

IN THE CONSTITUTIONAL COURT OF THE SLOVAK REPUBLIC

**PL ÚS/12.01 conformity of Act No. 73/1986 Coll. on artificial
interruption of pregnancy as amended by the Act No. 419/1991 Coll.
with the Constitution**

WRITTEN COMMENTS

BY

CENTER FOR REPRODUCTIVE RIGHTS

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SLOVAK FAMILY PLANNING ASSOCIATION

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Introduction

1. These written comments are submitted by the Center for Reproductive Rights and the International Women's Human Rights Law Clinic at the City University of New York School of Law, in cooperation with the Slovak Family Planning Association and Slovakia Pro Choice.
2. These comments rely on the jurisprudence of the European Human Rights System, as well as case law and statutes from member states, international and regional standards, and the jurisprudence of national-level courts outside of Europe.

Interest of the *Amici Curiae*

3. The Center for Reproductive Rights is a non-profit legal advocacy organization dedicated to defending and promoting women's reproductive rights worldwide. The International Legal Program, in collaboration with women's human rights advocates around the world, documents violations of reproductive rights, monitors laws concerning reproductive health care, and advocates at the United Nations and in regional human rights fora. With regard to third party interventions at the European Court of Human Rights, the Center was granted third party intervener status in *Vo v. France, D v Ireland* and *Tysiak v. Poland*
4. The International Women's Human Rights Law Clinic of the City University of New York School of Law is a graduate legal program, widely recognized for its scholarship and expertise in international law, international women's human rights and, particularly, in issues of reproductive and sexual rights and health. IWHR works in collaboration with local and national groups and has filed briefs and reports with international courts and human rights treaty bodies dealing with these issues.
5. The civic association Pro choice was founded in May 2001 as a platform for the co-operation of several human rights institutions and women's non-governmental organizations in Slovakia. Its main goal is to protect sexual and reproductive rights, as well as other human rights of women and children.
6. Slovak Family Planning Association (Slovak FPA) is a non-profit, multi-disciplinary, non governmental organization, established in 1991. Mission of the Slovak FPA is to support a responsible and cultivated sexual behavior of men and women and to defend basic human rights in the field of sexual and reproductive health. Slovak FPA is a member organization of a worldwide NGO International Planned Parenthood Federation.

The Legal Issue

7. This case raises the question of whether a foetus can claim a “right to life” under Article 15 of the Constitution of the Slovak Republic and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). If so, the petitioners argue, that the Constitutional Court of the Slovak Republic should invalidate the Slovak legislature’s decision to protect women’s rights to life, health, equality and conscientious decision by permitting abortion in the first trimester and thereafter when a woman’s life would be endangered by continued pregnancy. In other words, having failed to win in both the constitutional as well as legislative process, the petitioners turn to this Court for an advisory opinion.

8. These written comments assert that such a reading of the “right to life” would be inconsistent with Article 2 of the European Convention and the laws and jurisprudence of the overwhelming majority of member states of the Council of Europe. Such a reading of the “right to life” would also be inconsistent with international and regional standards and leading jurisprudence of national-level courts. Such a reading would also undermine, if not nullify, women’s fundamental human rights, including those under Articles 2, 8 and 14 of the European Convention.

9. Accordingly, there is no warrant in international law to invalidate the abortion law or Article 15 of the Slovak Constitution, which was drafted, in part, with the intention to preserve the current abortion law.¹

Discussion

Part I. There is no international legal support for holding that Article 2 of the European Convention on Human Rights requires protection of a fetal right to life which would override Article 15 of the Slovak Constitution or Slovakia’s permissive abortion law.

A. Jurisprudence of the European Human Rights System

10. The jurisprudence of both the European Commission on Human Rights (Commission) and the European Court of Human Rights (Court) clearly establish that the fetus is not a person entitled to the “right to life” under Article 2(1) and that granting a foetus the same rights as persons would place unreasonable limitations on the Article 2 rights of women, as persons already born, in contravention of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).²

1 Matúš Petrik, Memorandum: To some issues relating to reviewing compliance of the Act No. 73/1986 Coll. on artificial interruption of pregnancy with the Constitution of the Slovak Republic.

2 European Convention on Human Rights and Fundamental Freedoms, 312 U.N.T.S. 221 (entered into force on 3 September 1953). The ECHR was ratified by Slovakia on 1 January 1993.

The following cases address this issue:

11. In *Paton v. United Kingdom* (1980)³, a husband tried to prevent his pregnant wife from having an abortion by claiming that termination of the pregnancy would violate the fetus's right to life under Article 2. The Commission held that the word "everyone" in Article 2, and elsewhere in the European Convention, did not include fetuses and, recognizing the inseparability of the foetus and the pregnant woman, gave precedence to her rights under Article 2.⁴ Finding that if Article 2 protected the fetus, then abortion would have to be prohibited even in cases where the pregnancy involved a risk to the life of the pregnant woman, the Commission stated:

The life of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman.⁵

12. In *R.H. v. Norway* (1992),⁶ the Commission again declined to grant a foetus the protection due persons under Article 2 and rejected the applicant's claim that Norway's law allowing for his partner's abortion was contrary to Article 2 of the Convention. The Commission found that Norway's permissive abortion law was within the discretion of the state and dismissed the application.⁷

13. In *Boso v. Italy* (2002),⁸ the Court followed *R.H. v. Norway* in rejecting a claim that Italy's law authorizing abortion was contrary to a fetal right to life under Article 2 of the Convention. The Court found no violation of Article 2 when a woman sought a legal abortion, noting that the abortion in question took place in conformity with Italian law, which strikes a fair balance between the woman's interest and the state's interest in protecting the fetus.⁹ As in *R.H. v. Norway*, the complaint was dismissed.¹⁰

3 *Paton v. U.K.*, App. No. 8317/78, Eur. Com H.R., 13 May 1980, 3 Eur. H.R. Rep. 408 (1981), (Commission report), also cited as *X. v. U.K.*

4 *Id.* at paras 7-9.

5 *Id.* at para 19.

6 *R. H. v. Norway*, decision on admissibility, App. No. 17004/90, 73 Eur. Comm'n H.R. Dec. & Rep. 155 (19 May 1992).

7 *Id.*; *Paton v. U.K.*, *supra* para. 23.

8 *Boso v. Italy*, App. No. 50490/99, Eur. Ct. H.R., (5 September 2002).

9 *Id.*

10 *Id.*

14. In *Vo v. France* (2004),¹¹ the Court again refused to extend the right to life to fetuses under Article 2. The female applicant, who lost a wanted pregnancy due to the negligence of the doctor, contended that criminal sanction against the doctor based on unintentional homicide was required to vindicate the foetus' claimed right to life.¹² The Court recapitulated the earlier jurisprudence protecting women's right to abortion under the Convention, concluding 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."¹³ Thus the Court, made clear that although states have some level of discretion in deciding on availability of abortion, restrictions on abortion which interfere with women's basic human rights would violate the Convention (see *RH v. Norway*, *Boso v. Italy* and *Paton v. UK*, *Brüggemann and Scheuten v. Germany*). Because in *Vo* the rights and interests of the pregnant woman were not in conflict with the foetus, the court also recognized that states have discretion or a margin of appreciation as to whether to protect the fetus. But, noting that "there is no European consensus on the scientific and legal definition of the beginning of life,"¹⁴ the court declined to treat the fetus as a "person" even where there is no conflict with the rights of the woman. Instead, because "the life of the foetus was intimately connected with that of the mother and could be protected through her,"¹⁵ the Court ruled that France had no obligation under the Convention to criminalize the doctor's conduct as a form of homicide.¹⁶ Clearly, the *Vo* decision reaffirms previous European Commission and Court decisions which protect a woman's fundamental right to a safe abortion when her rights and interests are in conflict with those of the foetus.

15. In a broader sense, the *Vo* judgment, by refusing to treat malpractice as a form of homicide, protected doctors and providers from being deterred from providing abortions for fear of such additional sanction and, thus, indirectly protected women's access to reproductive health care, including abortion as well as the broad range of obstetrical health care. The petition in this case, seeking recognition of fetal "rights" in the Constitution, presents a similar broad danger, as discussed in Part II.

16. The *Vo* judgment was reaffirmed in *Evans v. The United Kingdom* (2006)¹⁷ where the applicant complained violation of her rights under Articles 2, 8, and 14 of the European Convention due to her partner's withdrawal of consent for use of embryos they had created and frozen for future implantation. The applicant claimed that the provisions of English law requiring the embryos to be destroyed once her partner withdrew his consent to their continued storage violated the embryos' right to life, contrary to Article 2 of the Convention. The Court, recalling its decision in *Vo v. France*, once again refused to

11 *Vo v. France*, App. No. 53924/00, Eur. Ct. H.R., (8 July 2004).

12 *Id.* at para. 50.

13 *Id.* at para. 80.

14 *Id.* at para. 84.

15 *Id.* at para. 86.

16 The Court did find that France's civil malpractice damages and regulatory laws protecting the public health were sufficient remedy to the plaintiff's injury. *Id.* at paras. 89, 92-93.

17 *Evans v. the United Kingdom*, App. No. 6339/05, Eur. Ct. H.R. (7 March 2006).

extend Article 2 protection to the embryos. Referring to the lack of any European consensus on the scientific and legal definition of when human life begins the Court left this decision to the states' margin of appreciation. In that regard, it recalled English law under which "...an embryo does not have independent rights or interests and cannot claim – or have claimed on its behalf – a right to life under Article 2 [of the Convention]."¹⁸ In addition, in the Court's extensive analysis and balancing of the rights of the applicant to preserve the embryos and the rights of her partner to have them destroyed, the Court did not include any "embryonic interests" into this balancing test, thus, indicating that the Convention does not require protection of such arguable interests.

17. It should also be noted that in one of the earliest abortion cases, *Brüggemann and Scheuten v. Germany* (1977),¹⁹ the Commission upheld a German statute criminalizing abortion after the 12th week of pregnancy except where the life or health of the woman was in danger. In so doing, the Commission recognized that the woman's right to a private life under Article 8(1) of the Convention was at stake, but was satisfied that the statutory permission for abortion was broad enough to be consistent with the woman's rights.²⁰ Implicit in the Commission's finding was the position that an absolute prohibition on abortion would be an impermissible interference with privacy rights under Article 8.

18. The recognition of the pregnant woman's right to private life in the context of abortion was also recognized in the European Court's recent judgment in *Tysiact v. Poland* (2007)²¹. The Court held that the Polish government had failed to fulfill its positive obligation, under Article 8 of the European Convention, to ensure the applicant's right to respect for her private life when she was denied a legal therapeutic abortion. The finding of a violation is specifically based on the government's failure to establish an effective procedure through which the applicant could have appealed her doctors' refusal to grant her request for abortion. The State argued that Polish law also protected the foetus and that in the applicant's case the conditions for lawful termination on health grounds had not been satisfied, the Court noted that "[W]hile the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be."²² In that respect, the Court held that the effective enjoyment of the woman's Article 8 rights requires the state to ensure that the relevant decision-making process concerning the termination of pregnancy is fair and such as to afford due respect to the interests of the pregnant woman, not the foetus, as safeguarded by Article 8.²³

18 Id. at para. 46.

19 *Brüggemann and Scheuten v. Germany*, App. No. 6959/75, 3 Eur. H.R. Rep. 244 (1977) (Commission report).

20 Id.

21 *Tysiact v. Poland*, App. No. 5410/03, Eur. Ct. H.R. (20 March 2007).

22 Id. at paras. 68, 107.

23 Id. at para. 113.

19. If the foetus was as a subject under Article 2, all cases described above would have been wrongly decided, and the statutory rights to abortion in Council of Europe member states would have been in jeopardy. The Court and the Commission have never recognized a fetus's right to life under Article 2 of the European Convention nor permitted the claimed interest in preservation of foetal life to annul a permissive abortion law. We note as well that the Charter of Fundamental Rights of the European Union,²⁴ which is also part of the draft EU Constitution, reaffirms in its Preamble the rights of the European Convention and the jurisprudence of the European Court of Human Rights.

20. These decisions are entirely consistent with the history of the European Convention on Human Rights. As discussed below history indicates that it adopted the approach of the Universal Declaration on Human Rights which accorded rights only after birth.

B. The Laws of Member States of the Council of Europe

21. National level courts have addressed the legal status of the foetus in the context of abortion. For example, both Austria's and The Netherlands' Constitutional Courts have rejected a "foetal rights" challenge to national legislation that liberalized access to abortion, holding *inter alia*, that Article 2 should not be interpreted to protect the unborn.²⁵ In 1975, the French *Conseil Constitutionnel* upheld France's abortion law, implicitly adopting the view that a foetus is not a child entitled to protection under the French Constitution.²⁶ While the Constitutional Court of Germany decided that abortion should remain technically illegal, it also specified that if a pregnant woman chooses abortion after seeing a counselor, she should not be prosecuted.²⁷ In 1995, *An Amended Law to Assist Pregnant Woman and Families* recognizing abortion in the first 12 weeks, was based on the Court's ruling, and was adopted by the German national parliament (Bundestag).²⁸ Under the law, abortion within the first twelve weeks is also legal if a woman has been the victim of a crime such as rape.²⁹ Further, if a woman's medical

24 Charter of Fundamental Rights of the European Union, OJ 2000/C 364/01.

25 Decision of the Constitutional Court of 11 October 1974, 39 *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (1974), summarized in *Annual Review of Population Law*, Vol. I, 49 (1974); *Juristenvereinigung Pro Vita v. De Staat der Nederlanden*, summarized in *Annual Review of Population Law*, 1991, Vol. 19, No. 5, 179-80 (1991).

26 Décision n° 74-54 du 15 janvier 1975, *Loi relative à l'interruption volontaire de la grossesse*, available at <http://www.conseil-constitutionnel.fr/decision/1974/7454dc.htm> (last visited 15 Feb. 2005).

27 German Embassy, *Questions & Answers about Germany: Health Care, Health Issues and Social Welfare: Health Issues: Is Abortion Legal?*, available at http://www.germany-info.org/relaunch/info/facts/facts/questions_en/health/healthissues3.html (last visited 14 February 2005).

28 Rosemarie Will, *German Unification and the Reform of Abortion Law*, 3 *Cardozo Women's L.J.* 399, 422-423 (1996). Under the terms of the new law, abortion is prohibited; however, a woman who has an abortion during the first twelve weeks will not be prosecuted as long as she first undergoes counseling that must seek to persuade her to carry the pregnancy to term. Will, 424-425. German Criminal Code, s.218, 218(a)(1) cited in Will, n. 112. While the law requires that counseling favor the "protection of unborn life," at the same time it must remain open and non-directive. German Criminal Code, s.219(1) cited in Will, n. 112. Thus, counselors must respect the woman's ultimate decision to choose to have an abortion and the State cannot punish for her decision. United Nations, *Abortion Policies: A Global Review: Volume 2, Gabon to Norway*, ST/ESA/SER.A/191, 26-27 (2001).

29 German Criminal Code, s.218(a)(3) cited in Will, n. 112.

condition requires the termination of a pregnancy, she may have a legal abortion at any time.³⁰ The German Court also recognized the rights of the pregnant woman, including her right to the free unfolding of her personality (art. 2 section 1 basic law), and her right to bodily integrity and life (art. 2 section 1 basic law) and protection of her dignity (art. 1 basic law).³¹ Thus, given the flexibility of the law and its application, the rights of the foetus are subordinate to the rights of the pregnant woman.

22. In addition, the laws on abortion adopted by most European states respect women's choice during the first trimester of pregnancy, and protect women's rights to life and health throughout the pregnancy. This statutory approach implicitly weighs the rights of the pregnant woman more heavily than any claim, whether characterized as rights or protection, on behalf of the foetus. Of the 46 state members of the Council of Europe, 40 permit a woman to terminate a pregnancy without restriction as to reason during the first trimester or on broad therapeutic grounds. Only a handful – Andorra, Ireland, Liechtenstein, Malta, Poland and San Marino – have maintained severe restrictions on abortion, with only narrow therapeutic exceptions.³² Thus the laws of the member states of the Council of Europe, like the Slovak law, are also overwhelmingly inconsistent with a foetal right to life claim.

C. International and Regional Human Rights Standards.

23. Long-settled international and regional human rights instruments reject the contention that states have an obligation to treat foetuses as having a right to life.

1. The Universal Declaration of Human Rights.

24. The working group on the Universal Declaration of Human Rights (UDHR)³³ explicitly rejected a version of Article 1 that was proposed specifically to grant foetuses a right to life, and thereby made it clear that international human rights begin at birth. Article 1 of the UDHR opens with the fundamental statement: “All human beings are *born* free and equal in dignity and rights.”³⁴ The word ‘born’ was intentionally used in this Article to refer to all persons born alive, and to exclude fetuses. The *travaux preparatoires* show that an amendment was proposed and rejected that would have deleted the word ‘born’ in part to protect the right to life from the moment of conception.³⁵ The representative from France explained that the statement, “All human beings are born free and equal...” meant that the right to freedom and equality was, “inherent from the moment of birth.”³⁶ Article 1 was adopted with this language by 45 votes, with 9 abstentions.³⁷ Therefore, it is clear that a foetus has no rights under the

30 German Criminal Code, s.218(a)(2) cited in Will, n. 112.

31 Will, *supra* at 402.

32 Center for Reproductive Rights, *The World's Abortion Laws* (2003) (wallchart).

33 G.A. Res. 217, U.N.Doc. A/810 (1948) (hereinafter “Universal Declaration”).

34 Id. Art. 1.

35 U.N. GAOR 3rd Comm., 99th mtg. at 110-124, U.N. Doc. A/PV/99 (1948).

36 Id. at 116.

37 U.N. GOAR 3rd Comm., 183rd mtg. at 119, U.N. Doc. A/PV/183 (1948).

UDHR. It follows that the term “everyone” utilized thereafter in the Declaration as a substitute for the then typical male-gendered pronouns³⁸ refers to born persons only.

25. Five decades after the Universal Declaration of Human Rights, the Programme of Action of the International Conference on Population and Development included the exact language of Article 1 of the UDHR, stating in Principle 1 that, “All human beings are born free and equal in dignity and rights.”³⁹ This reaffirmation of the principle that human rights, and the “human being” for the purposes of international human rights, begins at birth raised objections from only a tiny minority of states, indicating that the original understanding of the UDHR is still overwhelmingly accepted by the world community.⁴⁰

2. The European Convention for the Protection of Human Rights and Fundamental Freedoms.

26. The drafters of European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) relied heavily on the UDHR and thus did not even debate the question of dating rights from conception. The Council of Europe modeled itself closely after the United Nations and the Consultative Assembly of the Council explicitly based the European Convention on the “moral authority and technical value” of the UDHR.⁴¹ Thus when drafting the European Convention, the Consultative Assembly deliberately adopted language directly from the UDHR, including Article 3.⁴² Given that the European Convention relies strongly on the Declaration and declares that the purpose of the Convention is to “take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,”⁴³ it is logical that the term “everyone” in article 2 of the European Convention likewise excludes the foetus.⁴⁴ The jurisprudence and laws discussed in sections A and B supra, further reflect this original understanding.

38 Johannes Morsink, Women’s Rights in the Universal Declaration, 13 Hum. Rts. Q. 229-56, 233 (1991).

39 International Conference on Population and Development, Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 Sept. 1994, U.N. Doc.A/CONF.171/13/Rev.1(1995), principle 1.

40 Id. at Oral Statements and Reservations On the Programme of Action. Regarding Principle 1, Argentina orally associated itself with the written reservation from El Salvador stating that life must be protected from the moment of conception; and Guatemala submitted a written statement also asserting that life exists from the moment of conception. Id. at, “Written Statements on the Programme of Action.” Slovakia signed onto the Cairo Programme of Action with no reservations on this issue.

41 Committee on Legal and Administrative Questions Report, Section 1, Paragraph 6, 5 September 1949, in Collected Edition of the “Travaux Préparatoires,” Vol. 1 (1975), p. 194.

42 “Everyone has the right to life, liberty, and the security of person.” Id. at para. 8, p. 196.

43 ECHR, *supra* preambular paras. 2, 3, and 6.

44 It appears that the European Court on Human Rights did not have this history of the UDHR before it in *Vo*, when it opined that no one knew the meaning of “everyone.” *See Vo* para. 84.

3. The International Covenant on Civil and Political Rights

27. The negotiating history and subsequent practice under the International Covenant on Civil and Political Rights (ICCPR)⁴⁵ have likewise rejected the proposition that the right to life, protected in Article 6(1) of the Covenant, applies before birth. Article 6 (1) of the 1966 International Convention on Civil and Political Rights states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The *travaux préparatoires* of the Commission on Human Rights indicate that an amendment was proposed and rejected that stated, “The right to life is inherent in the human person from the moment of conception, this right shall be protected by law.”⁴⁶ The Commission ultimately voted to adopt Article 6, which has no reference to conception, by a vote of 55 to 0, with 17 abstentions.⁴⁷

28. Subsequently, the jurisprudence of the Human Rights Committee (Committee), which interprets and monitors states parties compliance with the International Covenant on Civil and Political Rights, has routinely emphasized the threat to women’s lives posed by illegal and unsafe abortion, thereby indicating that the Covenant’s protection of the right to life does not extend to fetuses.⁴⁸ The Committee has included in a General Comment 28 that restrictive abortion laws may violate the right to life of the pregnant woman when they result in maternal deaths.⁴⁹ In its Concluding Observations to various state parties, the Committee has repeatedly condemned strict legal prohibitions of abortion that produce maternal mortality as a violation of women’s right to life under Article 6 and has advised states to review and amend legislation criminalizing abortion.⁵⁰ Recently on 5

45 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 GAOR 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6546 (1966) (entered into force 23 March 1976). The ICCPR was ratified by Slovakia on 1 January 1993. See United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (2004), available at <http://unhchr.ch/pdf/report.pdf> (last visited 21 February 2005) (“Status of Ratifications”).

46 U.N. GAOR Annex, 12th Sess., Agenda Item 33, at 96, U.N. Doc. A/C.3/L.654; U.N. GAOR, 12th Sess., Agenda Item 33, at 113, U.N. Doc. A/3764 (1957).

47 U.N. GAOR, 12th Sess., Agenda Item 33, at 119 (q), U.N. Doc. A/3764 (1957).

48 See e.g., Concluding Observations of the Human Rights Committee: Bolivia, 05/05/97, U.N. Doc. CCPR/C/79/Add.74, ¶ 22; Concluding Observations of the Human Rights Committee: Colombia, 03/05/97, U.N. Doc. CCPR/C/79/Add.76, ¶ 24; Concluding Observations of the Human Rights Committee: Ecuador, 18/08/98, U.N. Doc. CCPR/C/79/Add.92, ¶ 11; Concluding Observations of the Human Rights Committee: Mongolia, 25/05/2000, U.N. Doc. CCPR/C/79/Add.120, ¶ 8(b); Concluding Observations of the Human Rights Committee: Poland, 29/07/99, U.N. Doc. CCPR/C/79/Add.110, ¶ 11; Concluding Observations of the Human Rights Committee: Senegal, 19/11/97, U.N. Doc. CCPR/C/79/Add 82, ¶ 12.

49 Human Rights Committee, General Comment 28: Equality of Rights Between Men and Women (68th Sess. 2000) at para. 10, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 12/05/2004, U.N. Doc. HRI/GEN/Rev. 7 (“Compilation”).

50 See e.g., Concluding Observations of the Human Rights Committee: Chile, 30/3/1999, U.N. GAOR, Hum. Rts. Comm., 65th Sess., 1740th mtg. ¶ 15, U.N. Doc. CCPR/C/79/Add.104. “The criminalization of all abortions, without exception, raises serious issues, especially in the light of unrefuted reports that many women undergo illegal abortions that pose a threat to their lives. ...The Committee recommends that the law be amended so as to introduce exceptions to the general prohibition of all

November 2004, the Committee in its Concluding Observations on Poland's compliance with the International Covenant on Civil and Political Rights "reiterated its deep concern about restrictive abortion law in Poland." The Committee noted that such a restrictive law "may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health" in violation of Article 6 of the ICCPR. The Committee recommended that Poland liberalize its abortion law.⁵¹

29. In 2005, the Human Rights Committee handed down a landmark decision, *K.L. v. Peru*⁵², in international human rights law. In considering an individual complaint submitted under the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee held the government of Peru in breach of its Covenant obligations for denying access to a therapeutic abortion. The Committee found the state liable under Article 7 of the ICCPR, the right to freedom from torture and cruel, inhuman or degrading treatment, for denying K.L.'s access to an abortion she needed to avoid serious harm to her mental health-harm associated with being forced to continue a pregnancy involving fetal anencephaly. It follows that a state's obligations to respect and ensure the right set out in article 7 of the ICCPR, require it to guarantee a woman's access to abortion in Cases where pregnancy threatens her physical or mental health, including because of severe fetal impairment. While K.L. was denied access to a legal abortion, the Committee's finding of an article 7 violation did not depend on the lawfulness of the procedure. The language of this part of the decision is neutral; the state is liable for "not enabling [K.L.] to benefit from a therapeutic abortion," not necessarily a legal one. Thus, in the context of article 7, both the legal and practical inaccessibility of a therapeutic abortion could constitute violations. These findings show the Committee's recognition of the continuing nature and long-term implications that denial of a therapeutic abortion could have to a woman's development and future mental health. In the context of article 17, the right to privacy, the Committee held that a state permitting abortion in prescribed circumstances must ensure that the textual guarantee in its national laws is an effective right in practice. In this case, the state should not only have refrained from interfering with K.L.'s decision to have a legal abortion, but also taken positive measures to enable the exercise of her right and ensure her access to services. The Committee found Peru in violation of its obligations under Article 17 when it denied K.L. her legally entitled right to an abortion.

abortions..."); *See also*, Concluding Observations of the Human Rights Committee: Argentina, 15/11/2000, U.N. Doc. CCPR/CO/70/ARG, ¶ 14; Concluding Observations of the Human Rights Committee: Costa Rica, 08/04/99, U.N. Doc. CCPR/C/79/Add.107, ¶ 11; Concluding Observations of the Human Rights Committee: Peru, *see supra*, ¶ 20; Concluding Observations of the Human Rights Committee: United Republic of Tanzania, 18/08/98, U.N. Doc. CCPR/C/79/Add.97, ¶ 15; Concluding Observations of the Human Rights Committee: Venezuela, 26/04/2001, U.N. Doc. CCPR/CO/71/VEN, ¶ 19.

51 Concluding Observations of the Human Rights Committee: Poland, 05/11/2004, U.N. Doc. CCPR/CO/82/POL, ¶ 8.

52 Human Rights Committee, *K.L. v Peru*, CCPR/C/85/D/1153/2003 [2005] UNHRC 64 (22 November 2005).

4. The Convention on the Rights of the Child.

30. Likewise, both the *travaux préparatoires* and the subsequent implementation of the Convention on the Rights of the Child (CRC)⁵³ make clear that this Convention does not extend the right to life to a foetus. An argument to the contrary is erroneously built upon Paragraph 9 of its Preamble, which provides: “Bearing in mind that, as indicated in the Declaration of the Rights of the Child, ‘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.’”⁵⁴ This reflects at most recognition of a state’s duty to promote, through nutrition, health and support directed to the pregnant woman, a child’s capacity to survive and thrive *after* birth. The *travaux* imply that this duty does not affect a woman’s choice to terminate an unwanted pregnancy.

31. The first Revised Draft of the preamble did not contain the quoted reference to protection “before...birth.” The Holy See led a proposal to reintroduce the words, “before as well as after birth,” to the fifth preambular paragraph, and “stated that the purpose of the amendment was not to preclude the possibility of an abortion.”⁵⁵ The words “before or after birth” were accepted, but the drafting group insisted upon the following interpretive statement: “In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by State Parties.”⁵⁶ The reference is to the definition of “child” in Article 1 as “every human being below the age of 18.”⁵⁷ The preamble is thus consistent with the long-standing understanding, rooted in the UDHR, that the term “human being” refers only to born persons.⁵⁸

32. The jurisprudence of the Committee on the Rights of the Child (CRC Committee), which interprets and monitors states parties compliance with the Convention on the Rights of the Child, also denies a right to life to the foetus by expressing repeated

53 Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR 44th Sess., Supp. No. 49 at 166, UN Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990). (CRC). The CRC was ratified by Slovakia on 1 January 1993. *See supra* “Status of Ratifications.”

54 *Id.* at preamble, para. 9.

55 U.N. Commission on Human Rights, Question of a Convention on the Rights of a Child: Report of the Working Group, 36th Sess., U.N. Doc. E/CN.4/L/1542 (1980).

56 U.N. Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, 45th Sess., E/CN.4/1989/48 at p.10 (1989), quoted in Jude Ibegbu, *Rights of the Unborn in International Law* 145 (2000). *See also* discussion in Lawrence J. LeBlanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* 69 (1995).

57 *See CRC, supra* Article 1 states that, “[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

58 Many commentators assert that the inclusion of this statement was in fact unnecessary, as the preambular language does not legally obligate states to provide protection for the unborn, nor does it define the moment at which a fetus becomes a “child.” *See* Jude Ibegbu, *Rights of the Unborn in International Law* 146-147 (2000).

concern over adolescent girls' access to safe abortion services. For example, General Comment 4 provides:

States parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices...The Committee urges States parties...to develop and implement programmes that provide access to sexual and reproductive health services, *including...safe abortion services*.⁵⁹

33. In its Concluding Observations, the CRC Committee understands that safe abortion is part of adolescent girls' right to adequate health (article 24) or to basic health and welfare. The Committee has repeatedly noted that "high maternal mortality rates, due largely to a high incidence of illegal abortion" contribute significantly to inadequate local health standards for children.⁶⁰ It has explicitly called for "review of [state practices]... under the existing legislation authorizing abortions for therapeutic reasons with a view to preventing illegal abortion and to improving protection of the mental and physical health of girls."⁶¹ It is clear that the definition of a "child" for purposes of the Convention does not include a foetus.

5. Other Regional Norms

34. The first preambular paragraph of the American Declaration on the Rights and Duties of Man contains similar language to the UDHR premising rights on birth, stating, "All men are *born* free and equal in dignity and rights."⁶² (emphasis supplied)

35. The jurisprudence of the Inter-American system is also consistent with that of the UN bodies. Article 4 of the American Convention on Human Rights, which protects the right to life "*in general, from the moment of conception*,"⁶³ has been interpreted by the Inter-American Commission (Commission) not to confer an equivalent right to life on the

59 *Compilation, Comm. On the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child* (33rd Sess. 2003) at para. 31, (emphasis added).

60 Concluding observations of the Committee on the Rights of the Child: Guatemala, 9/7/2001, U.N. Committee on the Rights of the Child, 27th Sess., at 40, U.N. Doc. CRC/C/15/Add.154; see also Concluding observations: Chad, 24/8/1999, U.N. Committee on the Rights of the Child, 21st Sess., at 30, U.N. Doc. CRC/C/15/Add.107.

61 Concluding Observations of the Committee on the Rights of the Child: Chad, 24/8/1999, U.N. GAOR, Comm. Rts. of the Child, 21st Sess., 557th mtg. ¶ 30, U.N. Doc. CRC/C/15/Add.107. See also Concluding Observations of the Committee on the Rights of the Child: Nicaragua, 24/8/1999, U.N. GAOR, Comm. Rts. of the Child, 21st Sess., 557th mtg. ¶ 35, U.N. Doc. CRC/C/15/Add.108, in which the Committee expressed its continuing concern regarding "high maternal mortality rate related to abortions."

62 American Declaration, O.A.S. Off. Rec. OEA/Ser.L/V/II.82, doc. 6, rev. 1(1948) at preambular para. 1. We note, however, that the American Declaration's use, in its title and its terminology, of androcentric terms contrasts with the deliberately gender-neutral use of the term "everyone" in the UDHR, an unfortunate reminder of the discriminatory past.

63 American Convention on Human Rights, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1969) at art. 4.

foetus or require invalidation of permissive abortion laws.⁶⁴ Challenging the refusal of a United States state court to convict a doctor of murder for having performed a late-term abortion, the case was brought under the American Declaration on the Rights and Duties of Man, which protects the right to life without reference to the “moment of conception.”⁶⁵ The Commission rejected the petitioners’ claim under the Declaration, noting that an absolute protection of the right to life would conflict with the laws regulating abortion and the death penalty in most American states.⁶⁶ Although the US has not ratified the American Convention, the Commission nonetheless examined the drafting history of Article 4. It found that the drafters chose not to include an unequivocal protection of the right to life from the moment of conception, but instead inserted the phrase “*in general*” to limit that protection. The Commission concluded that:

In the light of this history, it is clear that the petitioner’s interpretation of the definition given by the American Convention on the right to life is incorrect. The addition of the phrase, “in general, from the moment of conception” does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogota, when they approved the American Declaration. The legal implications of the clause, “in general, from the moment of conception” are substantially different from the shorter clause, “from the moment of conception” as appears repeatedly in the petitioner’s briefs.⁶⁷

36. In the African Union, the protection of women’s right to abortion is explicit. On July 11, 2003, the African Union adopted the Protocol on the Rights of Women in Africa⁶⁸ to supplement the African Charter on Human and Peoples’ Rights, adopted in 1981.⁶⁹ The Protocol, which entered into force in November 2005, calls upon states to protect women’s reproductive rights by authorizing abortion in cases of sexual assault, rape, incest, and foetal impairment and where the continued pregnancy endangers the mental and physical health or life of a woman. The Protocol’s broad protections of women’s right to terminate a pregnancy co-exist with the African Charter on the Rights and Welfare of the Child, a regional instrument that entered into force in 1999, which provides in Article 5(1), “Every child has an inherent right to life. This right shall be protected by law.”⁷⁰ Read together, the two instruments indicate that the right to life referred to in the African Charter is not meant to apply prenatally or to protect a fetus where that would contradict the right of women to abortion.

64 *Baby Boy*, Case 2141, Iter-Am. C.H.R. 25/OEA/ser. L./V./II.54, doc. 9 rev. 1 (1981).

65 American Declaration of Rights and Duties of Man, *supra* at ch.1, art.1.

66 *See supra Baby Boy*, at para. 18.

67 *Id.* at para. 30.

68 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(c), adopted by resolution AHG/Res. 240 (XXXI), 31st Sess. (11 July 2003) (*entered into force* 25 November 2005).

69 African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev.5 (1981) (*entered into force* 21 October 1986).

70 African Charter on the Rights and Welfare of the Child, art. 5(1), OAU Doc. CAB/LEG/24.9/49 (1990) (*entered into force* 29 November 1999).

D. National Laws and Jurisprudence from Selected Non-European States

37. National-level courts around the world have also declined to treat fetuses as persons under the law. The Supreme Court of Canada ruled against recognition of foetal personhood or any foetal rights independent of the pregnant woman in the case of *Winnipeg Child Family Services (Northwest Area) v. G.*⁷¹ In this case, social services sought an injunction to detain a pregnant woman against her will in a health center for treatment until she gave birth, on the basis that she was addicted to glue sniffing and was therefore endangering the foetus. The court held that such an injunction was not within its power to make orders for the protection of “children.” It found that a contrary ruling would have required it to take such unprecedented and highly consequential action as: (i) overturning the rule that rights accrue to a person only at birth (the ‘live-birth’ rule); (ii) recognizing a foetal right to sue the mother carrying the foetus; (iii) recognizing a cause of action for lifestyle choices which may adversely affect others; and (iv) recognizing an injunctive remedy which deprives a defendant of important liberties, including by involuntary confinement.⁷² Previously, in the case of *R v. Morgentaler*, the Court declined to rule that a foetus is entitled to the protections of persons under the Canadian Charter of Rights and Freedoms, and struck down Canada’s restrictive abortion law on the grounds that it unduly interfered with Canadian women’s basic right to security of the person.⁷³

38. The 1973 United States Supreme Court in *Roe v. Wade* ruled explicitly that personhood depends on birth and, therefore, a foetus is not a “person” entitled to constitutional protection.⁷⁴ *Roe* has been reaffirmed by the United States Supreme Court numerous times, most recently in *Stenberg v. Carhart*, in which the Court struck down a state law banning certain methods of abortion for failing to include protections for women’s health.⁷⁵ In the context of tort law, many states in the U.S. recognize a civil action for injury caused to a foetus, but have limited these claims to circumstances where the foetus is “born alive.”⁷⁶

39. In South Africa, in *Christian Lawyers Association of South Africa and others v. Minister of Health and others*, the High Court of South Africa, Transvaal Provincial Division considered a constitutional challenge to the recently enacted Choice on Termination of Pregnancy Act, which permits abortion without restriction as to reason during the first trimester and on broad grounds at later stages of pregnancy. Plaintiffs argued that the law was in conflict with Section 11 of the Constitution, which guarantees

71 3 S.C.R. 925 (1997). See also *R. v. Sullivan and Lemay*, 1 S.C.R. 489 (1991).

72 Id. at 941.

73 1 S.C.R. 30 (1988).

74 *Roe v. Wade*, 410 U.S. 113, 163 (1973).

75 *Stenberg v. Carhart*, 530 U.S. 914 (2000).

76 See e.g., *Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560 (Fla. 2d DCA 1976) (applying the “born-alive rule” to sustain tort claim against a third party tortfeasor in automobile accident where foetus sustained injury and then was born alive).

that “everyone has the right to life.” In considering whether the constitution's reference to “everyone” was intended to include the foetus, the Court held that such an interpretation was untenable. It continued:

Moreover, if section 11 were to be interpreted as affording constitutional protection to the life of a foetus, far-reaching and anomalous consequences would ensue. The life of the foetus would enjoy the same protection as that of the mother. Abortion would be constitutionally prohibited even though the pregnancy constitutes a serious threat to the life of the mother. The prohibition would apply even if the pregnancy resulted from rape or incest, or if there were a likelihood that the child to be born would suffer from severe physical or mental abnormality...If the plaintiff's contentions are correct then the termination of a woman's pregnancy would no longer constitute the crime of abortion, but that of murder. In my view, the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms. For the above reasons...I consider that under the Constitution the foetus is not a legal persona.⁷⁷

40. In May 2006 the Constitutional Court of Colombia delivered an important decision that decriminalized abortion.⁷⁸ Prior to this decision, Colombia had one of the most restrictive abortion laws in the world, which banned abortion under all circumstance, including saving a woman's life. In liberalizing the abortion law to allow abortion in cases where pregnancy threatens the health and life of the pregnant woman, where there is a severe fetal impairment and when the pregnancy is a result of a crime, the Court emphasized the protection of women's dignity, reproductive rights and health as a primarily interest in regulating abortion. The Court recognized that the legal system grants some protection to the fetus, however, “it does not grant it the same level or degree of protection it grants a human person.”⁷⁹ According to the Court, the interpretation of Colombian Constitution and other laws “requires weighing the unborn fetus right to life against other rights, principles and values recognized by [Colombian] Constitution and in other international human rights law instruments...”⁸⁰ Protection of life must be weighed against other values and rights protected by the Columbian Constitution; in the context of abortion those rights are the rights of a pregnant woman. Thus, the Court did not interpret the Colombian Constitution and the international treaties ratified by Colombia as protecting the life of unborn fetus. Importantly, in its reasoning, the Court addressed sexual and reproductive rights of women as human rights and thus a part of constitutional rights fundamental to all democratic states.⁸¹ In the Court's view:

77 *Christian Lawyers Association of South Africa and others v. Minister of Health and others*, the High Court of South Africa, Transvaal Provincial Division, 50 BMLR 241, 10 July 1998.

78 *Women's Link Worldwide, C-355/2005: Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia*, (Spain, 2007).

79 *Id.* p. 21.

80 *Id.* p. 24.

81 *Id.* p. 31.

Sexual and reproductive rights also emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice.⁸²

E. The Slovak Constitution's rejection of a foetal "right to life" from conception is consistent with the overwhelming weight of international and regional authority

41. Likewise, such "far reaching result" cannot be inferred or manufactured here with respect to the Slovak Constitution, the European Convention, the UDHR or international treaty law generally. To the contrary, the record is clear that the foetus has no right to life and that any protection of the foetus as potential "human life" cannot trump or override the Slovak legislation protecting a woman's right to decide to terminate a pregnancy.

42. According to both the text of the Slovak Constitution and the submission of Matúš Petrik,⁸³ the Constitution maintains a similar distinction between persons born and pre-natal human life. It should be noted that the absence of the word "born" in Article 12 of the Slovak Constitution does not carry the same history or meaning that it does in the Universal Declaration of Human Rights. Rather, the question whether human rights begin at birth or conception—and by implication other rights-- was debated in relation to Article 15 which defines the right to life. As a result, Article 15 makes a sharp distinction between the right to life as applicable to persons born and the lesser notion of "protection" accorded to all human life. The phrase in Article 15 (1), "everybody has the right to life," relates to physical, born persons only. It is significant, as Petrik's opinion states, that the phrase, "everyone has the right to be born," was explicitly rejected, and that the phrase, "human life deserves protection from the conception," was considered a declaratory, non-binding and non-rights-conferring declaration. Further, as Petrik explains, the addition of section 4, making a breach dependent on whether the act was criminal according to law, was adopted over objection precisely to preserve the current abortion, or interruption, law. Thus the declaration in Article 12 of the Slovak Constitution that, "All human beings are free and equal in dignity and rights," applies only to born persons.

43. More recently, the Slovak legislature has reaffirmed that life begins at birth in passing legislation recognizing the birth mother and not the egg donor as the legal mother of a child.⁸⁴

Part II. Recognizing a foetal "right to life" would be inconsistent with women's fundamental human rights, dignity and well-being.

82 Id. p. 32.

83 Petrik, *supra* note 1.

84 National Council of the Slovak Republic, Zákon o rodine a o zmene a doplnení niektorých zákonov (Act on Family), No. 36/2005 Coll. as amended, § 82 (1).

44. To interpret either Article 15 of the Constitution or Article 2 of the European Convention to protect a foetus's "right to life" would lay the theoretical foundation for overturning Slovakia's abortion law and thus for interference with, if not negation of, women's fundamental human rights to reproductive health and autonomy. Human rights bodies addressing the context of voluntary abortion consider that women's human rights to private life, to equality, to security of the person and health, to freedom of religion, conscience and opinion, and to freedom from torture and cruel, inhuman or degrading treatment, must take precedence over any claim to protection on behalf of the fetus.

45. Indeed, for this Constitutional Court to accept the arguments of petitioners would work a sharp and unjustifiable retrogression in the human rights of women under treaties, which Slovakia has ratified. It would also contradict the consistent global trend toward liberalization of abortion laws and protection of women's rights and health as summarized in a 1998 study:

Since 1985, 20 nations have significantly liberalized their abortion laws. Currently, 61% of the world's people live in countries where induced abortion is permitted for a wide range of reasons or without restriction as to reason. 25% reside in nations where abortion is generally prohibited. However, even where restricted, induced abortion is usually permitted when the woman's life is in danger.⁸⁵

A. Potential practical and legal consequences of recognizing a foetal "right to life" claim.

46. Before turning to these legal norms and authorities recognizing women's right to make decisions on whether or not to continue a pregnancy, it is well to examine some of the potential effects of according the fetus a "right to life" on women's rights and health. It must also be emphasized that poor, minority and young women are disproportionately affected by legal restrictions on abortion and other health care, as women who have money are often able to buy medically competent clandestine services or travel elsewhere for a legal abortion.⁸⁶

47. The experience of Romania from 1966 to 1989 is illustrative. Before 1966, access to safe, legal abortions was available through the nation's health care system. From 1966 to 1989, however, abortion and contraception were outlawed pursuant to then President Ceausescu's pro-natalist policies.⁸⁷ The result was an increase in the abortion-related maternal mortality level to 10 times that of any other European Country.⁸⁸ In the mid-

85 Anika Rahman, Laura Katzive and Stanley K. Henshaw, A Global Review of Laws on Induced Abortion, 1985-1999, *International Family Planning Perspectives*, 24, (1998), 56-64.

86 World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (Geneva: WHO, 2003).

87 World Health Organization, *Unsafe Abortion: Global and regional estimates of incidence of a mortality due to unsafe abortion with a listing of available country data* (Third Edition), (Geneva: WHO, 1997) ("WHO Unsafe Abortion"), and P. Stephanson, ScD, M., et. al., Commentary: The Public Health Consequences of Restricted Induced Abortion – Lessons from Romania, *American Journal of Public Health*, October 1992, Vol. 82, No. 10, 1328-1331.

88 *Id.* at 77.

1980s, illegal abortions were responsible for 86% of the maternal deaths. This was the highest percentage of maternal deaths due to illegal abortion in the world, and was substantially higher than the figures for developing countries such as Nigeria (25%) and Sri Lanka (13%).⁸⁹ It is estimated that, during this time period, about 200,000 children were placed in orphanages.⁹⁰ In addition, enforcement of the ban on abortion involved severe infringements on women's right to privacy. The law required that women undergo monthly physical examinations by the "gynecological police" to detect pregnancy. Those who were pregnant were registered and monitored to assure that any pregnancy was carried to term.⁹¹

48. In the first year following repeal of the ban in Romania in 1989, the maternal mortality rate fell by 50%;⁹² and by 1993, it had decreased by 317%⁹³ (as compared to pre-1989 statistics). It is generally clear that where abortion procedures are legal and accessible, abortion-related maternal mortality is significantly lower.⁹⁴

49. Unsafe abortions, which are primarily performed in countries with strict abortion laws, represent as much as one third of all the abortions performed every year around the world and are a major cause of chronic and often irreversible health problems and even death for about 80,000 women.⁹⁵ Around 800,000 women every year are likely to obtain hospital treatment for the complications of unsafe abortion.⁹⁶

50. The World Health Organization has identified the following complications as a result of illegal and unsafe abortions:

Sepsis, haemorrhage, genital and abnormal trauma, perforated uterus and poisoning due to ingestion of harmful substances, may be fatal if left untreated. Death may also result from secondary complications such as acute renal failure. Unsafe abortion may lead to reproductive tract infections (RTIs), chronic pelvic pain, pelvic inflammatory disease, and at times to infertility; genital trauma and infection may also warrant an immediate hysterectomy. An increased risk of ectopic pregnancy, premature delivery, or spontaneous abortion in subsequent pregnancies is another possible consequence of a poorly performed abortion. Women with a Sexually Transmitted Infection are at an increased risk of an ascending postabortion infection. The risk of infertility increases with each episode of PID salpingitis. Studies indicate that about 20-30 % of

89 WHO *Unsafe Abortion supra* and Jodi L. Jacobson, *Worldwatch Paper 97: The Global Politics of Abortion*, at 41 (1990).

90 Child Birth By Choice Trust, *Abortion in Law, History and Religion* (1995), See Romania chapter, <http://www.cbctrust.com/abortion.html>.

91 Negrau, *Listening to Women's Voices: Living in Post-Communist Romania*, 12 *Connecticut Journal of International Law* 117, 123 (1996).

92 See WHO *Unsafe Abortion, supra* Introduction.

93 Id.

94 The Alan Guttmacher Institute, *Facts in Brief: Induced Abortion Worldwide* (New York, 1999).

95 WHO *Unsafe Abortion, supra* at Ch. 4, Table 2.

96 Id. at Ch. 3, Sec. 1.

unsafe abortions may lead to RTI, of which 20 and 40% lead to PID and consequent infertility. It has been estimated that the prevalence of infertility and long-term RTI as a consequence of unsafe abortion correspond to 2 and 5%, respectively of women of reproductive age.⁹⁷

51. The life and health burden of illegality falls disproportionately on poor and young women who do not have the resources to access safe clandestine services. Further, the prospect of prosecution will deter women and girls from seeking emergency medical services necessitated by abortion complications. Alternatively, because of their dependence on public medical facilities for treatment in emergency, poor women and those who provide them abortions would be disproportionately targeted for prosecution.⁹⁸

52. Beyond this, conferral of a “right to life” on the foetus would open up an even broader range of draconian measures. Recognizing the foetus as a person is likely to precipitate grave ethical problems in the doctor-patient relationship. Considering the interests of a foetus separately from the pregnant women has the potential to create an adversarial situation with respect to the pregnant woman’s relationship with her physician. From the physician’s perspective, treating the foetus as a patient in its own right may give rise to a conflict of interest, in so far as the interests of the foetal patient might be accorded priority over or improperly compete with the health and life interests of the pregnant patient.⁹⁹ Abortion could be prosecuted as murder or homicide and the woman as well as provider could be the target. Access to basic obstetric services would be impaired if doctors thought that any malpractice could be prosecuted as negligent homicide, the very demand that the European Court of Human Rights rejected in *Vo*. At the same time, a foetal right to life would also threaten to heighten the standards and penalties for pregnancy-related care. Ethical principles of informed consent could be jeopardized by coercion and by withholding crucial information about medical dangers and options.¹⁰⁰

53. Further, a pregnant woman could be treated by law as a vessel, investigated and sanctioned for any activities that might endanger the continuation of the pregnancy or the foetus, such as the failure to follow medical advice, smoking, exercise, sexual activity, or continued employment.¹⁰¹ Pregnant women could be forced to undergo caesarian section and other invasive surgery thought to protect the foetus. As outlined by the Canadian Supreme Court and reflected in some of the challenges rejected in the European system,

97 World Health Organization, *Unsafe Abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2000* (Fourth edition), (Geneva: WHO, 2004), at 4.

98 See discussion, *infra*, regarding the Committee Against Torture’s condemnation of Chile’s policies.

99 Bernard Dickens & Rebecca Cook, Ethical and legal approaches to ‘the fetal patient,’ Vol. 83, *International Journal of Gynecology & Obstetrics*, 2003, 85-91 at 87.

100 See e.g., *Open Door Counselling and Dublin Well Woman v. Ireland*, 15 Eur. H.R. Rep 244 (Ser. A) (1992).

101 In the United States Supreme Court case of *Ferguson v. City of Charleston*, the Court rejected the argument that the state’s interest in the foetus justified a policy of nonconsensual drug testing of pregnant women to gather evidence of criminal activity for use in criminal prosecutions. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). See also *Dobson v. Dobson* 2 S.C.R. 753 (1999) (pregnant woman may not be held liable for injuries sustained by foetus following car accident); and *Montreal Tramways Co. v. Levielle* S.C.R. 456 (1933) (born child may not bring action for injury sustained prenatally).

foetal rights would open a frightening range of potential challenges to the woman's autonomy, enabling men, who impregnate, the state, and even foetuses or their self-styled representatives,¹⁰² to sue the woman for deciding on abortion or for taking any other action that could be claimed to have affected foetal survival. Spontaneous abortion or miscarriage, which occurs in the great majority of pregnancies, would become suspect, as what happened in, for example, Nepal¹⁰³.

54. The experience of other countries as well as logic demonstrate that the recognition of a foetal right to life would clearly threaten to override women's rights, health and dignity as persons. Were the foetus to be endowed with rights, the Court would be, at least, compelled to weigh such rights against the rights of women. This is very different from taking into account the more flexible and clearly subordinate notion of protection of potential human life. In this case, it is clear that the Slovak legislature has repeatedly rejected the foetal rights claim—in enacting the permissive abortion law and in rejecting a foetal right to life in the Constitution. There is no basis for this Court to do otherwise.

B. Women's human rights at stake.

1. Rights to life, security of the person and health.

55. Recognition of foetal rights would open the door to restricting abortion even where necessary to preserve the life or health of a pregnant woman. The jurisprudence of the European Court and Commission, however, has consistently recognized the right of a woman to terminate her pregnancy when her life or health is threatened by the pregnancy.¹⁰⁴ The Charter of Fundamental Rights of the European Union also protects the right to life¹⁰⁵ and the right to respect for physical and mental integrity.¹⁰⁶

56. As discussed heretofore, the United Nations Human Rights Committee, which interprets and monitors state compliance with the ICCPR, has recognized that restrictions on women's access to reproductive health care can violate Article 6, right to life, of the Convention.¹⁰⁷ Citing the high rates of maternal mortality associated with illegal abortion, the Committee has frequently criticized legislation that criminalizes or severely

102 See e.g., Part I, Para. 8-10, *supra* (impregnator claims rejected), and para. 30 (detention of pregnant woman on foetal endangerment grounds rejected).

103 See e.g., Center for Reproductive Rights, *Abortion in Nepal, Women Imprisoned*, (New York, 2002) http://www.reproductiverights.org/pub_bo_nepal.html.

104 See *supra* discussing *Bruggemann, Paton, Boso*.

105 Charter of Fundamental Rights of the European Union, *supra* .Art. 2.

106 Id. Art. 3.

107 *Compilation*, Human Rights Committee, General Comment No. 28: Equality of rights between men and women (article 3) (68th Sess. 2000), at 181, para. 20.

restricts access to abortion as a violation of the right to life, and advised states to review or amend legislation criminalizing abortion.¹⁰⁸

57. In *Open Door Counseling and Dublin Well Woman v. Ireland*,¹⁰⁹ the European Court invalidated under Article 10 an injunction that prevented two women's health clinics from disseminating information to women in Ireland on how and where to obtain an abortion in the United Kingdom.¹¹⁰ The Court found that restricting exchange of abortion information created a risk to the health of women whose pregnancies posed a threat to their lives.¹¹¹ Ruling that the injunction was "disproportionate to the aims pursued,"¹¹² the Court recognized that a woman's health interest supersedes a state's declared moral interest in protecting the rights of a foetus.

58. As discussed previously, international human rights bodies have likewise also prioritized the risks to life and security of the person associated with restrictions on abortion, and advised states to review and amend legislation criminalizing abortion.¹¹³

59. In its General Comment 14, *The Right to the Highest Attainable Standard of Health (Article 12)*, the Committee on Economic, Social and Cultural Rights (CESCR Committee), which interprets and monitors state compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), explains that Article 12, the right to the highest attainable standard of physical and mental health, includes the right to maternal, child, and reproductive and sexual health and requires states parties to implement measures to provide sexual and reproductive health services.¹¹⁴ In its emphasis on women and the right to health, the Committee defines "reproductive health" to include the "freedom to decide if and when to reproduce,"¹¹⁵ calls for the "removal of all barriers interfering with access to health services, education and information in the area of sexual and reproductive health,"¹¹⁶ and underlines the need for state parties to provide a full range of safe, effective, affordable, appropriate and confidential¹¹⁷ sexual and reproductive health services.¹¹⁸ In recent Concluding Observations on state reports, the CESCR Committee has also expressed deep concern over the relationship between

108 See *supra* notes 47-50. See also Concluding Observations of the Human Rights Committee: Lesotho, 08/04/99, U.N. Doc. CCPR/C/79/Add.106, ¶ 11.

109 See *supra* *Open Door Counselling*.

110 *Id.* at para. 80.

111 *Id.* at paras. 73-77.

112 *Id.* at para. 80.

113 See *supra* WHO *Unsafe Abortion*, Hum. Rts. Comm. *General Comment 28*.

114 Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health Art. 12) (22nd Sess.2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.5 (2001). Slovakia ratified the International Covenant on Economic, Social, and Cultural Rights on 28 May 1993, Office of the UN High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 9 June 2004, at Note 12.

115 *Id.* at Note 12.

116 *Id.* at paras. 21 and 34.

117 *Id.* at paras. 12(c) and 23.

118 *Id.* at para. 14 citing Note 12.

high rates of maternal mortality and illegal, unsafe, clandestine abortions¹¹⁹ specifically recognizing that restrictive abortion laws contribute significantly thereto.¹²⁰ In a number of cases, the Committee has specifically called upon the state party to liberalize its abortion law.¹²¹ The UN Human Rights Commission's Special Rapporteur on the right to Health has also underscored the importance of access to abortion as part of women's right to health.¹²²

60. The Slovak Constitution likewise protects women's right to life, security of the person and health under Articles 15, 16 and 40.¹²³

2. Right to private life.

61. Under Article 8, the European Court and Commission have ruled that the regulation of abortion is an interference with women's right to a private life. Since the *Brüggemann* decision, discussed heretofore, the European Commission and Court have increasingly recognized a pregnant women's right to terminate a pregnancy under Article 8. These decisions have followed the liberalization of abortion laws in almost all of Europe in the late 1970s. The cases of *Paton v. U.K.*, *R.H. v. Norway*, *Boso v. Italy*, not only rejected the suggestion that Article 2 protects the right to life of fetuses; they also support and further develop women's privacy rights under Article 8. In all three cases, the Commission rejected a 'father's' (should be single quotation marks) claim of right under Article 8 and recognized that respect for the private life of the pregnant woman as "the person primarily concerned by the pregnancy and its continuation or termination"¹²⁴ supersedes any rights of the 'father.'

62. The Human Rights Committee, in its General Comment No. 28 on Equality of Men and Women has likewise recognized that in addition to raising issues of right to life and to freedom from torture and inhuman or degrading treatment, "States may fail to respect women's privacy related to their reproductive functions," giving as examples requirements of husband's authorizations for sterilization or other preconditions such as age and parity requirements on a woman's decision to be sterilized or where doctors are required to report women who have had abortions.¹²⁵

119 See e.g., Cameroon, 08/12/99, U.N. Doc. E/C.12/1/Add.40 ¶ 25; Mauritius, 31/05/94, U.N. Doc E/C.12.1994/8, ¶ 15; Mexico, 08/12/99, U.N. Doc. E/C.12/1/Add. 41, ¶ 29; Nepal, 24/09/2001, UN.Doc. E/C.12/1/Add.66 ¶ 32; Panama, 24/09/2001, U.N. Doc. E/C.12/1/Add.64 ¶ 20; Poland, 16/06/98, U.N. Doc. E/C.12/1/Add.26 ¶20; Senegal, 24/09/2001, U.N. Doc. E/C.12/1/Add.62 ¶26.

120 See e.g., Bolivia, 21/05/2001 U.N. Doc. E/C.12/1/Add.60 ¶43; Mauritius, 31/05/94, U.N. Doc E/C.12.1994/8, ¶ 15; Nepal, 24/09/2001, U.N.Doc. E/C.12/1?Add.66 ¶ 32, 55; Poland, 16/06/98, U.N. Doc. E/C.12/1/Add.26 ¶12; Senegal, 24/09/2001, U.N. Doc. E/C.12/1/Add.62 ¶ ¶26, 27.

121 See e.g., Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Nepal, 31/08/2001, U.N. Doc. E/C.12/1/Add.66, ¶¶33, 55. See also, Concluding Observations of the Committee Against Torture: Chile, 14/06/2004, U.N. Doc. CAT/C/CR/32/5 ¶7(m).

122 *Compilation*, Hum. Rts. Comm., *General Comment No. 28*, *supra* paras. 10, 11, 20.

123 Constitution of the Slovak Republic, const. act No. 460/1992 Coll. as amended, ch. 2, Art. 15, 16; ch. 5, Art. 40.

124 *H. v. Norway*, *supra* para. 4; *Boso v. Italy*, *supra* para. 2.

125 *Compilation*, Hum. Rts. Comm., *General Comment No. 28*, *supra* para. 20.

63. The Charter of Fundamental Rights of the European Union guarantees the right to respect for private life.¹²⁶ Article 19 of the Slovak Constitution also protects the right to private life.¹²⁷

3. Right to equality and non-discrimination.

64. Recognition of a foetus's status as a person under law is utterly inconsistent with women's non-derogable right to equality and non-discrimination, protected under Article 12 of the Slovak Constitution, Article 14 of the European Convention, Articles 3 and 26 of the ICCPR, and Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹²⁸ While the European Court and Commission have not addressed this issue, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), which monitors and interprets compliance with CEDAW has noted that "laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" constitute a barrier to appropriate healthcare for women, compromising the right to non-discrimination in the area of health.¹²⁹ Likewise the Human Rights Committee notes the importance of protecting women's equality in regard to Article 17's protection of privacy, including sexual integrity and reproduction.¹³⁰

65. The discriminatory impact of restricting abortion is multi-faceted. The health consequences of unsafe abortion are suffered only by women, as are the physical and psychological effects of carrying an unwanted pregnancy to term and the burdens of raising the child. Moreover, the fundamental capacity to make important decisions about one's life, and to freedom of thought, conscience and religion under Article 24 of the Slovak Constitution, Article 9 of the European Convention, and Article 18 of the ICCPR, all essential components of liberty and human dignity, are denied only to women.¹³¹

66. Additionally, when the law requires women to continue an unwanted pregnancy, the effect is requiring her to rescue the foetus in circumstances where no one else—man or woman—would be required to engage in so immense a sacrifice of their bodily integrity, health and life to provide life-saving support even to a born human being. A duty to rescue could arise where a special relationship exists; however, even the relationship

126 Charter of Fundamental Rights of the European Union, *supra* Art. 7..

127 Slov. Const. ch. 2, art. 19, sec. 2.

128 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34, 180, UN GAOR 34th Sess., Supp. No. 46 at 193, art. 2, UN Doc. A/34/46 (1979) (entered into force 3 Sept. 1981). CEDAW was ratified by Slovakia on 27 June 1993, *see supra* Status of Ratifications of the Principal International Human Rights Treaties.

129 *Compilation*, Comm. on the Elim. of Discrimination against Women, General Rec. 24: Article 12 (Women and Health) (20th Sess. 1999), para. 14.

130 *See* Hum. Rts. Comm., General Comment 28, *supra* para 20.

131 *See also Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 896 (1992): "It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than the father's."

between a parent and a born-alive child does not give rise to a legal duty to “engage in a risky rescue.”¹³² Thus societies may expect (although the law rarely requires) a bystander to call for help if they see a drowning child, but they don’t require the person—parent or stranger-- to dive into the water to save them. While family members may voluntarily donate bodily material or organs to save the life of another, the law does not require that a parent or relative undergo even a minor operation to save their child.¹³³ Rather, such a rescue can only be undertaken voluntarily. On a physical level alone, pregnancy and childbirth are a highly risky rescue. They involve immense bodily changes, and serious temporary incapacities and suffering. They also entail often unpredictable risks of permanent health consequences, including persistent pain and loss of reproductive capacity, and death. Yet, restrictive abortion laws would compel this immense sacrifice from women and from women only, thereby denying women the equal respect for their life, bodily integrity and dignity to which, as full human beings, they are entitled. The rejection of the proposal, “everyone has a right to be born” by the drafters of the Slovak Constitution thus is essential to protecting the equality of women and the voluntariness of pregnancy.¹³⁴

67. Additionally, as the international human rights treaty bodies have recognized, restrictive abortion laws discriminate against the poor, and the more marginalized and powerless women. Poorer women who cannot afford safe, clandestine abortions from high-priced providers, disproportionately die and have their health, fertility and sexuality compromised by complications of unsafe abortion. Restrictive abortion laws also discriminate against the young who likewise have little recourse to expensive safe clandestine abortion.

4. Right to freedom of thought, conscience, and religion.

68. To recognize a right to life in the foetus would also violate Article 18 of the ICCPR which states: “Everyone shall have the right to freedom of thought, conscience and religion.”¹³⁵ In its General Comment No. 22, the Human Rights Committee emphasized that these rights are non-derogable¹³⁶ and that the right of freedom of thought and conscience are protected to the same extent as the right to freedom of religion.

69. Because the decision whether to bring a child into the world is so deeply serious that it is inherently one of conscience,¹³⁷ the international protections apply to the making of

132 Rosamund Smith, *Rights, Duties, and the Body: Law and Ethics of Maternal-Fetal Conflict* (Portland, Oregon: Hart Publishing, 2002) 355.

133 *McFall v. Shimp*, 10 Pa D. & C. 3d 90 (1978).

134 *See supra*, Petrik.

135 ICCPR, *supra* Article 18.

136 *Compilation*, Hum. Rts. Comm. General Comment No. 22: Article 18 (The Right to Freedom of Thought, Conscience and Religion) (48th Sess., 1993) at para. 1.

137 The religious, (though not necessarily sectarian), dimensions of the abortion decision have been emphasized by the United States Supreme Court in *Casey*, *supra* at 916. “The authority to make such traumatic and yet empowering decisions is an

reproductive choices as well as to access to services necessary to effectuate that choice. The exercise of conscience may be based on religious teachings opposed to or favoring the right of decision; or it may be based on one's conscientious decision independent of religious teaching or belief. In all cases, Article 18.2 protects the freedom of decision. The Human Rights Committee has made clear that this right also includes the right to be free from government compulsion to adhere to laws created mainly to reflect or uphold religious doctrines:

Policies or practices having the same intention or effect, such as, for example, those restricting access to education, *medical care*, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.¹³⁸

70. This principle is further based on Article 5 of the ICCPR which prohibits every person from asserting their rights in a manner which would deny rights protected by the Convention to others. Therefore, it is impermissible to allow the beliefs of the person or group to be imposed on another. When laws that restrict access to reproductive health services are themselves influenced by a particular religious belief, they deny freedom of religion, conscience and thought both to those who do not adhere to that belief in general and to those who do believe that unquestioned adherence to that belief is inappropriate in the particular instance. Thus, as to everyone, such laws constitute state compulsion to act in accordance with religion.

71. The CEDAW Committee has likewise expressed concern that religion should not be permitted to interfere with women's rights under the Convention to education and health, including reproductive health. With respect to non-secular states, the Committee stated its view that "the Church-State system of education perpetuates an intermingling of the secular and religious spheres, which is a serious impediment to the full implementation of the Convention."¹³⁹ The Committee went on to emphasize that the "consequences of this system seriously affect girls' and women's rights to education and to health, *including reproductive health protected under the Convention*."¹⁴⁰ Equally significant, the Committee recognized that even constitutionally secular states can be strongly influenced by a particular religion or church. Thus the Committee warned that the right to reproductive health must not be compromised by religious influence.¹⁴¹

72. The Slovak Constitution also protects the "freedom of thought, conscience, religion, and belief."¹⁴² The European Court of Human Rights has found analogous protection in

element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience."

138 *Compilation*, Hum. Rts. Comm., General Comment No. 22, *supra* para. 5 (emphasis supplied).

139 CEDAW, Concluding Observations: Belize (1999) 01/07/99, U.N. Doc. A/52/38/Rev.1, para. 48. (emphasis added).

140 *Id.*

141 CEDAW, Concluding Observations: Ireland (1999) 01/07/99, U.N. Doc. A/52/38/Rev.1, para. 180..

142 Slovak. Const., ch. 2, Art. 24, sec. 1.

Article 9 of the European Convention on Human Rights,¹⁴³ and the Preamble to the World Health Organization Constitution similarly protects the right to health against religious discrimination.¹⁴⁴

5. Right to freedom from torture and other cruel, inhuman or degrading treatment or punishment.

73. Article 3 of the European Convention and article 7 of the ICCPR grant the right to be free from torture and cruel, inhuman or degrading treatment or punishment. This non-derogable right is further elaborated in the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). At a minimum, the imposition of restrictions on abortion sought by petitioners would constitute degrading treatment to women and girls since they deny respect for their fundamental rights and stigmatize and shame them for asserting these rights. In addition, the consequences of suffering unwanted pregnancy and childbirth or obtaining or self-inducing clandestine abortion are cruel and inhuman and often involve torturous suffering. In countries where abortion is criminalized, women will be afraid to seek professional help when suffering complications for fear of becoming targets of the criminal justice system, thus increasing suffering and the risk of death.

74. In June, 2004, the United Nations Committee Against Torture (CAT Committee) condemned the practice in Chilean public hospitals of interrogating women seeking life-saving emergency medical care as a result of complications of illegal abortions and withholding service unless the woman confesses to the abortion and names the provider.¹⁴⁵ The Committee recommended that Chile:

eliminate the practice of extracting confessions for prosecution purposes from women seeking emergency medical care as a result of prohibited abortion; investigate and review convictions where such statements have been admitted into evidence, and take remedial measures including nullifying convictions which are not in conformity with the Convention. In accordance with World Health Organization guidelines, the State Party should ensure immediate and unconditional treatment of such persons seeking emergency medical care....¹⁴⁶

143 “[Article 9 is] a precious asset for atheists, agnostics, sceptics, and the unconcerned...asserted ‘alone’ and ‘in private.’” *Kokkinakis v. Greece*, para. 31, Eur. Ct. H.R. App. No. 14307/88, 25 May 1993.

144 Constitution of the World Health Organization as amended, adopted by the International Health Conference, New York, 19 June – 22 July 1946, Off. Rec. Wld Hlth Org., 2, 100 (entered into force on 7 April 1948).

145 Committee Against Torture, Conclusions and Recommendations: Chile (32nd Sess. 2004), at 4, ¶ 6(j), U.N. Doc. CAT/C/CR/32/5.

146 *Id.* at E(7)(m).

75. The Charter of Fundamental Rights of the European Union explicitly prohibits torture and inhuman or degrading treatment or punishment.¹⁴⁷ The Slovak Constitution also prohibits torture, or cruel, inhuman, or degrading treatment or punishment.¹⁴⁸

Conclusion

76. Accordingly, we urge the Slovak Constitutional Court to reject the petition and uphold Slovakia's humane and rights-protective abortion law. This law is not only consistent with Article 15 of the Slovak Constitution; it is further consistent with the European Convention and the practice of European states generally, as well as with Slovakia's international human rights treaty obligations. Any other decision would gravely jeopardize women's lives and health and work an unjustifiable retrogression in and denial of women's equality and internationally protected human rights.

147 Charter of Fundamental Rights of the European Union., *supra* Art. 4.

148 Slov. Const., ch. 2, Art. 16, sec. 2.