



# General Assembly

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

#### Opinion No. 19/2020 concerning Imelda Cortez Palacios (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 December 2019 the Working Group transmitted to the Government of El Salvador a communication concerning Imelda Cortez Palacios. The Government has not replied to the communication. 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. Imelda Cortez Palacios is a national of El Salvador born on 30 December 1997. She lives in poverty, has psychosocial difficulties and has completed one year of high school. She is resident in El Paraíso, Jiquilisco, Usulután. At the time of her arrest, she was 19 years old and a student.
5. At approximately 5 p.m. on 17 April 2017, Ms. Cortez Palacios experienced severe abdominal pain and went to the latrine outside her house. While in the latrine, she felt an internal tear, began to bleed heavily and passed out. When her family found her, she was very unwell, and they asked someone for help to take her to hospital. When she arrived at Jiquilisco National Hospital at approximately 6.30 p.m., she was admitted with heavy bleeding and was found to have given birth in a non-hospital setting.
6. The source states that despite Ms. Cortez Palacios being extremely unwell, the doctor on duty questioned her in an aggressive and psychologically abusive manner, asking what she had done with the baby. Ms. Cortez Palacios explained that she had felt something come out when she was in the latrine. At that point, the doctor notified the authorities, who sent officials to the hospital and Ms. Cortez Palacios' home. Under pressure and feeling bewildered, Ms. Cortez Palacios reported that her stepfather had been sexually abusing her since the age of 12 and that he had forced her not to tell anyone and had threatened to use violence against her family.
7. At approximately 7 p.m. on 17 April 2017, officers of the National Police received a call from the National Hospital reporting that a woman had been admitted with signs of an abortion. When they arrived at Ms. Cortez Palacios' home, they searched the property and found a newborn baby girl. At 8 p.m., police officers arrested Ms. Cortez Palacios at Jiquilisco National Hospital, accusing her of abortion through negligence.
8. On 20 April 2017, in a written statement submitted to the Prosecutor's Office in Usulután, the family of Ms. Cortez Palacios stated that since November 2016 she had been experiencing problems with her colon and a swollen belly and had had difficulty going to the bathroom, symptoms which she apparently did not identify as being caused by pregnancy.
9. On 20 April 2017, Jiquilisco Magistrate's Court No. 2 ordered Ms. Cortez Palacios to be placed in pretrial detention, charged her with attempted aggravated homicide and scheduled an initial hearing for the following day. At the conclusion of the initial hearing on 21 April 2017, the Court determined that pretrial detention was appropriate considering the serious nature of the offence and the alleged existence of proof.
10. On 21 April, in clinical file No. 244917, which was signed by a doctor from the Institute of Forensic Medicine, it was recorded that an examination of Ms. Cortez Palacios' uterus had shown that she had been between 18 and 20 weeks pregnant. An expert conducted a psychological assessment of her on 18 April 2017 and described her as having limited intellectual capacity and potentially a "mild mental impairment". On 17 May 2018, another psychological assessment found that Ms. Cortez Palacios displayed signs of depression, anxiety and fear due to the sexual abuse she had suffered, as well as a slight intellectual disability and indicators of sociocultural difficulties.
11. On 3 September 2018, at the preliminary hearing, the Jiquilisco Court of First Instance confirmed the pretrial detention of Ms. Cortez Palacios, stating that article 331 of the Code of Criminal Procedure limits the changes that can be made to precautionary measures, that there were doubts as to whether the defendant would cooperate with the proceedings and that she was accused of a serious offence. The decision was appealed. On 14 September 2018, the Second Chamber, Eastern Section, dismissed the appeal and upheld the decision of the Court of First Instance. On 5 December 2018, the Usulután Trial Court refused to review the pretrial detention, stating that changes to the precautionary measures could have been requested earlier, rather than a few days before the trial.
12. With regard to the newborn baby, the Institute of Forensic Medicine stated in a report dated 4 July 2017 that according to the clinical file, her health had not suffered from being exposed to faecal matter or being delivered in a non-hospital setting.

13. The source reports that Ms. Cortez Palacios was held in police cells from 29 May to 7 July 2017 and in San Miguel Prison from 7 July 2017 to 17 December 2018. She endured severely overcrowded conditions. While she was deprived of her liberty, she had to sleep in a hammock, despite the fact that a mattress had been bought and a specific request made for it to be donated to her.

14. On 17 December 2018, at the trial, the Prosecution Service, by expanding the indictment, changed the charges against Ms. Cortez Palacios to abandonment and neglect. On the same date, the Usulután Trial Court acquitted Ms. Cortez Palacios of all charges and closed the case.

(a) Legal basis for detention

15. The source indicates that the National Police arrested Ms. Cortez Palacios on alleged grounds of flagrante delicto. The source reports that there was no legal basis for her arrest, which was carried out after officers received information from the hospital accusing her of abortion through negligence, an offence provided for in article 137 of the Criminal Code in the following terms:

Anyone who causes an abortion through negligence shall receive a prison sentence of between 6 months and 2 years. Abortion caused by a pregnant woman's own negligence, and attempted abortion by the pregnant woman herself, shall not be punishable.

16. Subsequently, in a decision of 20 April 2017, detention was ordered for the legal duration of questioning, as provided for in article 328 of the Code of Criminal Procedure (Decree No. 733 of 2009):

When a person accused of having committed an offence is brought before a judge, the judge may order that he or she be detained for the duration of questioning and transferred to the appropriate prison, with written notification submitted to the prison governor. [...] Questioning may last no longer than 72 hours from the time the accused person is brought before the judge.

17. At an initial hearing on 21 April 2017, the same court instigated legal proceedings against Ms. Cortez Palacios for the offence of attempted aggravated homicide under articles 128 and 129 (1), (3), (5) and (7), in conjunction with article 24 of the Criminal Code, which provide as follows:

Article 128. Any person who kills another person shall be sentenced to between 10 and 20 years in prison.

Article 129. In relation to the offence of homicide, the following factors are considered to be aggravating circumstances: (1) When the perpetrator is a descendant or ascendant of the victim, an adoptive parent or adopted child of the victim, or the victim's sibling, spouse or common-law partner; [...] (3) When the offence is committed with malice aforethought or premeditation or is accompanied by abuse of a position of superiority; [...] (5) When the perpetrator uses extreme cruelty or intentionally causes maximum pain; [...] (7) When the offence is committed with base or trivial motives.

Article 24. An offence is classed as incomplete or attempted when the perpetrator initiates or performs any direct act with the intention of committing the offence but is unable to complete the offence owing to reasons beyond his or her control.

18. Furthermore, article 323 of the Code of Criminal Procedure regulates arrest in flagrante delicto in the following terms:

The police shall arrest anyone caught in flagrante delicto. In such cases, all persons are authorized to make the arrest and prevent any subsequent consequences of the offence, but must hand the offender to the National Civil Police immediately for an investigation to begin. Flagrante delicto exists in the following circumstances: when the perpetrator of an offence is caught at the time of committing or attempting to commit it; immediately after an offence has been committed; when a perpetrator is being pursued by the authorities or private individuals; within 24 hours of commission

of the offence; or when, within that time period, the perpetrator is caught by the police with objects or items used to commit the offence or which are the proceeds of the offence. If the National Civil Police, during an arrest in flagrante delicto, becomes aware of a possible reason that might excuse the arrested person from criminal responsibility, it shall immediately hand him or her over to the Attorney General's Office.

19. Pretrial detention is also provided for in articles 329 and 330 of the Code of Criminal Procedure, as follows:

Article 329. The pretrial detention of an accused person may be ordered if the following requirements are met: (1) There is sufficient evidence to reasonably demonstrate the existence of an offence and the likelihood of the accused's participation; (2) The offence carries a maximum prison term of more than 3 years or, in the event that the term is less than 3 years, the judge deems pretrial detention necessary given the circumstances of the offence, or if the accused person is subject to some other precautionary measure.

Article 330. Pretrial detention may also be ordered in the following cases: (1) When the accused, without legitimate grounds, fails to appear at the first hearing or on all occasions deemed necessary by the court; (2) When the conduct of the accused during the proceedings or the circumstances of the case give rise to a belief that he or she will try to evade justice, or when it is not possible to establish home, family or work ties or other circumstances that would indicate his or her willingness to comply with the proceedings; (3) When there is a strong suspicion that the accused will obstruct a specific investigative act by destroying, altering, concealing, suppressing or falsifying evidence, or will induce fellow defendants, victims, witnesses or experts to give false information or to behave in a dishonest or misleading manner, or will induce other persons to behave in a similar manner or commit other similar acts; (4) When, in the light of the accused's conduct during the proceedings or during other earlier proceedings, the judge strongly suspects that he or she will continue to commit criminal offences; (5) When the accused has failed to comply with the conditions attached to alternative measures ordered in place of pretrial detention. In these cases, the first requirement set out in the previous article must also be met.

20. On 3 September 2018, at the preliminary hearing, the Jiquilisco Court of First Instance confirmed the pretrial detention of Ms. Cortez Palacios, stating that article 331 of the Code of Criminal Procedure limits the changes that can be made to precautionary measures, that there were doubts as to whether the defendant would cooperate with the proceedings and that she was accused of a serious offence, a decision that was upheld by both the Second Chamber, Eastern Section, and the Usulután Trial Court. The relevant section of article 331 states that:

Alternative measures shall not be applied, and pretrial detention shall not be substituted, for the following offences: homicide, aggravated homicide, kidnapping, sexual offences, aggravated robbery, extortion, defrauding the public purse, sale of persons, smuggling of persons, trafficking in persons, civil unrest, offences covered by the Drug-Related Activities Act or offences covered by the Money-Laundering Act.

21. Subsequently, in the expansion of the indictment provided for in article 384 (1) of the Code of Criminal Procedure, the Prosecution Service changed the legal classification of the offence to abandonment and neglect, punishable under the Criminal Code as follows:

Article 199. Anyone who abandons, neglects or endangers the life or personal integrity of a child under the age of 18 or a person unable to provide for him- or herself, and to whom he or she has a legal duty of care, shall be punished with a prison term of between 1 and 3 years.

(i) Category I

22. The source alleges that Ms. Cortez Palacios' deprivation of liberty violated articles 9, 10 and 11 of the Universal Declaration of Human Rights and article 9 of the Covenant because: (a) she was arrested without a warrant from a competent judicial authority, in

arbitrary application of the concept of flagrante delicto; (b) the characterization of obstetric emergencies as cases of aggravated homicide violates international law; (c) she was detained for more than 48 hours before being brought before a judge; and (d) the use of pretrial detention for reasons other than a flight risk or obstruction of the process is contrary to international law.

23. Ms. Cortez Palacios was arrested by National Civil Police officers in application of the concept of flagrante delicto, without an arrest warrant or an order to appear in court issued by a judicial authority. The source states that, according to the law, a person is in flagrante delicto when he or she is caught during the commission of an allegedly unlawful act. In this case, the arrest occurred in the hospital, several hours after Ms. Cortez Palacios suffered an obstetric emergency and was reported by health personnel as having had an abortion. The allegedly unlawful act is a “result” offence; in order for the concept of flagrante delicto to apply, the police would have had to catch Ms. Cortez Palacios in the commission of the act. In this case, the allegedly unlawful act was identified several hours later, on the basis of a report by hospital staff. As a result, the concept of flagrante delicto does not apply and the police thus required a warrant issued by a judge.

24. The source adds that a detention is also arbitrary when the national legislation applied is incompatible with international law. In that regard, the offence of attempted aggravated homicide should not be applied to births occurring in non-hospital settings. It is argued that the absence of an exception to the applicability of the offence of aggravated homicide in cases of births occurring in non-hospital settings results in the criminalization of obstetric emergencies in the context highlighted by the Human Rights Committee and the Committee on the Elimination of Discrimination against Women in their concluding observations on El Salvador. According to the source, this criminalization is incompatible with international law, is discriminatory and disproportionate and violates victims’ rights to sexual and reproductive health.

25. The source recalls that international standards for the protection of human rights require that anyone arrested or detained on a criminal charge should be brought before a judicial authority without delay. In this regard, a “delay” is considered to be any period of time longer than 48 hours, which is understood as being sufficient to transfer an individual and prepare for a judicial hearing. Longer delays must remain the exception and be justified by the circumstances of the case. The international norms protecting the right to liberty and security of person require the detainee’s physical presence before a judicial authority. In the present case, it is noted that these guarantees were not respected, since Ms. Cortez Palacios was deprived of her liberty in the absence of a court order and at a time when she was significantly unwell, having been admitted to hospital on 17 April 2017. She was brought before a judge on 20 April 2017, an unjustifiable delay of more than 48 hours.

26. According to the source, the provision governing 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 obstructed. These are the only grounds on which international law permits the use of pretrial detention. Even in these cases, the possible adoption of other less harmful measures, such as a reporting requirement or house arrest, should be considered. Furthermore, it is the State’s responsibility to establish the proportionality of pretrial detention. The source argues that the application of this provision in the case of Ms. Cortez Palacios means that her pretrial detention must be considered arbitrary.

(ii) Category III

27. The source argues that the criminal proceedings against Ms. Cortez Palacios and her pretrial detention violated the guarantees set out in articles 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 10 of the Covenant, since: (a) her right to be presumed innocent was not respected; (b) the fact that she was a victim of repeated sexual abuse was not considered, and her cognitive impairment was ignored, meaning that she was not treated with dignity; and (c) her right to a fair trial was impeded.

28. Anyone accused of a criminal offence has the right to be presumed innocent and to be afforded guarantees of due process during the trial. The source indicates that the State

authorities who were involved in the proceedings against Ms. Cortez Palacios violated her right to be presumed innocent, since they deprived her of her liberty without any evidence proving beyond any reasonable doubt that she had committed an offence. At the time she was reported by the medical authorities, the stigma of abortion in El Salvador negated the possibility of being presumed innocent, reversing the burden of proof and violating principles of criminal law and international human rights law.

29. The source indicates that the only proven facts are: (a) that Ms. Cortez Palacios experienced an obstetric emergency which necessitated her transfer to hospital, where she was deprived of her liberty; (b) that her pregnancy was the result of repeated sexual abuse; and (c) that the child was born without medical assistance and is in good health. However, the National Police officers assumed that Ms. Cortez Palacios had committed an offence by allegedly “attempting to take the life of her newborn daughter” and that she was a dangerous person who might obstruct justice.

30. In addition, the source notes that the authorities of El Salvador ordered and upheld the deprivation of liberty based on the seriousness of the offence. The source indicates that this element does not provide sufficient justification for the imposition of pretrial detention, which should be precautionary and not punitive. Furthermore, the source claims that such actions on the part of the authorities affect the fairness of trials, thus rendering the detention arbitrary.

31. The source adds that Ms. Cortez Palacios’ dignity was harmed because she was detained when she was very unwell and her status as a victim of sexual abuse was not given consideration at any point. Her detention prevented her from receiving the psychosocial care she needed and left her unable to begin the necessary process of physical and psychological healing that would enable her to resume her life after her traumatic experience, not to mention stand trial. Therefore, there was a violation of article 10 (1) of the Covenant, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

32. In this regard, the source points out that the Inter-American Court of Human Rights has established that in cases of sexual violence, in parallel with the investigation of the facts, victims must receive:

medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a protocol for such attention aimed at reducing the consequences of the rape.<sup>1</sup>

Likewise, in cases of alleged violence against women, criminal investigations must include a gender perspective and be conducted by officials trained to handle such cases and deal with victims of discrimination and gender-based violence.

33. The source alleges that Ms. Cortez Palacios’ right to a defence was violated when the preliminary hearing was postponed seven times, since it was impossible to carry out the psychosocial assessments that were essential for building her defence. In addition, the constant changes in the prosecutor in charge of the case caused unjustified delays, to the detriment of the detainee’s liberty and affecting due process. Given these circumstances, the source alleges that the conduct of the proceedings violated the provisions of article 14 of the Covenant, and therefore requests that the detention be considered arbitrary under category III.

(iii) Categories II and V

34. The source argues that the detention of Ms. Cortez Palacios constitutes a violation of international law, as it is based on discrimination on the grounds of sex, 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.

<sup>1</sup> *Fernández Ortega et al. v. Mexico*, Judgment of 30 August 2010, Preliminary Objections, Merits, Reparations and Costs, para. 194, Series C No. 215.

35. The source states that the right to have access to sexual and reproductive health services and the right of women not to be treated as criminals if they give birth in a non-hospital setting or experience an obstetric emergency flow from the right to equality and the right not to be subjected to gender-based 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.

36. The source alleges that the detention of Ms. Cortez Palacios constitutes discrimination on the basis of sex and gender, since it follows a series of practices based on the stereotype that dictates that a woman must assume the role of a mother, even in extreme situations where she is completely helpless, for example when unconscious after giving birth in a non-hospital setting, when completely terrified by threats from her rapist, or when unaware that she was pregnant and having received no prenatal care.

37. According to the source, it is important to stress that Ms. Cortez Palacios reported that her pregnancy was the result of rape. The Prosecution Service treated her assertion as a lie, telling her that she was making such allegations solely in an attempt to avoid the proceedings against her.

38. The source claims that the failure to take Ms. Cortez Palacios' status as a victim into consideration during the investigation and the accusations of lying made against her by officials of the Public Prosecutor's Office reveal the existence of gender stereotypes in judicial practice. In this regard, the source notes that States have an obligation to eliminate stereotypes as an essential step towards ensuring that women have equal access to justice.

39. The Human Rights Committee has expressed itself in this regard, stating that States parties should:

ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights.<sup>2</sup>

40. The source points out that various international human rights bodies have expressed their views on the systematic practice of prosecuting and imprisoning women suffering obstetric emergencies in El Salvador, including the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Office of the United Nations High Commissioner for Human Rights and the Inter-American Commission on Human Rights.

41. The source claims that, in addition to discrimination against women on grounds of sex and gender, there are other inextricably linked factors that affect access to justice, such as socioeconomic status or living in a rural area. The Committee on the Elimination of Discrimination against Women has recognized that rural women face particular obstacles in obtaining access to justice, which worsens the discrimination against them. According to the source, 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 limited access is a result of prevailing social norms and patriarchal attitudes, insufficient budget allocations to rural health services, the lack of infrastructure and trained personnel, the lack of information on modern methods of contraception, remoteness and the lack of transport. The source asserts that this is particularly relevant in the case in question, since Ms. Cortez Palacios faced particular obstacles in obtaining access to justice as a poor woman from a rural area, including lack of timely access to health care during pregnancy, childbirth and the postpartum period and the constant obstruction of her judicial process.

#### *Response from the Government*

42. The Working Group transmitted the source's allegations to the Government on 12 December 2019 and requested that it submit a response by 10 February 2020. The Working

<sup>2</sup> General comment No. 28 (2000) on the equality of rights between men and women, para. 5.

Group regrets that the Government did not respond to the communication within the time limit.

### Discussion

43. 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 requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>3</sup> In the present case, in the absence of a response from the Government within the time limit, the allegations made by the source are considered reliable in principle, having been corroborated by the information at the Working Group's disposal.

44. The Working Group was convinced that at the time of her arrest, Ms. Cortez Palacios was a 19-year-old student living in poverty and had completed one year of high school.

45. The Working Group also received convincing information that at 5 p.m. on 17 April 2017, Ms. Cortez Palacios felt severe abdominal pain and went to the latrine outside her house, where she felt an internal tear, began to bleed heavily and passed out. She was transferred to hospital, where she was admitted with heavy bleeding and was found to have given birth in a non-hospital setting. The Working Group received alarming information concerning the aggressive way in which the doctor on duty interviewed Ms. Cortez Palacios and the fact that hospital staff alerted the police, who searched Ms. Cortez Palacios' home, where they found a healthy newborn baby. At 8 p.m. the same day, police officers arrested Ms. Cortez Palacios at the hospital for the offence of abortion through negligence.

46. The Working Group notes that on 17 December 2018, at the trial, the Prosecution Service changed the charges against Ms. Cortez Palacios to abandonment and neglect, and that on the same day she was acquitted of all charges by the trial court.

47. Although Ms. Cortez Palacios is now at liberty, this case illustrates a detention policy in El Salvador<sup>4</sup> that mainly affects poor women. In accordance with paragraph 17 (a) of its methods of work, the Working Group will therefore analyse whether the deprivation of liberty was arbitrary.

### *Category I*

48. The Working Group has indicated that anyone who is arrested must be informed, at the time of their arrest, not only of the reasons for the arrest<sup>5</sup> but also of the judicial avenues available for challenging the lawfulness of the arrest.<sup>6</sup> The reasons for the arrest must include not only the general legal basis but also factual specifics to indicate the substance of the complaint and the wrongful act committed. These reasons concern the official basis for the arrest, not the subjective motivations of the arresting officer.<sup>7</sup>

49. Moreover, in the view of the Working Group, persons who are detained have the right to be informed by the arresting authority, upon apprehension, of their right to a lawyer of their choice.<sup>8</sup> Persons who have been arrested also have the right to be informed promptly of the charges against them.<sup>9</sup> The Working Group has consistently stated in its jurisprudence that a person is arrested in *flagrante delicto* when he or she is apprehended during the commission of an offence or immediately thereafter, or else is arrested in hot pursuit. The Working Group considers that an arrest made after the alleged commission of an offence, without immediacy, cannot be considered to have been made in *flagrante delicto*, even if it

<sup>3</sup> A/HRC/19/57, para. 68.

<sup>4</sup> Opinion No. 68/2019.

<sup>5</sup> Covenant, art. 9 (2).

<sup>6</sup> A/HRC/30/37, principle 7. Right to be informed.

<sup>7</sup> General comment No. 35 (2014) on liberty and security of person, para. 25.

<sup>8</sup> A/HRC/30/37, principle 9. Assistance by legal counsel and access to legal aid.

<sup>9</sup> Covenant, art. 9 (2).



takes place within hours of the criminal act, and in particular if it relies on a report having been made to the police.<sup>10</sup>

50. In the present case, the Working Group was convinced that Ms. Cortez Palacios was arrested at the hospital several hours after suffering an obstetric emergency, following which health personnel had made a report to the police and the police had carried out a search of her home.

51. In addition, the Working Group received convincing information that Ms. Cortez Palacios was brought before a judicial authority after spending 48 hours in police custody in hospital. This implies that during the time she was in police custody in the hospital, there was no order from a competent authority justifying her arrest or specifying a charge against her. The Working Group was also convinced that Ms. Cortez Palacios' arrest did not take place at the time of commission of an offence or soon afterwards during hot pursuit.

52. The Working Group was therefore convinced that in the present case, the deprivation of liberty of Ms. Cortez Palacios violated articles 9, 10 and 11 of the Universal Declaration of Human Rights and article 9 of the Covenant, since she was arrested without a warrant from a competent judicial authority and was not caught in flagrante delicto.

53. Furthermore, the Working Group was made aware that pretrial detention was automatically applied in the present case, in contravention of the international obligations of El Salvador. Article 9 (3) of the Covenant provides as follows:

It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

The Working Group wishes to recall that it examined this matter in detail in Opinion No. 1/2018 and concluded that mandatory pretrial detention violates the provisions of the Covenant, which stipulates that detention pending trial should be the exception rather than the rule and must be based on an individualized determination that it is reasonable and necessary.<sup>11</sup>

54. Automatic pretrial detention for specified offences deprives detainees of their right to seek alternatives to detention, such as bail, in violation of the right to be presumed innocent under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. The imposition of mandatory pretrial detention for specific offences overturns the presumption of innocence, as persons accused of those offences are automatically detained without there being a balanced consideration of alternatives to detention.

55. The Working Group found that the present case is similar to another case from El Salvador that it had previously examined, in which it found that automatic pretrial detention for the alleged commission of certain types of offences,<sup>12</sup> without a case-by-case examination of its necessity and appropriateness, violates articles 9 and 14 of the Covenant and reveals the absence of a legal basis for detention.

56. Furthermore, in the present case, the Working Group considers that the authorities of El Salvador should not have brought charges relating to the offence of abortion or homicide by negligence in a case in which a poor woman with a psychosocial impairment had suffered an obstetric emergency. The Working Group is aware that there are no exceptions to the applicability of this offence in the criminal legislation of El Salvador, which has resulted in the criminalization of obstetric emergencies that have affected childbirth or resulted in the death of newborn babies. As a result, the relevant legislation is applied in a discriminatory and disproportionate manner against women, particularly poor women who have been unable to obtain access to reproductive health services, rendering it contrary to international law.

<sup>10</sup> Opinions No. 9/2018, para. 38; No. 53/2014, para. 42; No. 46/2012, para. 30; No. 67/2011, para. 30; and No. 61/2011, paras. 48 and 49; E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

<sup>11</sup> See also Opinions No. 64/2019, No. 14/2019, No. 75/2018, No. 53/2018, No. 16/2018, No. 24/2015 and No. 57/2014; A/HRC/19/57, paras. 48–58; and general comment No. 35, para. 38.

<sup>12</sup> Opinion No. 68/2019.

When a criminal provision used as the basis for an arrest violates the principle of legality, in this case by being discriminatory, the arrest is devoid of any legal basis.

57. On the basis of the foregoing, the Working Group determines that the detention of Ms. Cortez Palacios had no legal basis and was therefore arbitrary under category I.

### *Category III*

58. The Working Group wishes to recall that under customary international law, everyone has the right not to be arbitrarily deprived of liberty,<sup>13</sup> and persons accused of an offence are entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of any charge against them.<sup>14</sup> It also recalls that persons charged with a criminal offence have the right to be presumed innocent and to have a public trial with all due process guarantees.<sup>15</sup>

59. Article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant recognize the right of all persons charged with a criminal offence to be presumed innocent. This right imposes a number of obligations on all State institutions to treat persons accused of a criminal offence as innocent until they have been found guilty beyond any reasonable doubt. As stated above, the Working Group found that Ms. Cortez Palacios was subjected to automatic pretrial detention, which implies a violation of the right to be presumed innocent set forth in article 14 (2) of the Covenant.

60. The Covenant recognizes the right of everyone charged with a criminal offence to be tried without undue delay.<sup>16</sup> The Working Group, like the Human Rights Committee, considers that delays in criminal proceedings can be justified only by the complexity of the case or the behaviour of the parties and that delays for any other reasons are incompatible with the Covenant and compromise the impartiality of a trial.<sup>17</sup> In addition, the Human Rights Committee has stated that when such delays are caused by a lack of resources, to the extent possible States should allocate supplementary budgetary resources.<sup>18</sup>

61. The Working Group was convinced that Ms. Cortez Palacios' right to be tried without undue delay was violated when the preliminary hearing was postponed seven times for reasons attributable to the authorities and unrelated either to the complexity of the case or the conduct of the defence, in contravention of article 14 (3) (c) of the Covenant.

62. In the light of the foregoing considerations, the Working Group has concluded that the deprivation of liberty of Ms. Cortez Palacios contravened international standards relating to the right to a fair trial, as set out in the Universal Declaration of Human Rights and the Covenant, and was of such gravity as to render it arbitrary under category III.

### *Category V*

63. The source argues that the detention of Ms. Cortez Palacios constitutes a violation of international law, as it is based on discrimination on the grounds of sex, 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.

64. In this regard, the Working Group emphasizes that article 1 of the Constitution recognizes every human being as a person from the moment of conception. This has led to the systematic criminalization of women who suffer obstetric emergencies, the vast majority of whom live in poverty. The information available to the Working Group indicates that between 2000 and 2011, 129 women were prosecuted for abortion or aggravated homicide,

<sup>13</sup> Article 9 of the Universal Declaration of Human Rights; A/HRC/22/44, paras. 37–75 (Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law).

<sup>14</sup> Article 10 of the Universal Declaration of Human Rights.

<sup>15</sup> Article 11 of the Universal Declaration of Human Rights.

<sup>16</sup> Article 14 (3) (c).

<sup>17</sup> General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 27.

<sup>18</sup> Ibid.

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.<sup>19</sup>

65. 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.

66. 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.<sup>20</sup> 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.<sup>21</sup>

67. The Committee on Economic, Social and Cultural Rights has repeatedly expressed its concern about these issues, especially 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".<sup>22</sup>

68. The United Nations High Commissioner for Human Rights also said he was "appalled" at the consequences of the absolute prohibition on abortion and the punishment of women for obstetric emergencies: "It only seems to be women from poor and humble backgrounds who are jailed, a telling feature of the injustice suffered."<sup>23</sup>

69. 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. 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.<sup>24</sup>

Such sentences allegedly fail to respect the right of the accused to a fair trial, and negative stereotypes are said to prevail.

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

Stereotyping and gender bias in the justice system have far-reaching consequences for women's full enjoyment of their human rights. They impede women's access to justice in all areas of law, and may have a particularly negative impact on women victims and survivors of violence. Stereotyping distorts perceptions and results in

<sup>19</sup> 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), 17 November 2014, available in Spanish at: [https://scholar.harvard.edu/files/viterna/files/viterna\\_guardado\\_2014\\_white\\_paper\\_spanish.pdf](https://scholar.harvard.edu/files/viterna/files/viterna_guardado_2014_white_paper_spanish.pdf).

<sup>20</sup> See, for example, A/HRC/43/5.

<sup>21</sup> CEDAW/C/SLV/CO/8-9, para. 37 (b).

<sup>22</sup> E/C.12/SLV/CO/3-5, para. 22.

<sup>23</sup> OHCHR, Conclusions of the visit to El Salvador, 17 November 2017, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22412&LangID=E>.

<sup>24</sup> Conclusions and Observations on the Working Visit to El Salvador, 29 January 2018, available at [https://www.oas.org/en/iachr/media\\_center/PReleases/2018/011A.asp](https://www.oas.org/en/iachr/media_center/PReleases/2018/011A.asp).

decisions based on preconceived beliefs and myths rather than relevant facts. Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far-reaching consequences, for example, in criminal law, where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity. In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.<sup>25</sup>

71. In this regard, the Human Rights Committee expressed its concern in 2018 about:

the disproportionate sentences of up to 40 years' imprisonment imposed, on charges of aggravated homicide, not only on women seeking an abortion, but also on women who have suffered a miscarriage.<sup>26</sup>

It recommended that the State 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.<sup>27</sup>

72. The Working Group notes that this case not only reflects deep discrimination against Ms. Cortez Palacios, 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 and prosecutorial authorities interpret the legislation. That 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 deprivation of liberty that are unnecessary, disproportionate, serve no legitimate purpose and, above all, are implemented in an unreasonable manner.

73. 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.<sup>28</sup> 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.<sup>29</sup>

74. In the present case, the Working Group was convinced that the detention of Ms. Cortez Palacios constitutes discrimination on the basis of sex and gender, since it follows a series of practices based on the stereotype that dictates that a woman must assume the "role of a mother", even in extreme situations where she is completely helpless, for example when unconscious after giving birth in a non-hospital setting, when completely terrified by threats from her rapist, or when unaware that she was pregnant and having received no prenatal care. Based on the information received, the Working Group found that Ms. Cortez Palacios faced particular obstacles in obtaining access to justice because she is a poor woman with a psychosocial impairment.

75. Based on the foregoing, the Working Group concludes that the detention of Ms. Cortez Palacios constitutes a violation of international law, as it is based on discrimination on the grounds of sex, gender, socioeconomic status and psychosocial impairment, in breach

<sup>25</sup> General recommendation No. 33 (2015) on women's access to justice, para. 26.

<sup>26</sup> CCPR/C/SLV/CO/7, para. 15.

<sup>27</sup> *Ibid.*, para. 16.

<sup>28</sup> General comment No. 36 (2018) on the right to life, para. 8.

<sup>29</sup> Opinion No. 68/2019.

of articles 2 and 26 of the Covenant and articles 2 and 7 of the Universal Declaration of Human Rights, and that it is therefore arbitrary under category V.

76. In addition, the Working Group notes that Ms. Cortez Palacios was placed in pretrial detention because under national legislation, specifically article 331 of the Code of Criminal Procedure, persons accused of the offence for which she was being prosecuted must not remain free during the trial. Legal provisions allowing mandatory pretrial detention for some offences discriminate between defendants, namely those who may apply for alternatives to detention and those who may not, in a way that does not take into account the equality of human beings.<sup>30</sup> The Working Group found that this discrimination is based on the “other status” of certain defendants, namely the fact of having been accused of an offence for which alternatives to detention are not permitted, which constitutes unlawful discrimination under articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant.<sup>31</sup> The Working Group considers that the facts in the present case disclose a further violation under category V.

77. 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. Cortez Palacios, in order to ensure effective compliance with the State’s obligations under the Covenant, the Universal Declaration of Human Rights and international law.

78. In the light of the allegations made by the source in the present case, the Working Group refers the 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, the Special Rapporteur on the rights of persons with disabilities and the Working Group on discrimination against women and girls.

79. The Working Group informs the Government of its willingness to make an official visit to El Salvador, taking into account the standing invitation that the State issued to all special procedures in February 2010. Visits are a unique opportunity for direct constructive dialogue with a view to better understanding the situation of deprivation of liberty in the country and the underlying causes of arbitrary detention, thus effectively contributing to its prevention. Given that a considerable time period has elapsed since its last visit to El Salvador in 2012, the Working Group deems it an opportune moment to continue its dialogue with the Government by way of another country visit. In 2018, the Working Group made a request to the Government to visit El Salvador, and urges the relevant authorities to consider this request again and respond positively.

### **Disposition**

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

The deprivation of liberty of Imelda Cortez Palacios, being in contravention of articles 2, 9, 10, 11 and 26 of the Universal Declaration of Human Rights and articles 2, 7, 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

81. The Working Group requests the Government of El Salvador to take the steps necessary to remedy the situation of Ms. Cortez Palacios 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.

82. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Ms. Cortez Palacios an enforceable right to compensation and other reparations, in accordance with international law.

<sup>30</sup> Opinion No. 1/2018.

<sup>31</sup> Opinions No. 64/2019, No. 14/2019 and No. 75/2018.

83. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Cortez Palacios and to take appropriate measures against those responsible for the violation of her rights.

84. 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, the Special Rapporteur on the rights of persons with disabilities and the Working Group on discrimination against women and girls.

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

#### **Follow-up procedure**

86. 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 compensation or other reparations have been made to Ms. Cortez Palacios;

(b) Whether an investigation has been conducted into the violation of Ms. Cortez Palacios' 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.

87. 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.

88. 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.

89. 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.<sup>32</sup>

*[Adopted on 1 May 2020]*

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<sup>32</sup> See Human Rights Council resolution 42/22, paras. 3 and 7.