. Arana was transferred to hospital and placed in police custody on suspicion of attempted aggravated homicide. Two days later, she was charged by the prosecutor’s office, which argued that she had thrown her daughter into the toilet and thrown pieces of brick at her. On 24 September 2013, while Ms. Arana was still in hospital, the judiciary ordered her detention.

Category I

84. The Working Group has consistently found in its jurisprudence that a person is arrested in flagrante delicto when he or she is apprehended during the commission of a crime or immediately thereafter, or else is arrested in hot pursuit. The Working Group considers that an arrest made after the alleged commission of a crime, without immediacy, cannot be considered as having been made in flagrante delicto, even if it comes within 24 hours of the criminal act.²

85. In the present case, the Working Group is convinced that the deprivation of liberty of Ms. Rogel, Ms. Arana and Ms. Hernández occurred in hospital, several hours after they had suffered an emergency. Therefore, it cannot be considered that they were arrested in flagrante delicto, as they were not apprehended during the commission of a crime, immediately thereafter or in hot pursuit. The Working Group also did not receive convincing information that warrants were issued prior to the initial arrests. Consequently, it considers that, in the absence of any legal basis that could legitimately have been invoked by the authority, the detentions were arbitrary under category I.

Category III

86. The source alleges that the trials of Ms. Rogel, Ms. Arana and Ms. Hernández were biased and in violation of articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

87. The Working Group considers that the right of accused persons to be assisted by defence counsel and to have adequate time and facilities to mount a defence implies that

² See opinions Nos. 13/2019, para. 53; 9/2018, para. 38; 36/2017, para. 85; 53/2014, para. 42; 46/2012, para. 30; 67/2011, para. 30; and 61/2011, paras. 48 and 49. See also E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

they should be given prompt access to lawyers and should be able to communicate privately with them. The State must guarantee the confidentiality of communications with lawyers, with adequate time for them to prepare a defence, and must also provide access to the file containing all documents, evidence and other materials that the prosecution intends to submit to the court.

88. In Ms. Rogel's case, the source alleges that the authorities disregarded the fact that she was admitted to hospital with a diagnosis of incomplete abortion and in a poor state of health, which shows how defenceless she was when she suffered the obstetric emergency. The Working Group also received convincing information that the psychosocial report in the file, which has been taken as valid evidence, is based on testimonies from people who are not fully identified. This prevents the defence from disputing the expert opinion and from verifying the statements made by the witnesses.

89. In addition, the Working Group found that Ms. Arana's right to a fair trial was undermined, as she was represented during the criminal proceedings by several different public defenders, who were appointed moments before each of the hearings and even failed to appear at the relevant proceedings. Ms. Arana did not have genuine access to effective legal representation that would ensure follow-up of her case and guarantee her right to lodge an appropriate appeal against the grounds for deprivation of liberty.

90. The Working Group found that Ms. Rogel and Ms. Arana's right to an adequate defence was not respected in the present case, in violation of article 14 (3) (d) of the Covenant and article 11 of the Universal Declaration of Human Rights.

91. Moreover, international human rights law establishes that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible. It follows that detention must be an exception made in the interests of justice. Article 9 (3) of the Covenant indicates that "release may be subject to guarantees to appear for trial". The applicable provisions require that the justification for pretrial detention be analysed in a reasoned judicial decision in every case. The Working Group considers that, before issuing a pretrial detention order, the judge must verify, on a case-by-case basis, that less detrimental preventive measures are not applicable and sufficient.

92. In the present case, the prosecutor's office requested a formal investigation with pretrial detention in respect of Ms. Rogel, accusing her of aggravated homicide and arguing that the crime is of a serious nature and she might evade and/or obstruct justice. The judiciary, in ordering the detention measure, considered that there was a likelihood of involvement in the crime, that it is a serious crime and that, since it is punishable by 30 years' imprisonment, the accused might seek to evade prosecution. Similarly, it noted that "although there is no victim or injured party, it is possible that the accused may obstruct a specific act of investigation". When this measure was reviewed by the judiciary itself, a decision was made to maintain the pretrial detention measure on the grounds that it was "necessary to achieve the aims of the proceedings and ensure that the young woman stands trial".

93. Concerning the pretrial detention of Ms. Hernández, the Working Group is aware that the prosecutor's office charged her with the crime of aggravated homicide and that the judiciary considered that:

Since aggravated homicide is classified as a serious crime, defendants, faced with a possible penalty of imprisonment for such a crime, generally try to evade justice not only by changing their place of residence but even, sometimes, by leaving the country, in view of the penalty that may be imposed, so the precautionary measure of pretrial detention becomes necessary and is considered appropriate.

In another decision, the judiciary further noted that:

There is an obvious and natural risk of flight and of obstruction of the proceedings, since the crime is punishable by very high minimum and maximum penalties, and thus, objectively speaking, there is a high risk that the defendant will seek to evade justice and, consequently, that the investigation will be hindered, among other factors.

94. In Ms. Rogel and Ms. Hernández's cases, the Working Group found that the judiciary relied on the seriousness of the crime to justify pretrial detention and did not set out its reasons for finding that there was a flight risk.³ Similarly, it did not explain whether there were measures less detrimental to personal liberty could have been imposed to ensure that the defendants stood trial.

95. In addition, the Working Group found that Salvadoran legislation provides for automatic pretrial detention in cases where the penalty could exceed 3 years' imprisonment. This is a requirement under article 331.2 of the Criminal Code, which, in domestic jurisprudence, has been interpreted as requiring an individualized analysis of the need for the measure in each case. The Working Group did not receive convincing information to suggest that this specific analysis was carried out in each case to justify the need for pretrial detention.

96. Consequently, the Working Group is of the opinion that the detentions of Ms. Rogel, Ms. Arana and Ms. Hernández, based as they were on the seriousness of the offence and lacking an individualized analysis to justify the need for pretrial detention, were arbitrary, in that they violated the presumption of innocence and ran counter to article 9 (3) of the Covenant.

97. In the light of the above considerations, the Working Group is of the opinion that the fundamental guarantees of a fair, independent and impartial trial have been violated, in breach of articles 9 and 14 of the Covenant and articles 10 and 11 of the Universal Declaration of Human Rights.

Category V

98. The Working Group will analyse whether the detention of the three women for offences under the Criminal Code constitutes a violation of international law because it involves discrimination on the basis of economic status and gender.

99. The Working Group notes that the Criminal Code establishes an absolute ban on abortion and that, since 1999, the Constitution has recognized "every human being as a person from the moment of conception".

100. The Working Group observes that the absolute ban on abortion has led to the systematic criminalization of women who suffer an obstetric emergency, the vast majority of whom are living in poverty. The information received indicates that, between 2000 and 2011, 129 women were prosecuted for abortion or aggravated homicide, with sentences ranging from 30 to 50 years' imprisonment. According to the information received, 68 per cent of the women were sentenced when they were between 18 and 25 years old, 22 per cent have a low level of schooling, 82 per cent have little or no income and most come from rural or marginalized urban areas.⁴

101. The Working Group received information that, between 2002 and 2010, 57.36 per cent of the recorded reports of suspected abortion came from public health professionals, in violation of the duty of professional secrecy and confidentiality. The Working Group was also struck by the fact that the practice of handcuffing women to hospital beds while they are still receiving medical treatment has become widespread among health personnel and the police authorities.

102. The Working Group received information from the source explaining that, in these types of criminal cases, women normally suffer systematic violations of their procedural rights owing to a lack of effective legal assistance during interrogations and the trial, the irregular collection of evidence and the assessment of evidence from a stereotypical

³ Opinions Nos. 4/2019, para. 66; 3/2018, para. 62; 56/2017, para. 68; and 51/2017, para. 53.

⁴ Jocelyn Viterna and José Santos Guardado, *Análisis Independiente de la Discriminación Sistemática de Género en el Proceso Judicial de El Salvador contra Las 17 Mujeres Acusadas del Homicidio Agravado De Sus Recién Nacidos* (Independent Analysis of Systematic Gender Discrimination in the Legal Proceedings in El Salvador against the 17 Women Accused of the Aggravated Homicide of their Newborns), 2014, available in Spanish at: https://scholar.harvard.edu/files/viterna/files/viterna_guardado_2014_white_paper_spanish.pdf.

perspective of women's role in society. Similarly, appeal rulings are issued by the same court that handed down the conviction at first instance, and legal representation is inadequate. At the same time, women prosecuted for suffering an obstetric emergency are deprived of their liberty in extremely overcrowded and unhealthy conditions characterized by a lack of care. They are also separated from their children and other family members.

103. The Working Group wishes to recall that the Committee on the Elimination of Discrimination against Women has noted that:

Stereotyping and gender bias in the justice system have far-reaching consequences on women's full enjoyment of their human rights [and frequently result] in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity.⁵

104. The Working Group has found that this issue has repeatedly been mentioned in periodic reviews of the human rights situation in El Salvador and has been the subject of repeated recommendations made to the State. In this context, the Committee on the Elimination of Discrimination against Women recommended that El Salvador should strengthen measures to ensure the access of girls, adolescents and women in rural areas to adequate sexual and reproductive health services, including family planning and the prevention of early pregnancies and unsafe abortions.⁶

105. The Human Rights Committee, meanwhile, has recommended that El Salvador should:

Review all cases of women who have been imprisoned for abortion-related offences, with the aim of ensuring their release, and ensure that these women have access to legal assistance and to due process.⁷

The Committee also expressed concern about the disproportionate sentences of up to 40 years' imprisonment for aggravated homicide imposed on women who have an abortion or suffer a miscarriage.⁸

106. The Committee on Economic, Social and Cultural Rights has repeatedly expressed concern about these issues, in particular:

Cases in which women whose health was seriously at risk have turned to the health system and been reported on suspicion of having had an abortion. ... disproportionate criminal penalties have [even] been imposed with no regard for due process.⁹

107. The former United Nations High Commissioner for Human Rights said that he was "appalled" at the consequences of the absolute ban on abortion and at the punishment of women who suffer obstetric emergencies:

It only seems to be women from poor and humble backgrounds who are jailed, a telling feature of the injustice suffered.¹⁰

108. The Inter-American Commission on Human Rights, meanwhile, has found that the absolute criminalization of abortion gives rise to significant problems, for example:

By imposing a disproportionate burden on the exercise of the rights of women and girls and creating a context that facilitates unsafe abortions, [it] ignores the State's international obligations to respect, protect, and guarantee women's rights to life, to health, and to integrity.¹¹

⁵ General recommendation No. 33, para. 26. See also A/HRC/38/36, paras. 19 and 75, and A/HRC/41/33, para. 40.

⁶ CEDAW/C/SLV/CO/8-9, para. 37 (b).

⁷ CCPR/C/SLV/CO/7, para. 16.

⁸ Ibid., para. 15.

⁹ E/C.12/SLV/CO/3-5, para. 22.

¹⁰ OHCHR, Statement at the end of the mission to El Salvador, 17 November 2017.

¹¹ Conclusions and observations on the working visit to El Salvador, 29 January 2018.

109. The Commission further considered that “the absolute criminalization of abortion also has profound consequences on the national health system, the prison system, and the child protection system in the country”. Such sentences allegedly fail to respect the right of the accused to a fair trial, and negative stereotypes are said to prevail.¹²

110. In the present case, the Working Group found that the three detained women did not receive even minimal health checks during pregnancy and that the crimes with which they were charged were directly related to obstetric emergencies. The detentions were based on gender discrimination, since they stemmed from widespread practices in which women who are in a state of serious ill health and defenceless are expected to put the potential life resulting from their pregnancy above their own life, even when they are unconscious or vulnerable, it being presumed that they are acting in bad faith.

111. In Ms. Rogel’s case, the indictment filed by the prosecutor’s office states that:

There was an expulsion during childbirth that began pulmonary expiration autonomously, in other words, with its own lungs, demonstrating the criminal intent with which the accused acted, firstly by concealing her pregnancy and then, when she was admitted to hospital, by not reporting the being that she had expelled in the toilet, and it is obvious that a newborn, who is extremely weak and defenceless, will manage to survive only with the prompt and tender care of its mother, which was not provided in this case.

112. In Ms. Hernández’s case, the prosecutor’s office indicated the following:

Demonstrating also the criminal intent with which the defendant acted, firstly by concealing her pregnancy and then, when she was admitted to hospital, by not reporting it and instead claiming not to know that she was pregnant, since it is not credible and even absurd that a student in the third year of her baccalaureate in health care would not recognize or feel the changes in her body during pregnancy.

113. At a hearing on 12 April 2016, the court considered that Ms. Hernández:

Must have known that she was expecting a baby, but when she turned up at the hospital in Cojutepeque, she continued to say that she did not know that she was pregnant, attempting, by that attitude, to deceive the professionals who would attend to her; therefore, in the opinion of the undersigned, the defendant poses a latent flight risk.

During a hearing on 7 March 2017, another court considered that the defendant had committed an intentional criminal act:

Since, on realizing that she was pregnant, she was obliged to care for and protect the unborn child and to seek professional help to enable her child to be born in optimal conditions. At no point did she mention to her mother that she was pregnant. Rather, it is alleged that, when the time came for her to give birth, she went to the toilet, which was a septic tank. Despite knowing her condition, she told her mother that all she had was diarrhoea. Given that pregnancy is a condition of which it is difficult to claim ignorance, especially for someone with the defendant’s level of education, it is to be assumed that she intended to murder her own child.

114. The Working Group notes that this case not only reflects deep discrimination against the three women detained on account of their gender, but also reveals structural problems in the exercise of several fundamental rights, including equal access to health services for vulnerable persons and persons in situations of discrimination per se, such as poverty. In the present case, the problem lies not only in the legislation applied, which must be comprehensively reformed as a matter of urgency, but also in the way that the judicial authorities interpret that legislation. This interpretation, which is contrary to the human rights and dignity of women, also leads to the exercise of official police duties and the provision of health services in a manner that violates the rights enshrined in the Covenant and the Universal Declaration of Human Rights. The result is the imposition of measures of

¹² Ibid.

deprivation of liberty that are unnecessary, disproportionate, serve no legitimate purpose and are seemingly implemented in an unreasonable manner.

115. The Working Group considers that a legislative framework that affects only one gender and restricts women's rights in the way that this case demonstrates, is discriminatory. In the view of the Working Group, laws, judgments or public policies that restrict the right to personal liberty by criminalizing conduct related to the consequences of a lack of access to and enjoyment of the highest attainable standard of health, or of obstetric violence, or which criminalize the exercise of women's reproductive rights, must be considered to be *prima facie* discriminatory.

116. The Working Group concludes that the detention of Ms. Rogel, Ms. Arana and Ms. Hernández constitutes a violation of international law, as it is based on discrimination on the grounds of sex or gender and socioeconomic status, in breach of articles 2 and 26 of the Covenant and articles 2 and 7 of the Universal Declaration of Human Rights. It is therefore arbitrary under category V.

117. In view of the allegations concerning violations of the right to health and discrimination and violence against women, the Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on violence against women, its causes and consequences, and the Working Group on discrimination against women and girls, for appropriate action.

118. The Working Group calls on the authorities of El Salvador to review, reinterpret, amend, discontinue the application of, and/or repeal – depending on the case, within the framework of their respective competencies and in an urgent and comprehensive manner – the criminal legislation applied against Ms. Rogel, Ms. Arana and Ms. Hernández, in order to ensure effective compliance with the State's obligations under the Covenant, the Universal Declaration of Human Rights and international law.

119. The Working Group informs the Government of its willingness to make an official visit to El Salvador. Such visits are an opportunity for direct constructive dialogue with a view to better understanding the situation of deprivation of liberty in the country and the causes underlying arbitrary detention, thus effectively contributing to its prevention.

Disposition

120. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Sara del Rosario Rogel García, Berta Margarita Arana Hernández and Evelyn Beatriz Hernández Cruz, being in contravention of articles 2, 7, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

121. The Working Group requests the Government of El Salvador to take the steps necessary to remedy the situation of Ms. Rogel, Ms. Arana and Ms. Hernández without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

122. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Rogel, Ms. Arana and Ms. Hernández immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

123. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Rogel, Ms. Arana and Ms. Hernández and to take appropriate measures against those responsible for the violation of their rights.

124. The Working Group urges the Government to adopt legislative and judicial reforms, as well as public policy reforms, in order to ensure compliance with its international human rights obligations, in the light of the considerations set out in the present opinion.

125. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on violence against women, its causes and consequences, and the Working Group on discrimination against women and girls.

126. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

127. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Ms. Rogel, Ms. Arana and Ms. Hernández have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Rogel, Ms. Arana and Ms. Hernández;
- (c) Whether an investigation has been conducted into the violation of Ms. Rogel, Ms. Arana and Ms. Hernández's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of El Salvador with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

128. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

129. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

130. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.¹³

[Adopted on 20 November 2019]

¹³ See Human Rights Council resolution 42/22, paras. 3 and 7.