

# WHOSE RIGHT TO LIFE?

Women's Rights and Prenatal Protections  
under Human Rights and Comparative Law



The right to life is a fundamental human right, central to the enjoyment of all other human rights. International human rights law recognizes this basic right as accruing at birth, and international and regional human rights bodies, as well as courts worldwide, have clearly established that any prenatal protections must be consistent with women's human rights.

An emerging trend to extend a right to life before birth, and in particular from conception, poses a significant threat to women's human rights, in theory and in practice. These efforts, often rooted in ideological and religious motivations, are part of a deliberate attempt to deny women the full range of reproductive health services that are essential to safeguarding women's fundamental rights to life, health, dignity, equality, and autonomy, among others.

These attempts to grant a right to life before birth—and therefore recognize prenatal legal personhood—seek to bestow rights on a zygote, embryo, or fetus that would be equal or superior to the rights of women. In many cases, these measures aim to outlaw any procedure that terminates a pregnancy. In other cases, these attempts have sought to justify restrictions on access to in vitro fertilization and contraception. Across the board, these strategies attempt to deny women the ability to make autonomous decisions regarding their fertility with complete disregard for women's basic human rights.

### WHERE NATIONAL LEGAL FRAMEWORKS PROTECT LIFE BEFORE BIRTH

Several countries have adopted various legal frameworks for protecting life before birth:

- Explicit recognition of a constitutional right to life before birth, as in the national constitutions of Guatemala and Chile.<sup>1</sup>
- Constitutional protections that confer equal protection for the life of both the pregnant woman and the “unborn,” as in the national constitutions of Ireland and the Philippines.<sup>2</sup>
- Legislation establishing that the right to life is subject to protection prenatally, as Poland has done.<sup>3</sup>

The strategy of promoting the recognition of a right to life before birth has emerged in the context of constitutional reform processes, legislative initiatives, and court challenges that seek to extend constitutional protections of the right to life prenatally. For example, in 2010, the Dominican Republic adopted a new constitution, which recognized a right to life from conception.<sup>4</sup> In 2008 and 2010, the United States (U.S.) state of Colorado,<sup>5</sup> and in 2011, the U.S. state of Mississippi<sup>6</sup> rejected initiatives to amend the constitutions of these states to recognize that ‘life begins at conception’ and that from the moment of fertilization, zygotes, embryos, and fetuses are people with all the rights guaranteed to persons under their state constitutions. Since 2008, at least 16 Mexican states have amended their constitutions to protect the right to life from either fertilization or conception.<sup>7</sup> Members of the Slovak Parliament challenged the constitutionality of the country's abortion law, arguing that the constitution protects the right to life before birth. However, in 2007, the Slovak Constitutional Court found that granting the right to life to a fetus would directly contradict women's constitutional rights to health and privacy and upheld the constitutionality of the abortion law.<sup>8</sup>

There are a number of steps that States can and should take to promote a legitimate interest in prenatal life while respecting women's fundamental rights. This toolkit analyzes how States can meet their international human rights obligations as they seek to protect the value of prenatal life. The toolkit sets forth international and comparative legal standards for interpreting right to life protections. It also identifies how relevant human rights, public health, and scientific evidence supports legal protections to guarantee women's rights as a crucial step in protecting the right to life and ensuring the health and well-being of women and their children. When States protect a right to life before birth without regard for women's rights, inconsistencies in law arise that jeopardize women's fundamental rights while doing little to protect prenatal life or existing children.

### The Beginning of Human Life: Scientific, Moral, Religious, and other Considerations

Efforts to promote recognition of a right to life before birth frequently try to capitalize on the lack of moral or ethical consensus on when human life begins, often seeking to codify a single religious or other ideological viewpoint on this question. In many instances, these attempts have deliberately distorted scientific evidence around the progression of a woman's pregnancy.

There is no consensus on when human life begins across various disciplines, including religion. Different religions maintain differing viewpoints on this issue. Religious beliefs about the start of human life vary from the moment of fertilization,<sup>9</sup> to 40 days after fertilization,<sup>10</sup> to the 120<sup>th</sup> day of gestation,<sup>11</sup> to the point at which the head emerges from the womb.<sup>12</sup>

The medical and scientific community similarly has not arrived at a consensus on when human life begins, but it has agreed on the following terms and phrases to understand the progression of a woman's pregnancy:

- **Fertilization** occurs when a single sperm penetrates an egg cell to form a **zygote**.<sup>13</sup>
- After fertilization, the zygote travels through a woman's fallopian tube and begins to divide to form several cells, becoming a **blastocyst** or **preembryo**.<sup>14</sup>
- The blastocyst or preembryo reaches the uterus roughly five days after fertilization.<sup>15</sup> The **implantation** of the fertilized egg in the uterine lining generally defines the beginning of **pregnancy** according to medical standards.<sup>16</sup> It is worth noting that the term "conception" is not a scientific term; it is used informally to refer to either fertilization or implantation and is thus an imprecise term.
- Approximately three weeks after fertilization has occurred, the implanted blastocyst or preembryo is sufficiently developed to be considered an **embryo**.<sup>17</sup>
- The embryo develops into a **fetus** between the end of the eighth<sup>18</sup> and the end of tenth week<sup>19</sup> of pregnancy.

Notably, a significant percentage of zygotes—estimated to be between one-half and two-thirds—do not develop into human beings.<sup>20</sup> Studies indicate that between 25-35% of preembryos never implant into the uterine lining,<sup>21</sup> up to 30% fail shortly after implantation,<sup>22</sup> and roughly 15% of clinically established pregnancies miscarry.<sup>23</sup>

## Overview

This toolkit provides the legal and contextual framework, broken down in the following fact sheets, for understanding and responding to the harmful efforts to dismantle women's human rights in the context of prenatal right to life protections:

- o **International and Regional Standards on the Right to Life**, which outlines human rights standards interpreting right to life protections, demonstrating that human rights law does not recognize a right to life before birth.
- o **High Courts Reject Recognition of a Prenatal Right to Life**, which examines high court decisions addressing prenatal protections in each region of the world, and the common threads that run through them.
- o **Striking a Balance: Women's Rights and an Interest in Prenatal Life**, which identifies how states can legitimately promote an interest in prenatal life while ensuring respect for women's fundamental human rights.
- o **Women's Rights Jeopardized by Prenatal Protections**, which examines the potential human rights violations that occur when an interest in prenatal life is prioritized above women's fundamental human rights.
- o **The Law Defines Legal Personhood, Not Human Life**, which analyzes the role of lawmakers and policy makers in defining when legal personhood begins, as well as the legal implications of recognizing a zygote, embryo, or fetus as a rights-holder.

<sup>1</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [C.P.] tit. II, cap. I, art. 3 (2002) (Guat.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, § 1 (1980) (Chile).

<sup>2</sup> Ir. Const., 1937, art. 40.3.3; Const. (1987), Art. II, § 12 (Phil.).

<sup>3</sup> USTAWA z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży [Law of Jan. 7, 1993 on Family Planning, Human Embryo Protection, and Conditions of Legal Pregnancy Termination, as amended Dec. 23, 1997, art. 1 (Pol.)], available at [www.worldabortionlaws.com](http://www.worldabortionlaws.com).

<sup>4</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA [C.P.] art. 37 (2010) (Dom. Rep.).

<sup>5</sup> The Associated Press, *Colorado voters reject anti-abortion measure*, Wash. Post, Nov. 3, 2010.

<sup>6</sup> Katharine Q. Seelye, *Mississippi Voters Reject Anti-Abortion Measure*, N.Y. Times, Nov. 8, 2011; Denise Grady, *Medical Nuances Drove 'No' Vote in Mississippi*, N.Y. Times, Nov. 14, 2011.

<sup>7</sup> GRUPO DE INFORMACIÓN EN REPRODUCCIÓN ELEGIDA [INFORMATION GROUP ON REPRODUCTIVE CHOICE], REFORMAS APROBADAS A LAS CONSTITUCIONES ESTATALES QUE PROTEGEN LA VIDA DESDE LA CONCEPCIÓN/FECUNDACIÓN 2008-2011 [APPROVED CONSTITUTIONAL STATE REFORMS THAT PROTECT LIFE FROM CONCEPTION/FERTILIZATION 2008-2011] (2011).

<sup>8</sup> Nález Ústavného súdu Slovenskej republiky, sp. zn. [Decision of the Constitutional Court of the Slovak Republic, No.] PL. ÚS 12/01-297 (Dec. 4, 2007) (unofficial translation on file with the Center for Reproductive Rights).

<sup>9</sup> Daniel P. Sulmasy, *Emergency Contraception for Women Who Have Been Raped: Must Catholics Test for Ovulation or is Testing For Pregnancy Morally Sufficient?*, 16 Kennedy Inst. Ethics J. 305, 307 (2006) (describing commonly held Catholic views on when life begins); R. E. Florida, *Buddhist Approaches to Abortion*, 1 ASIAN PHILOSOPHY 39, 42 (1991) (describing a commonly held Buddhist view that life begins when sperm, egg and vignana come together).

<sup>10</sup> Lindsey Disney & Larry Poston, *The Breath of Life: Christian Perspectives on Conception and Ensoulment*, 92 ANGLICAN THEOLOGICAL REVIEW 271, 278 (2010) (describing various Christian views on when life begins).

<sup>11</sup> *Id.* at 281 (describing commonly held Islamic views on when life begins).

<sup>12</sup> *Id.* at 279 (describing commonly held perspectives in Judaism on when life begins).

<sup>13</sup> ANÍBAL FAÚNDES & JOSÉ S. BARZELATTO, THE HUMAN DRAMA OF ABORTION: A GLOBAL SEARCH FOR CONSENSUS 14 (2006); F. Zegers-Hochschild et al., *International Committee for Monitoring Assisted Reproductive Technology and the World Health Organization Revised Glossary on ART Terminology, 2009*, 24 HUMAN REPRODUCTION 2683, 2685 (2009).

<sup>14</sup> FAÚNDES & BARZELATTO, *supra* note 13, at 15, 17; Guttmacher Institute, *The Implications of Defining When a Woman is Pregnant*, 8 GUTTMACHER REP. ON PUB. POL'Y, 7, 8 (2005); Zegers-Hochschild et al., *supra* note 13, at 2685.

<sup>15</sup> Zegers-Hochschild et al., *supra* note 13, at 2686; Guttmacher Institute, *supra* note 14, at 8.

<sup>16</sup> Guttmacher Institute, *supra* note 14, at 7; FAÚNDES & BARZELATTO, *supra* note 13, at 17.

<sup>17</sup> Guttmacher Institute, *What Methods Should be Included in a Contraceptive Coverage Insurance Mandate?* 1 GUTTMACHER REP. ON PUB. POL'Y 1, 1 (1998); FAÚNDES & BARZELATTO, *supra* note 13, at 17.

<sup>18</sup> STEDMAN'S MEDICAL DICTIONARY 658 (27th ed. 2000); Zegers-Hochschild et al., *supra* note 13, at 2685 (2009).

<sup>19</sup> FAÚNDES & BARZELATTO, *supra* note 13, at 17.

<sup>20</sup> SCOTT F. GILBERT, DEVELOPMENTAL BIOLOGY 827 (5th ed., 1997).

<sup>21</sup> KENNETH L. BECKER MD, PhD ED., PRINCIPLES AND PRACTICE OF ENDOCRINOLOGY & METABOLISM 1050 (Ch. 107) (2001).

<sup>22</sup> *Id.*

<sup>23</sup> Raj Rai & Lesley Regan, *Recurrent Miscarriage*, 368 THE LANCET 601, 601 (2006).

## II. INTERNATIONAL AND REGIONAL STANDARDS ON THE RIGHT TO LIFE

International and regional human rights treaties protect a right to life without defining when life begins. Authoritative sources for interpretation—including the history of negotiations and the jurisprudence of the bodies charged with interpreting and monitoring compliance with human rights treaties—clarify that these protections do not apply before birth and recognize that to protect an absolute right to life before birth could contradict human rights protections for women. The histories of negotiations over the terms of human rights treaties (*travaux préparatoires*), which provide a source for interpretation where the language of a treaty is ambiguous,<sup>1</sup> indicate that right to life provisions are not intended to protect a prenatal right to life. Additionally, treaty monitoring bodies, through general comments, concluding observations, and decisions in individual cases, consistently emphasize the importance of protecting women’s rights, and assert that to guarantee women’s fundamental rights to life and health, among others, States must remove barriers to the full enjoyment of those rights, such as the denial of safe and legal abortions.

### International Human Rights Standards

#### Universal Declaration of Human Rights

Article 1 of the Universal Declaration of Human Rights states that “[a]ll human beings are born free and equal in dignity and rights.”<sup>2</sup> Significantly, the history of negotiations indicates that the word “born” was used intentionally to exclude a prenatal application of the rights protected in the Declaration.<sup>3</sup> The drafters of the Declaration rejected a proposal to delete “born,” and the resulting text of the Declaration conveys intentionally that the rights of the Declaration are “inherent from the moment of birth.”<sup>4</sup>

#### International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) rejects the proposition that the right to life, protected in Article 6(1), extends to prenatal life.<sup>5</sup> The drafters of the ICCPR specifically rejected a proposal to amend this article to provide that “the right to life is inherent in the human person from the moment of conception, this right shall be protected by law.”<sup>6</sup>

The Human Rights Committee, which interprets and monitors state compliance with the ICCPR, has further clarified that the ICCPR’s right to life protections may be violated when women are exposed to a risk of death from unsafe abortion as a result of restrictive abortion laws.<sup>7</sup> In the case of *K.L. v. Peru*, the Committee established that the denial of a therapeutic abortion, where continued pregnancy posed a significant risk to the life and mental health of the pregnant woman, violated the woman’s right to be free from cruel, inhuman, or degrading treatment.<sup>8</sup> The Human Rights Committee reaffirmed this decision in the case of *L.M.R. v. Argentina*, when it held that the denial of a legal abortion for a rape victim inflicted physical and mental suffering, violating the woman’s right to be free from torture or cruel, inhuman, or degrading treatment, and her right to privacy.<sup>9</sup>

#### Convention on the Rights of the Child

Although the Preamble of the Convention on the Rights of the Child (CRC) provides that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,”<sup>10</sup> the history of negotiations makes clear that this language is not intended to extend Convention protections, including right to life protections, prenatally. To the contrary, the negotiations explicitly note that this language is not “intend[ed] to prejudice the interpretation of Article 1 or any other provision of the Convention,” where Article 1 defines “a child” for the purposes of the Convention as “every human being below the age of 18 years.” Proponents of the amendment calling for safeguards before birth further clarified that “the purpose of the amendment was not to preclude the possibility of abortion.”<sup>11</sup>

## II. INTERNATIONAL AND REGIONAL STANDARDS ON THE RIGHT TO LIFE (continued)

The Committee on the Rights of the Child, which interprets and monitors state compliance with the CRC, supports the understanding that the CRC does not protect a prenatal right to life. The Committee has not issued any comments suggesting that there is a right to life before birth; instead the Committee has expressed concern about maternal mortality in adolescent girls stemming from unsafe abortion<sup>12</sup>—a violation of their right to life—and urged states to reform punitive abortion legislation and ensure access to safe abortion services, irrespective of the legality of abortion.<sup>13</sup>

### **Convention on the Elimination of All Forms of Discrimination against Women<sup>14</sup>**

The jurisprudence of the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which interprets and monitors state compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), makes clear that the fundamental principles of non-discrimination and equality require that the rights of a pregnant woman be given priority over an interest in prenatal life.

In the case of *L.C. v. Peru*, the CEDAW Committee found that the government had violated a pregnant girl's rights by prioritizing the fetus over her health by postponing an essential surgery until the girl was no longer pregnant. The girl's continued pregnancy posed a substantial risk to her physical and mental health, and the CEDAW Committee held that the denial of a therapeutic abortion and the delay in providing the surgery constituted gender-based discrimination and violated her rights to health and freedom from discrimination.<sup>15</sup> The CEDAW Committee has further expressed concern that women's rights to life and health may be violated by restrictive abortion laws.<sup>16</sup>

## **Regional Human Rights Standards**

### **American Declaration on the Rights and Duties of Man and American Convention on Human Rights**

Article 1 of the American Declaration on the Rights and Duties of Man provides that “[e]very human being has the right to life, liberty, and the security of his person.”<sup>17</sup> Drafters of the American Declaration specifically rejected a proposal to adopt the following language: “Every person has the right to life. This right extends to the right to life from the moment of conception.”<sup>18</sup> They reasoned that such a provision would have conflicted with existing abortion laws in the majority of the member states.<sup>19</sup>

While article 4 of the American Convention on Human Rights states: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception,”<sup>20</sup> both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, the two adjudicatory bodies that interpret and monitor compliance with the Inter-American system's human rights conventions, have clarified that this protection is not absolute.<sup>21</sup>

In the case of *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, the Inter-American Court – which provides authoritative interpretations of the Inter-American system's human rights conventions – struck down Costa Rica's ban on the use of in vitro fertilization, which Costa Rica attempted to justify as a measure to protect the right to life prior to birth, since some of the embryos created will perish. The Court determined that, under the American Convention, the “right to life should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights”<sup>22</sup> and that disproportionate restrictions on the exercise of other human rights due to absolute protection of the right to life “would be contrary to the protection of human rights.”<sup>23</sup> The Court ruled that the term “in general” in article 4's protection of the right to life was intended “to allow, as appropriate, an adequate balance between competing rights and interests.”<sup>24</sup> This decision affirmed the Inter-American Commission's decision over two decades earlier in the case of *Baby Boy v. United States*, in which it held that a law permitting abortion without restriction as to reason was compatible with the American Declaration and the American Convention, because they do not provide absolute protection of the right to life prior to birth.<sup>25</sup>

## II. INTERNATIONAL AND REGIONAL STANDARDS ON THE RIGHT TO LIFE (continued)

Furthermore, in *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, the Inter-American Court refuted the proposition that other international human rights conventions and declarations protect the right to life prior to birth, finding that such documents, including the Universal Declaration of Human Rights, the ICCPR, and the CRC, did not provide any evidence to substantiate the notion that the embryo could be considered “a person.”<sup>26</sup> Finally, in addressing the issue of when life begins, the Court reasoned that since there is not an agreed definition of when life begins, adopting one such definition “would imply imposing specific types of beliefs on others who do not share them.”<sup>27</sup>

The determination that the American Convention does not protect an absolute right to life before birth has also been affirmed through provisional and precautionary measures issued to states with restrictive abortion laws. Following the denial of necessary cancer treatment to a pregnant Nicaraguan woman on the grounds that such treatment could cause an abortion, the Inter-American Commission issued precautionary measures to Nicaragua, finding that the State could not deny her life- and health-saving care and calling on the State to provide the necessary medical treatment.<sup>28</sup> Additionally, the Inter-American Court issued provisional measures ordering El Salvador to take all necessary steps to preserve the life of a woman whose pregnancy placed her life in grave danger,<sup>29</sup> which under these circumstances required termination of the pregnancy.<sup>30</sup> Implicit in these determinations is the notion that the State cannot prioritize the health or well-being of the fetus over the pregnant woman’s rights.

### European Convention on Human Rights

Article 2(1) of the European Convention on Human Rights provides: “Everyone’s right to life shall be protected by law.”<sup>31</sup> The European Commission on Human Rights, in *Paton v. United Kingdom*, held that the Convention language “tend[s] to support the view that [Article 2] does not include the unborn,”<sup>32</sup> and acknowledged that recognition of an absolute right to life before birth would “be contrary to the object and purpose of the Convention.”<sup>33</sup>

In *Vo v. France*, the European Court of Human Rights, which interprets and monitors compliance with the European Convention, affirmed that “the unborn child is not regarded as a ‘person’ directly protected by Article 2 of the Convention and that if the unborn do have a ‘right’ to ‘life,’ it is implicitly limited by the mother’s rights and interests,”<sup>34</sup> including her rights to life, health, and privacy.<sup>35</sup> The Court reiterated this holding in *A, B and C v. Ireland*,<sup>36</sup> and noted that “[a] prohibition of abortion to protect unborn life is not...automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother’s right to respect for her private life is of a lesser stature,” such that restrictions on abortion must be consistent with women’s fundamental rights.<sup>37</sup>

### African Charter on Human and Peoples’ Rights and Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa

Article 4 of the African Charter on Human and Peoples’ Rights states that “[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.”<sup>38</sup> Drafters of the African Charter specifically rejected language protecting a right to life from the moment of conception.<sup>39</sup>

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) does not address when life begins, but it implicitly reinforces the understanding that the right to life accrues at birth, providing that States must take measures to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the [pregnant woman] or the life of the [pregnant woman] or the foetus.”<sup>40</sup>

## II. INTERNATIONAL AND REGIONAL STANDARDS ON THE RIGHT TO LIFE (continued)

- <sup>1</sup> Vienna Convention on the Law of Treaties, art. 32, *adopted* May 23, 1969, 1155 u.n.t.s. 331 (*entered into force* Jan. 27, 1980).
- <sup>2</sup> Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res.217a (III), Article 1, U.N. Doc. A/810 (1948).
- <sup>3</sup> U.N. GAOR 3<sup>rd</sup> Comm., 99<sup>th</sup> mtg., ¶¶ 110-124, U.N. Doc. A/PV/99 (1948).
- <sup>4</sup> *Id.*
- <sup>5</sup> International Covenant on Civil and Political Rights, art. 6(1), G.A. Res. 2200a (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).
- <sup>6</sup> U.N. GAOR Annex, 12<sup>th</sup> Session, Agenda Item 33, ¶¶ 96, 113, 119, U.N. Doc. A/C.3/L.654.
- <sup>7</sup> See, e.g., Human Rights Committee (H.R. Committee), *Concluding Observations to: Argentina*, ¶ 14, UN Doc. CCPR/CO/70/ARG (2000); *Bolivia*, ¶ 22, UN Doc. CCPR/CO/79/Add.74 (1997); *Costa Rica*, ¶ 11, U.N. Doc. CCPR/CO/79/Add.107 (1999); *Chile*, ¶ 211, U.N. Doc. a/54/40 (1999); *El Salvador*, ¶ 14, U.N. Doc. CCPR/CO/78/SLV (2004); *Ecuador*, ¶ 11, U.N. Doc. CCPR/CO/79/Add.92 (1998); *Gambia*, ¶ 17, U.N. Doc. CCPR/CO/75/GMB (2004); *Guatemala*, ¶ 19, U.N. Doc. CCPR/CO/72/GTM (2001); *Honduras*, ¶ 8, U.N. Doc. CCPR/CO/HND/CO/1 (2006); *Kenya*, ¶ 14, U.N. Doc. CCPR/CO/83/KEN (2005); *Kuwait*, ¶¶ 466, 467, U.N. Doc. A/55/40; GAOR 55<sup>th</sup> Sess., Supp. No. 40 (2000); *Lesotho*, ¶ 11, U.N. Doc. CCPR/CO/79/Add.106 (1999); *Mauritius*, ¶ 9, U.N. Doc. CCPR/CO/83/MUS (2005); *Morocco*, ¶ 29, U.N. Doc. CCPR/CO/82/MAR (2004); *Paraguay*, ¶ 10, U.N. Doc. CCPR/CO/PRY/CO/2 (2006); *Peru*, ¶ 15, U.N. Doc. CCPR/CO/79/Add.72 (1996); *Peru*, 20, ¶ U.N. Doc. CCPR/CO/70/PER (2000); *Poland*, ¶ 8, U.N. Doc. CCPR/CO/82/POL (2004); *United Republic of Tanzania*, ¶ 15, U.N. Doc. CCPR/CO/79/Add.97 (1998); *Trinidad and Tobago*, ¶ 18, U.N. Doc. CCPR/CO/70/TTO (2000); *Venezuela*, ¶ 19, U.N. Doc. CCPR/CO/71/VEN (2001); *Vietnam*, ¶ 15, U.N. Doc. CCPR/CO/75/VNM (2002).
- <sup>8</sup> K.L. v. Peru, H.R. Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/d/1153/2003 (2005).
- <sup>9</sup> L.M.R. v. Argentina, H.R. Committee, Commc'n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- <sup>10</sup> Convention on the Rights of the Child, adopted Nov. 20, 1989, ¶ 9 of pmbll., GA Res. 44/25, annex, U.N. GAOR 44<sup>th</sup> Sess., Supp. No.49, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990).
- <sup>11</sup> Question of a Convention on the Rights of the Child: Rep. of the Working Group, U.N. Comm'n on Human Rights, 36<sup>th</sup> Sess., U.N. Doc. E/CN.4/L.1542 (1980). See also Rep. of the Working Group on a Draft Convention on the Rights of the Child, U.N. Comm'n on Human Rights, 45<sup>th</sup> Sess., at 11, U.N. Doc. E/CN.4/1989/48 (1989).
- <sup>12</sup> Committee on the Rights of the Child (CRC Committee), *General Comment No. 4: Adolescent Health and Development in the Content of the Convention on the Rights of the Child* (33<sup>rd</sup> Sess., 2003), ¶ 31, U.N. Doc. CRC/GC/2003/4 (2003).
- <sup>13</sup> See, e.g., CRC Committee, *concluding Observations to: Chad*, ¶ 30, U.N. Doc. CRC/C/15/Add.107 (1999); *Chile*, ¶ 55, U.N. Doc. CRC/C/CHL/CO/3 (2007); *Palau*, ¶ 46, U.N. Doc. CRC/C/15/Add.149 (2001); *Uruguay*, ¶ 51, U.N. Doc. CRC/C/URY/CO/2 (2007); CRC Committee, *General Comment No. 15: The right of the child to the enjoyment of the highest attainable standard of health*, (62<sup>nd</sup> Sess., 2013), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 70, U.N. Doc. CRC/C/GC/15 (2013).
- <sup>14</sup> Convention on the Elimination of All Forms of discrimination Against Women, *adopted* Dec. 18, 1979, art. 12, G.A. Res. 32/180, UN GAOR, 34<sup>th</sup> Sess., Supp. No. 46, U.N. Doc. A/34/46 U.N.T.S. 13 (*entered into force* Sept. 3, 1981). See also Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20<sup>th</sup> Session, 1999), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 11, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).
- <sup>15</sup> L.C. v. Peru, CEDAW Committee, Commc'n No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).
- <sup>16</sup> See, e.g., CEDAW Committee, *Concluding Observations to: Belize*, ¶ 56, U.N. Doc. A/54/38/Rev. 1, GAOR, 54<sup>th</sup> Sess., Supp. No. 38 (1999); *Chile*, ¶ 228, U.N. Doc. A/54/38/Rev. 1, GAOR, 54<sup>th</sup> Sess., Supp. No. 38 (1999); *Colombia*, ¶ 393, U.N. Doc. A/54/38/Rev. 1, GAOR, 54<sup>th</sup> Sess., Supp. No. 38 (1999); *Dominican Republic*, ¶ 337, U.N. Doc. A/53/38/Rev.1, GAOR, 53<sup>rd</sup> Sess., Supp. No. 38 (1998); *Paraguay*, ¶ 131, U.N. Doc. A/51/38, GAOR 51<sup>st</sup> Sess., Supp. No. 38 (1996).
- <sup>17</sup> American Declaration on the Rights and Duties of Man, *adopted* 1948 by the Ninth International Conference of American States, art. 1, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
- <sup>18</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 194-197 (Nov. 28, 2012); *Baby Boy v. United States*, Resolution 23/81, Inter-Am. Comm'n H.R., Resol. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, ¶ 18(b) (Mar. 6, 1981), *citing* Novena Conferencia Internacional Americana, Actas y Documentos Vol. V, at 449 (1948).
- <sup>19</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶¶ 194-197 (Nov. 28, 2012); *Baby Boy v. United States*, Resolution 23/81, Case 2141, Inter-Am. Comm'n H.R., Resol. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, ¶ 18(e) (Mar. 6, 1981).
- <sup>20</sup> American Convention on Human Rights, *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (*entered into force* July 18, 1978).
- <sup>21</sup> *Baby Boy v. United States*, Resolution 23/81, Case 2141, Inter-Am. Comm'n H.R., Resol. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, ¶ 25 (Mar. 6, 1981); *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 258 (Nov. 28, 2012).
- <sup>22</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 258 (Nov. 28, 2012).
- <sup>23</sup> *Id.* ¶ 259.
- <sup>24</sup> *Id.* ¶ 263.
- <sup>25</sup> *Baby Boy v. United States*, Resolution 23/81, Case 2141, Inter-Am. Comm'n H.R., Resol. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, ¶ 30 (Mar. 6, 1981).
- <sup>26</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶¶ 224-244 (Nov. 28, 2012).
- <sup>27</sup> *Id.* ¶ 185.
- <sup>28</sup> Inter-Am. Comm'n H. R., Precautionary Measures 43-10, "Amelia," Nicaragua (2010).
- <sup>29</sup> Inter-Am. Ct. H. R., Provisional Measures, El Salvador Matter of B., Order of the Court (May 29, 2013).
- <sup>30</sup> *Id.* ¶ 14.
- <sup>31</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), *adopted* Nov. 4, 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (*entered into force* Sept. 3, 1953).
- <sup>32</sup> *Paton v. United Kingdom*, App. No. 8416/79, ¶ 9, 19 Eur. Comm'n of H.R. Dec. & Rep. 244 (1980).
- <sup>33</sup> *Id.* ¶ 20.
- <sup>34</sup> *Vo v. France*, App. No. 53924/00, Eur. Ct. H.R., ¶ 80 (2004).
- <sup>35</sup> *Id.* ¶ 65.
- <sup>36</sup> A, B and C v. Ireland, App. No. 25579/05, Eur. Ct. H.R., ¶¶ 237-238 (2010).
- <sup>37</sup> *Id.* ¶ 238.
- <sup>38</sup> African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, art. 4, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (*entered into force* Oct. 21, 1986).
- <sup>39</sup> Compare Frans Viljoen, *The African Charter on Human and People's Rights / The Travaux Préparatoires in the Light of Subsequent Practice*, 25 HUM. RTS. L.J. 313, 314 (2004) (noting that the drafters of the African Charter relied largely on the American Convention on Human Rights), with Draft African Charter on Human and Peoples' Rights, art. 17, O.A.U. Doc. CAB/LEG/67/1 (1979) (adopting the language of art. 4(1) of the American Convention on Human Rights, but replacing "moment of conception" with the "moment of his birth").
- <sup>40</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2<sup>nd</sup> Ordinary Sess., Assembly of the Union, *adopted* July 11, 2003, art. 14(2)(c).

### III. HIGH COURTS REJECT RECOGNITION OF A PRENATAL RIGHT TO LIFE

High courts in every region of the globe have considered the question of who is accorded a right to life within a given legal system, particularly in the context of laws on abortion. Landmark decisions from high courts around the world assert that, while States have a legitimate interest in the value of prenatal life, there is no prenatal right to life. Taken together, these decisions reinforce the standards set by international and regional human rights bodies that the right to life does not exist before birth, and that any steps a State takes to protect prenatal life must be consistent with women's fundamental rights.

#### Constitutional Rights Accrue at Birth

A number of high courts have addressed whether constitutional rights, including the right to life, extend prenatally in the context of laws on abortion, and have concluded that these rights accrue only at birth. The U.S. Supreme Court, for instance, explicitly rejected the claim that a “fetus is a ‘person’ within the language and meaning of” the U.S. Constitution.<sup>1</sup> In interpreting the Slovak Constitution's right to life provision—“Everyone has the right to life. Human life is worthy of protection even prior to birth”<sup>2</sup>—the Slovak Constitutional Court asserted that it is “beyond any doubts that the concept of everyone [in this provision] should be understood as everybody who is born [such that the] capacity to have rights arises by birth and ends by death.”<sup>3</sup> The Supreme Court of Nepal,<sup>4</sup> Colombia's Constitutional Court,<sup>5</sup> and South Africa's High Court, Transvaal Provincial Division<sup>6</sup> similarly held that there is no constitutional right to life before birth.

#### Prenatal Protections Cannot Trump Women's Constitutional Rights

In considering the scope of constitutional protections, courts have acknowledged that recognition of a prenatal right to life could create an impermissible conflict between the rights of the pregnant woman and those of the zygote, embryo, or fetus.<sup>7</sup> The Supreme Court of Nepal explained, for example, that:

*[a] fetus is able to exist only because of the mother; if we grant the fetus rights that go against the mother's health or well-being it could create a conflict between the interests of the mother and the fetus, and even compel us to recognize the superiority of the fetus, a situation that would be against the mother. It is not possible to put the mother's life at risk to protect the fetus.*<sup>8</sup>

While acknowledging a legitimate interest in protecting prenatal life, these courts have distinguished this interest in the value of prenatal life from a legally constructed right to life and emphasized that efforts to protect this legitimate interest must be consistent with women's fundamental rights. In South Africa, the High Court, Transvaal Provincial Division asserted that in evaluating the constitutionality of prenatal protections, “proper regard must be had to the rights of women as enshrined in the Constitution,” including women's rights to life; privacy; health; equality; freedom and security of the person, including reproductive and bodily autonomy; respect for human dignity; and freedom of religion, belief, and opinion.<sup>9</sup>

To ensure that efforts to protect prenatal life do not jeopardize women's fundamental rights, the Colombian Constitutional Court ruled that Colombia's restrictive abortion law must be expanded to permit abortion in certain circumstances. The Court held the law to be unconstitutional because it “entails the complete pre-eminence of the life of the fetus and the absolute sacrifice of the pregnant woman's fundamental rights.”<sup>10</sup> The Court further explained that “[this law] extinguishes the woman's fundamental rights, and thereby violates her dignity by reducing her to a mere receptacle for the fetus, without rights or interests of constitutional relevance worthy of protection.”<sup>11</sup>

### III. HIGH COURTS REJECT RECOGNITION OF A PRENATAL RIGHT TO LIFE (continued)

The U.S. Supreme Court has similarly affirmed that women's rights to life and health must be given priority over the state interest in protecting prenatal life.<sup>12</sup> The Court has further recognized, in the context of pregnancy, that "the liberty of the woman is at stake in a sense unique to the human condition,"<sup>13</sup> and has described the psychological harm and distress, as well as the mental and physical health consequences, associated with carrying an unwanted pregnancy to term.<sup>14</sup>

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 115, 157 (1973).

<sup>2</sup> CONSTITUTION OF THE SLOVAK REPUBLIC, 460/1992 Coll. *as amended*, art. 15(1) (Slovk.).

<sup>3</sup> *Nález Ústavného súdu Slovenskej republiky*, sp. zn. [Decision of the Constitutional Court of the Slovak Republic, No.] PL. ÚS 12/01-297 (Dec. 4, 2007), at 4 (emphasis added) (unofficial translation on file with the Center for Reproductive Rights) [hereinafter *Slovak Constitutional Court Decision*].

<sup>4</sup> *Lakshmi Dhikta v. Government of Nepal*, Writ No. 0757, 2067 (2007) (Supreme Court of Nepal), at 3 (unofficial translation on file with the Center for Reproductive Rights) [hereinafter *Lakshmi Dhikta v. Nepal*].

<sup>5</sup> WOMEN'S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA, 21 (2007) [hereinafter *Colombian Constitutional Court Decision*].

<sup>6</sup> *Christian Lawyers Association of South Africa v. The Minister of Health* 1998 (11) BCLR 1434 (T) at 24 – 25 [hereinafter *Christian Lawyers Association of South Africa*].

<sup>7</sup> *See, e.g., id.* at 30 – 31; *Slovak Constitutional Court Decision*, *supra* note 3, at 10.

<sup>8</sup> *Lakshmi Dhikta v. Nepal*, *supra* note 4, at 2.

<sup>9</sup> *Christian Lawyers Association of South Africa*, *supra* note 6, at 30 – 31.

<sup>10</sup> *Colombian Constitutional Court Decision*, *supra* note 5, at 49.

<sup>11</sup> *Id.* at 50.

<sup>12</sup> *See Roe v. Wade*, 410 U.S. at 163-164.

<sup>13</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

<sup>14</sup> *Roe v. Wade*, 410 U.S. at 153.

**“What we do know is that a fetus does not have a separate existence and it can only exist within a mother’s womb. That is why, even if we do recognize a fetal interest, we cannot say that it shall prevail over a mother’s interest.”**

- Supreme Court of Nepal, *Lakshmi Dhikta v. Nepal*<sup>1</sup>

**“The constitutional value of unborn human life can... be protected only to such extent that this protection [does] not cause an interference with the essence of [a] woman’s freedom and her right to privacy.”**

- Constitutional Court of the Slovak Republic, *Decision on the Constitutionality of the Act on Artificial Interruption of Pregnancy*<sup>2</sup>

**“[I]f the unborn do have a ‘right’ to ‘life,’ it is implicitly limited by the mother’s rights and interests.”**

- European Court of Human Rights, *Vo v. France*<sup>3</sup>

### **An Interest in Protecting Prenatal Life Cannot Be Prioritized over Women’s Rights**

Legal rights, including the right to life, virtually always accrue at birth. Before birth, there may be a legitimate interest in protecting prenatal life, but zygotes, embryos, and fetuses are not typically recognized as holders of legal rights. As noted in the above fact sheets on human rights standards and high court decisions, recognition of legal rights before birth could create a conflict of rights, especially where the interest in prenatal life is pitted against the interests of women. High courts around the world have recognized this potential conflict of interests; they have explained that while there may be an objective value in protecting prenatal life, there is an essential distinction between the value of prenatal life and a legal right to life.<sup>4</sup>

States must therefore ensure that any steps taken to protect their interest in prenatal life are consistent with the fundamental human rights of women. To do otherwise, as the Colombian Constitutional Court explained, runs the risk of treating a woman “as a mere instrument for reproduction,” violating her right to dignity.<sup>5</sup> Thus, any legal protections granted to prenatal life cannot be prioritized over women’s rights.

Furthermore, prenatal protections must not perpetuate discrimination against women, as non-discrimination is one of the founding principles of human rights law. The Committee on the Elimination of Discrimination against Women has noted that the proposition “that protection of the foetus should prevail over the health of the mother” is grounded in stereotyped roles for women and constitutes gender-based discrimination in violation of a woman’s rights.<sup>6</sup>

Where courts have interpreted right to life provisions as precluding legal abortion, these interpretations have given way to legal inconsistencies, often with discriminatory legal effects, for instance “by affording the fetus rights against its mother, [even where the law does not otherwise recognize] the fetus’s rights with respect to injuries caused by third persons.”<sup>7</sup>

### INTER-AMERICAN COURT STRIKES ABSOLUTE RIGHT TO LIFE FOR EMBRYOS

In 2000, the Constitutional Chamber of Costa Rica's Supreme Court of Justice held that human life begins at fertilization, and that zygotes, embryos, and fetuses are thus entitled to all human rights, including a right to life.<sup>8</sup> As a result, in vitro fertilization was banned in Costa Rica, even though abortion remained legal when a pregnancy posed a risk to the woman's life or health.<sup>9</sup> In 2012, the Inter-American Court of Human Rights struck down Costa Rica's prohibition of IVF as a means to protect the right to life prior to birth, finding that where there are prenatal protections, they must be "gradual and incremental, according to [life's] development."<sup>10</sup>

### A Prenatal Right to Life Cannot Be Absolute

Although some countries recognize the value of prenatal life, only a handful actually includes constitutional or legislative protections for a prenatal right to life. The Irish Constitution, for instance, "acknowledges the right to life of the unborn ... with due regard for the equal right to life of the mother."<sup>11</sup> In its clause protecting the right to life, the Kenyan Constitution states that "[t]he life of a person begins at conception."<sup>12</sup>

Where national laws do include protection of a legal right to life before birth, however, these protections generally operate alongside recognition that this right is not absolute. This is often done by permitting abortion where necessary to safeguard the rights of a pregnant woman. The Supreme Court of Ireland has clarified that in balancing the equal rights of the pregnant woman and the "unborn," the woman has a right to an abortion where the pregnancy poses a risk to her life.<sup>13</sup> The Kenyan constitutional protection of the right to life contains an explicit clause stating that abortion, although generally not permitted, is allowed where the life or health of the pregnant woman is at risk, there is need for emergency treatment, "or if permitted by any other written law."<sup>14</sup>

Importantly, under international law, a right to life before birth cannot be absolute. International human rights standards provide that any rights or protections accorded to prenatal life are necessarily limited by the rights of women,<sup>15</sup> and a fundamental principle of international law states that governments cannot invoke their domestic law to justify non-compliance with treaty obligations.<sup>16</sup>

### RESTRICTING WOMEN'S REPRODUCTIVE RIGHTS DOES NOT PROMOTE LIFE

Efforts to promote a right to life before birth often simultaneously aim to restrict access to both contraception and abortion. These actions are couched in rhetoric espousing the value of life, but they often serve the opposite purpose, driving rates of maternal mortality and morbidity higher. Evidence demonstrates that the legal status of abortion does not affect the incidence of induced abortions.<sup>17</sup> Instead, restrictive abortion laws contribute to higher rates of unsafe abortion with attendant risks to the life and health of the pregnant woman.<sup>18</sup> Lack of access to contraception, including emergency contraception, leads to higher rates of unintended pregnancies and higher rates of induced abortion.<sup>19</sup> Arguments for recognizing a right to life before birth have not addressed this crucial paradox.

### Safeguarding Women's Rights while Promoting Prenatal, Infant, and Child Survival

In many cases, women's rights align with both an interest in prenatal life and regard for the life and well-being of any existing children the woman may have. Accordingly, governments can take a number of actions to promote prenatal, infant, and child survival while respecting women's human rights:

- o **Provide the information and means for women to determine the number and spacing their pregnancies.** By providing access to comprehensive sexuality education and contraceptive information and services, women can better plan their pregnancies. This will enable women to increase the intervals between births, which can greatly reduce infant and maternal mortality.<sup>20</sup>
- o **Promote access to adequate nutrition and nutritional supplements for pregnant women.** Anemia and malnutrition during pregnancy contribute to higher rates of maternal and infant death and low birth weight,<sup>21</sup> and inadequate folic acid intake can lead to life- or health-threatening conditions, such as spina bifida.<sup>22</sup>
- o **Increase access to emergency obstetric care and skilled birth attendants.** Emergency obstetric care and skilled attendance during birth can help detect and treat complications, such as eclampsia and obstructed labor, that can lead to stillbirths and death or disability of women and newborns.<sup>23</sup>
- o **Reduce maternal mortality.** Maternal death is closely linked to child mortality, and “[c]hildren who have lost their mothers are up to 10 times more likely to die prematurely than those who have not.”<sup>24</sup>
- o **Improve access to the interventions necessary to prevent vertical transmission of HIV.** The risk of vertical HIV transmission can be reduced to less than 2% where pregnant women living with HIV have access to several key interventions,<sup>25</sup> improving the chance of child survival.
- o **Address underlying social conditions that can contribute to high-risk pregnancies, such as intimate partner violence.** Intimate partner violence during pregnancy has been shown to lead to greater risk of miscarriage and pre-partum hemorrhage, as well as pre-term labor and low birth weight.<sup>26</sup>

<sup>1</sup> *Lakshmi Dhikta v. Government of Nepal*, Writ No. 0757, 2067 (2007) (Supreme Court of Nepal) (unofficial translation on file with the Center for Reproductive Rights) [hereinafter *Lakshmi Dhikta v. Nepal*].

<sup>2</sup> *Nález Ústavného súdu Slovenskej republiky*, sp. zn. [Decision of the Constitutional Court of the Slovak Republic, No.] PL. ÚS 12/01-297 (Dec. 4, 2007), at 10 (unofficial translation on file with the Center for Reproductive Rights) [hereinafter *Slovak Constitutional Court Decision*].

<sup>3</sup> *Vo v. France*, App. No. 53924/00, Eur. Ct. H.R., ¶ 80 (2004).

<sup>4</sup> *See, e.g.*, TC, Acórdão N.º 75/2010, Mar. 26, 2010 (60 Diário da Rep.15566) (Port.); WOMEN'S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA (2007) [hereinafter *Colombian Constitutional Court Decision*]; *Lakshmi Dhikta v. Nepal*, *supra* note 1; *Slovak Constitutional Court Decision*, *supra* note 2; *see also*, *Paton v. United Kingdom*, App. No. 8416/79, 19 Eur. Comm'n of H.R. Dec. & Rep. 244, ¶ 9 (1980).

<sup>5</sup> *Colombian Constitutional Court Decision*, *supra* note 4, at 53.

<sup>6</sup> *L.C. v. Peru*, CEDAW Committee, Comm'n No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

<sup>7</sup> REBECCA J. COOK, INTERPRETING THE 'PROTECTION OF LIFE' 4 (2010), [http://www.gire.org.mx/publica2/SeminarioAborto\\_300810\\_Cook\\_eng.pdf](http://www.gire.org.mx/publica2/SeminarioAborto_300810_Cook_eng.pdf).

<sup>8</sup> *Sala Constitucional de la Corte Suprema de Justicia* [Constitutional Chamber of the Supreme Court of Justice], Expediente [Record] No. 95-001734-0007-CO, Voto [Vote] No. 2306-00, Mar. 15, 2000 (Costa Rica).

<sup>9</sup> Código Penal [CP] (Penal Code) No. 4573, art. 121, May 4, 1970 (Costa Rica).

<sup>10</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 264 (Nov. 28, 2012).

<sup>11</sup> IR. CONST., 1937, art. 40.3.3.

<sup>12</sup> CONSTITUTION, art. 26(2) (2010) (Kenya) [hereinafter *Constitution of Kenya*].

<sup>13</sup> *Attorney General v. X and Others*, [1992] 1 I.R. 846P (Ir.).

<sup>14</sup> *Constitution of Kenya*, *supra* note 9, at art. 26(4).

<sup>15</sup> *See, supra*, International and Regional Standards on the Right to Life Fact Sheet.

<sup>16</sup> *Vienna Convention on the Law of Treaties*, art. 27, adopted May 23, 1969 (entered in to force Jan. 27, 1980).

<sup>17</sup> WORLD HEALTH ORGANIZATION (WHO), UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008 6 (6th ed., 2011).

<sup>18</sup> *Id.*; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health Anand Grover, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 21, U.N. Doc. A/66/254 (Aug. 3, 2011).

<sup>19</sup> GUTTMACHER INSTITUTE, ABORTION WORLDWIDE: A DECADE OF UNEVEN PROGRESS 37 (2010).

<sup>20</sup> UNITED NATIONS POPULATION FUND (UNFPA), *MDG Linkages to UNFPA's Work on Population, Reproductive Health and Women's Empowerment*, <http://www.unfpa.org/public/home/sitemap/icpd/MDGs/pid/6626> (last visited Oct. 13, 2013).

<sup>21</sup> WHO, COUNTDOWN TO 2015 DECADE REPORT (2000-2010) WITH COUNTRY PROFILES: TAKING STOCK OF MATERNAL, NEWBORN, AND CHILD SURVIVAL 13 (2010).

<sup>22</sup> WHO, NUTRITION FOR HEALTH AND DEVELOPMENT: A GLOBAL AGENDA FOR COMBATING MALNUTRITION 17 (2000).

<sup>23</sup> The Partnership for Maternal, Newborn and Child Health, *Make Stillbirths Count*, 13 KNOWLEDGE SUMMARY: WOMEN AND CHILDREN'S HEALTH 2, 3 (2011); WHO, *Making Pregnancy Safer: Skilled birth attendants*, [http://www.who.int/making\\_pregnancy\\_safer/topics/skilled\\_birth/en/index.html](http://www.who.int/making_pregnancy_safer/topics/skilled_birth/en/index.html) (last visited Dec. 9, 2011).

<sup>24</sup> UNFPA & UNITED NATIONS CHILDREN'S FUND, WOMEN'S AND CHILDREN'S RIGHTS: MAKING THE CONNECTION 51 (2010).

<sup>25</sup> WHO, PMTCT STRATEGIC VISION 2010-2015: PREVENTING MOTHER-TO-CHILD TRANSMISSION OF HIV TO REACH THE UNGASS AND MILLENNIUM DEVELOPMENT GOALS 6 (2010).

<sup>26</sup> WHO, INTIMATE PARTNER VIOLENCE DURING PREGNANCY: INFORMATION SHEET 2 (2011).

When governments prioritize an interest in prenatal life over women's fundamental rights, women may be denied access to emergency contraception, safe abortion, post-abortion care, and other essential health services, such as life-saving or emergency treatment. States that do so jeopardize women's rights to life and health; freedom from cruel, inhuman, or degrading treatment; liberty and personal security; freedom from discrimination; and autonomy.

### Women's Right to Life and Health

#### Case Study: L.C.'s story<sup>1</sup>

L.C., a young girl from Peru, was 13 years old when she found out that she was pregnant, after having been repeatedly raped by a neighbor. Scared and ashamed, L.C. attempted to commit suicide by jumping off the roof of a building near her home. Her suicide attempt resulted in a devastating spinal injury, and doctors concluded that an emergency surgery was necessary to stabilize her, reduce the risk of paralysis of her arms, and potentially help her regain control over her bowels. However, when hospital staff learned that L.C. was pregnant, they postponed the surgery. L.C. and her mother requested a legal therapeutic abortion, but hospital officials denied their request. L.C. eventually suffered a miscarriage. Several weeks after the miscarriage, and more than three months after she was told she needed surgery, L.C. finally underwent the procedure. The excessive delay, coupled with the absence of adequate rehabilitation treatment, rendered the procedure virtually useless. L.C. is now quadriplegic. In 2011, the CEDAW Committee held that the Peruvian government violated L.C.'s rights to health and to freedom from discrimination by prioritizing the interest of the fetus over L.C.'s physical and mental health, and denying L.C. an abortion.

#### Case Study: Haydee's Story<sup>2</sup>

Haydee, a woman from the Philippines, was diagnosed with a grave medical condition as a result of her first pregnancy. During her second pregnancy, she suffered a stroke and her health deteriorated quickly. A doctor recognized the imminent threat that this second pregnancy posed to her life, and performed a safe abortion. Although she tried to prevent subsequent pregnancies, Haydee was unable to access medically appropriate and affordable contraceptives and became pregnant again. Despite the fact that Haydee needed an abortion to save her own life, the doctor she consulted prioritized the life of the fetus and refused to provide the necessary abortion "because it is the taking of a life." Fearing for her life, Haydee self-induced an abortion and experienced serious complications and weeks of heavy bleeding as a result. When she sought emergency care at a hospital, a doctor told her, "[t]hat is a sin. You killed your own child." The medical staff proceeded to verbally abuse her, and threatened to report her to national authorities, despite the risk that continued pregnancy had posed to her life and health. Treaty monitoring bodies have linked the Philippines' ban on abortion to violations of the right to health and the right to life, urging the state to permit abortion under certain circumstances and remove punitive provisions on women who have abortions.<sup>3</sup>

### Women's Right to be Free from Cruel, Inhuman or Degrading Treatment

#### Case study: K.L.'s story<sup>4</sup>

K.L., a 17-year-old Peruvian girl, was pregnant with an anencephalic fetus, a fetal abnormality that is ultimately fatal in all cases. K.L.'s doctors informed her that continued pregnancy posed risks to her life and physical and mental health, and recommended that she terminate the pregnancy. The hospital director, though, refused to authorize the legal abortion, forcing K.L. to carry the pregnancy to term. The baby survived for four days after birth, during which time hospital officials made K.L. breastfeed the child. This harrowing experience had a severe impact, and doctors diagnosed K.L. with severe depression requiring psychiatric treatment. A psychiatric report concluded that "the so-called principle

of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance.”<sup>5</sup> In 2005, the Human Rights Committee found that the mental suffering K.L. experienced as a result of the denial of therapeutic abortion constituted cruel, inhuman, and degrading treatment.

### Women's Right to Liberty and Security

#### Case study: Z's story<sup>6</sup>

In May 2006, Z, a young pregnant woman from one of Moldova's poorest regions, self-induced an abortion at a late stage of her pregnancy. Suffering from severe blood loss, she sought emergency care at a local hospital, only to be reported to the police by doctors and then detained. Even though there is no criminal penalty under Moldovan law for women who have illegal abortions, Z was charged with intentional and premeditated murder, and in December 2006, she was sentenced to 20 years in prison. By charging Z with murder, the state implicitly recognized the fetus as a legal person capable of being a victim of homicide. After five years of wrongful imprisonment – during which Z was harassed by guards, denied essential medical care, and subjected to inhuman conditions – the Moldovan Pardoning Commission granted Z a pardon.

#### Case study: Rosmery and Manuela's story<sup>7</sup>

Rosmery and Manuela, Salvadorian women, both suffered complications during labor leading to stillbirths. When the women sought follow-up medical care, doctors accused both women of having undergone abortions in violation of El Salvador's restrictive abortion law. Police immediately arrested them for homicide—one of the women was shackled while she was still receiving critical medical care. Both were sentenced to more than 30 years in prison. In Rosmery's case, after more than eight years in prison, a judge ordered her release, acknowledging that a mistake had been made. Nevertheless, the government never compensated Rosmery for the grievous rights violations. Manuela died in prison; she had suffered from Hodgkin's lymphoma—a form of cancer—before she even became pregnant, but she received treatment only after it was too late to save her. In 2012, Manuela's case was filed before the Inter-American Commission on Human Rights, where it aims to establish that investigating and imprisoning women for experiencing stillbirths violates their rights to liberty and security of the person, along with a number of other fundamental rights. Her case is currently pending.

### Women's Rights to Privacy and to Decide the Number and Spacing of Children

#### Case study: Ana Cristina's story<sup>8</sup>

Ana Cristina Castillo, a Costa Rican woman, and her husband had been trying to have children for eight years. She suffers from endometriosis damage, while her husband has a low sperm count. After three years of unsuccessfully trying hormones, surgery, and insemination, the couple started in vitro fertilization (IVF). Before they were able to conceive, though, the practice was outlawed. In 2000, Costa Rica's Constitutional Chamber of the Supreme Court of Justice held that human life begins at conception—which the Court defined as the moment of fertilization—and is entitled to the protection of the law from that point. Five of the seven justices reasoned that IVF places human life at too great a risk because some of the embryos will perish. In 2012, the Inter-American Court of Human Rights overturned Costa Rica's ban on IVF, holding that the ban violates the rights to privacy, liberty, personal integrity, form a family and be free from discrimination<sup>9</sup> and ordering Costa Rica to take positive measures to ensure that IVF is accessible, available, and of good quality.<sup>10</sup>

**Case study: Emergency Contraception in Honduras<sup>11</sup>**

Honduras's Constitution provides that the "unborn" will be treated as a born person in the context of individual constitutional rights, including the right to life.<sup>12</sup> On that basis, a 2009 Ministerial decree prohibits the promotion, use, sale, purchase, and free distribution of emergency contraception (EC) on the scientifically inaccurate grounds that EC could potentially cause an abortion. This decree prohibits the dissemination of information on EC and applies to all individuals, including victims of sexual violence, denying women access to an effective means of preventing unwanted pregnancies and the related risks that unwanted pregnancies can present. In practice, this means that if a woman or girl is sexually assaulted, healthcare providers cannot give her the care that she needs to prevent a pregnancy resulting from rape. The ban violates women's right to privacy and the right to decide the number and spacing of children, as well as their right to health. The Committee on the Rights of the Child has linked the prohibition of emergency contraception in other countries with violations of women's and adolescent girls' right to health,<sup>13</sup> and the Committee against Torture has indicated that denying women emergency contraception following sexual assault could amount to cruel, inhuman and degrading treatment.<sup>14</sup>

<sup>1</sup> L.C. v. Peru, CEDAW Committee, Comm'n No. 22/2009, ¶ 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

<sup>2</sup> CENTER FOR REPRODUCTIVE RIGHTS, FORSAKEN LIVES: THE HARMFUL IMPACT OF THE PHILIPPINE CRIMINAL ABORTION BAN 38-41 (2010).

<sup>3</sup> Committee on the Elimination of Discrimination against Women, *Concluding Observations: Philippines*, ¶ 27-28, U.N. Doc. CEDAW/C/PHI/CO/6 (2006); Committee on Economic, Social and Cultural Rights, *Concluding Observations: Philippines*, ¶ 31, U.N. Doc. E/C.12/PHL/CO/4 (2008); Human Rights Committee, *Concluding Observations: Philippines*, ¶ 13, U.N. Doc. CCPR/C/PHL/CO/4 (2012).

<sup>4</sup> K.L. v. Peru, Human Rights Committee, Comm'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

<sup>5</sup> *Id.* ¶ 2.5

<sup>6</sup> CENTER FOR REPRODUCTIVE RIGHTS, Z. v. MOLDOVA, <http://reproductiverights.org/en/case/z-v-moldova> (last visited Nov. 14, 2013). *See also*, Application No. 28415/08 to the Eur. Ct. H.R. (2009) (on file with the Center for Reproductive Rights).

<sup>7</sup> Interview with Rosmery, in San Salvador (July 15, 2011) (on file with the Center for Reproductive Rights); Interview with Manuela's relatives, in Morazán (July 17, 2011) (on file with the Center for Reproductive Rights).

<sup>8</sup> Press Release, Center for Reproductive Rights, Center Joins Couples' Legal Battle Against Costa Rica's IVF Ban (Dec. 10, 2004), *available at* <http://reproductiverights.org/en/press-room/center-joins-couples%E2%80%99-legal-battle-against-costa-rica%E2%80%99s-ivf-ban>; Letter from interested civil society to the Inter-American Commission on Human Rights (Nov. 10, 2010), *available at* <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Carta%20Costa%20Rica.pdf>.

<sup>9</sup> Artavia Murillo *et al.* ("In Vitro Fertilization") v. Costa Rica, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 317 (Nov. 28, 2012).

<sup>10</sup> *Id.* ¶¶ 334-338.

<sup>11</sup> Secretaría de Salud [Secretary of Health], Acuerdo [Resolution] No. 2744, Oct. 21, 2009 (Hond.).

<sup>12</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS, art. 67 (1982).

<sup>13</sup> Committee on the Rights of the Child, *Concluding Observations: Ecuador*, ¶ 60, U.N. Doc. CRC/C/ECU/CO/4 (2010).

<sup>14</sup> Committee against Torture, *Concluding Observations: Peru*, ¶ 15, U.N. Doc. CAT/C/PER/CO/5-6 (2013).

**“We need not resolve the difficult question of when life begins. When those trained in their respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary...is not in a position to speculate.”**

- United States Supreme Court, *Roe v. Wade*<sup>1</sup>

**“The Constitutional Court’s role in this proceeding is neither answering the philosophical, moral or ethical question when the human life starts, nor the question of correctness or morality... its only role is to answer the question what are the constitutional side fences that the Constitution sets to the legislator.”**

- Constitutional Court of the Slovak Republic, *Decision on the Constitutionality of the Act on Artificial Interruption of Pregnancy*<sup>2</sup>

**“These are topics on which men and women of different faiths, or indeed of no faith at all, may and do hold, passionately and with the utmost sincerity, starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them. The days are past when the business of the judges was the enforcement of morals or religious belief.”**

- United Kingdom, High Court of Justice, Queens Bench Division, *Smeaton v. The Secretary of State for Health*<sup>3</sup>

In general, laws define legal personhood—a term used to determine who is accorded rights and protections within a legal system<sup>4</sup>—separately from moral, ethical, and religious perspectives on when life begins.<sup>5</sup> Courts have observed that the task of the judiciary is to interpret the law in accordance with their legal traditions, and not to engage in moral or spiritual discourse.<sup>6</sup> Many courts that have addressed abortion, for instance, have observed “that the judicial task is not to resolve conflicts about biological facts or moral or spiritual values [about when life begins], but to make determinations of law, according to legal traditions and contexts, guided but not governed by social effects.”<sup>7</sup>

### Legal Consequences of Recognizing Prenatal Personhood

The rights and entitlements that accompany legal personhood virtually always accrue at birth. Recognizing legal personhood at any stage of prenatal development could have wide-ranging, and often unintended, consequences throughout the legal sphere, which could lead to further human rights violations and other legal inconsistencies:

- o **Violating the Separation of Church and State:** Recognizing prenatal personhood could carry implications for constitutional protections of freedom of religion and conscience.<sup>8</sup> In such a context, individuals whose moral, ethical, or religious beliefs lead them to believe that life begins at birth could be restricted from acting in a manner consistent with their religious views, such as procuring an abortion when the pregnant woman’s life is at risk.<sup>9</sup>

## VI. THE LAW DEFINES LEGAL PERSONHOOD, NOT HUMAN LIFE (continued)

- **Complicating Criminal Laws:** Granting legal personhood status before birth would mean that zygotes, embryos, and fetuses are included as victims throughout the penal code, opening the door to criminal investigation and prosecution of women who suffer miscarriages or stillbirths.<sup>10</sup>
- **Limits on Women's Behavior and Autonomy:** Recognizing legal personhood *in utero* could lead to restrictions on the behavior of pregnant women. Pregnant women could be sanctioned for child abuse or endangerment if they engage in behavior that is deemed risky to the fetus, such as riding in a car without their seatbelt fastened or drinking alcohol at any gestational stage.
- **Reproductive Technologies:** Recognizing legal personhood as beginning at fertilization could have significant consequences for women seeking fertility treatment. For example, women undergoing *in vitro* fertilization could be required to implant all fertilized eggs to avoid the destruction or freezing of some embryos. This practice could lead to higher rates of multiple pregnancies and jeopardize both the health of women and fetal development.
- **Property Laws:** Legal personhood status for prenatal life could have implications for property rights by allowing zygotes, embryos, or fetuses to have inheritance rights that currently are only granted to individuals who are alive after birth for a certain period of time.
- **Registration:** Vital registration, such as a census used to determine the funding and distribution of services and resources or a death registry, could be seriously impacted if zygotes, embryos, or fetuses were counted as legal persons. Pregnant women who miscarry could be required to register the miscarriage through death registries.

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<sup>1</sup> Roe v. Wade, 410 U.S. 115, 157 (1973).

<sup>2</sup> Nález Ústavného súdu Slovenskej republiky, sp. zn. [Decision of the Constitutional Court of the Slovak Republic, No.] PL. ÚS 12/01-297 (Dec. 4, 2007), at 1 (unofficial translation on file with the Center for Reproductive Rights).

<sup>3</sup> Smeaton v. The Secretary of State for Health [2002] EWHC 610 (High Court Administrative, England), 2 FAM. L. REP. 146 (2002) (holding that emergency contraception does not constitute abortion under the Offences against the Person Act of 1961).

<sup>4</sup> See Joseph F. Bell, *Schiavo's Right to Refuse Food and Water: Ascendancy of the Artificial Natural Person*, 2 LIBERTY U.L. REV. 193 (2007); JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (2nd ed. 1972).

<sup>5</sup> See, e.g., *Wartelle v. Women's and Children's Hosp., Inc.*, 705 So. 2d 778, 780 (1997); *Christian Lawyers Association of South Africa v. The Minister of Health*, 1998 (11) BCLR 1434 (T).

<sup>6</sup> Rebecca J. Cook, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1, 25 (2003) (discussing the role of courts in answering moral and ethical questions).

<sup>7</sup> *Id.* at 26.

<sup>8</sup> See, e.g., COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, REP. OF THE COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, ISSUED ON THE SUBMISSION OF THE PROPOSED CONSTITUTION OF KENYA 14 (2010); John Morton Cummings, Jr., *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U.L. REV. 1191, 1193 (1990).

<sup>9</sup> Many Jewish denominations agree that abortion is a religious duty when the pregnant woman's life is in danger. See, e.g., Brief for American Jewish Congress et al. as Amici Curiae, *Webster v. Reproductive Health Services*, et al., 492 U.S. 490 (1989) (No. 88-605); *Religions: Abortion, Judaism and Abortion*, BBC, (July 15, 2009), [http://www.bbc.co.uk/religion/religions/judaism/jewishethics/abortion\\_1.shtml](http://www.bbc.co.uk/religion/religions/judaism/jewishethics/abortion_1.shtml).

<sup>10</sup> See, e.g., Jason Foster, *Woman faces charge of killing unborn child during August suicide attempt*, HERALD ONLINE, Feb. 21, 2009, [www.heraldonline.com/2009/02/21/1152282/woman-faces-charge-of-killing.html](http://www.heraldonline.com/2009/02/21/1152282/woman-faces-charge-of-killing.html).