APPLICATION BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Gretel Artavia Murillo y Otros ("Fecundación in Vitro")

v.

COSTA RICA

September 17, 2012

Amicus Brief Prepared by

The Center for Reproductive Rights

TABLE OF CONTENTS

INTERESTS OF AMICUS CURIAE

The Center for Reproductive Rights has the honor of submitting this brief of Amicus Curiae to the Inter-American Court of Human Rights (hereinafter also referred to as "Inter-American Court" or "The Court") regarding the case of *Gretel Artavia Murillo y Otros ("Fecundación in Vitro") v. Costa Rica*. This brief presents various considerations concerning protections of the right to life in the regional and universal human rights systems, the importance of the principle of judicial certainty, and information on how in vitro fertilization protects and fulfills human rights, and the rights to life and health in particular.

The Center for Reproductive Rights (CRR) is an independent non-governmental organization dedicated to advancing reproductive rights worldwide. These rights are based on principles of women's autonomy and control over their bodies, sexuality and reproduction, and are underlying determinants of women's abilities to fulfill a range of fundamental human rights. CRR was founded in 1992, and has offices in New York City and Washington DC, United States of America; Bogota, Colombia; Nairobi, Kenya; and Kathmandu, Nepal. CRR's work focuses on developing legal and advocacy strategies to promote and protect reproductive rights across the globe.

SUMMARY OF ARGUMENTS

The Inter-American Court of Human Rights is charged with determining whether States may extend the right to life to the moment of fertilization and therefore consider an unimplanted embryo to be a born human being for all legal purposes. This honorable Court must decide if such protection and its impact on the human rights of the Costa Rican population is in accordance with the American Convention; in order to properly consider this matter, the meaning of such an application of the right to life must be carefully considered.

The Costa Rican Supreme Court's decision to ban in vitro fertilization is based on a misinterpretation of protections of the right to life in regional and universal human rights treaties, and its supposedly resulting obligation to confer an absolute protection to the right to life from the moment of conception, based on its status as a State party to a number of human rights treaties. This amicus brief will set forth the human rights standards that establish that the right to life, as it is enshrined in the Inter-American and universal human rights systems, does not grant a right to life from the moment of fertilization, and that absolute protections to human life before birth have been systematically rejected by human rights bodies and national courts worldwide. It will also address how States recognize incremental advancements of the State interest in developing life depending upon the gestational stage in line with the principle of proportionality, and how a breach on the principle of judicial certainty would result after an interpretation that confers absolute protections or a right to life to fertilized ova.

CONTENT AND OBJECTIVE OF AMICUS CURIAE

The objective of this amicus is to provide the Court with information concerning the content and scope of article 4 of the American Convention on Human Rights and its application in addressing the compatibility of IVF with States' human rights obligations under the Convention. In doing so, the first two sections of this Amicus will analyze the content of the right to life in international human rights law by studying the body of law *–corpus iuris-* of the right to life and its developments within the United Nations and the European human rights systems. The third

section will then explore the scope of the right to life in the Inter-American human rights system. Following the rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, it will analyze the text of article 4 and the subsequent applications of it by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to then use a supplementary means of interpretation by analyzing the *travaux préparatoires* of the American Convention on Human Rights. Finally, the third section will also explore the scope of the right to life as enshrined and developed in the American Declaration on the Rights and Duties of Man (hereinafter "American Declaration"), an instrument that historically precedes the American Convention on Human Rights.

The fourth section will show how legal frameworks worldwide acknowledge the different developmental stages of human life prior to birth, and will reflect on the content of the right to life and the use of the principle of proportionality in constitutional and criminal law (including within Costa Rica's own legal system), when striking a balance between the protection of life and the respect for human rights, which becomes relevant for the interpretation of article 4 of the American Convention on Human Rights, given the mandate set forth in article 29 of the Convention, which prohibits restricting rights and freedoms recognized by virtue of the laws of the State Parties. The fifth section will then question the breach on the principle of judicial certainty that would bring a potential Court decision embracing Costa Rica's interpretation of article 4 of the Convention in this case, both for legal systems throughout Latin America and Costa Rica itself. Finally, the sixth and last section will address the fact that reproductive health services –including allowing access to in vitro fertilization- must be provided as part of the positive measures that States must take in order to protect, respect, and fulfill human rights and fundamental freedoms.

I. INTERNATIONAL HUMAN RIGHTS NORMS DO NOT RECOGNIZE A PRE-NATAL RIGHT TO LIFE.

Although governments have provided protection to prenatal stages of development, it is incompatible with international human rights to unconditionally extend the right to life to the moment of conception. This section of the Amicus brief will explore the impermissibility of creating an absolute right to life from the moment of conception in the Inter-American and universal human right systems, as well as the conflicting precedent within the Inter-American system which would result if such a position were embraced by the Court.

To understand restrictions on States' protection of life prior to birth, it is critical to recognize the difference between granting fetal rights and protecting a State's interest in developing human life prior to and during gestation. While States may take certain measures in order to advance an incrementally-growing interest in developing human life, this is different than granting legal rights prior to birth because the granting of legal rights creates an inherent conflict between the rights of women and the embryo.

The latter characterizes the Costa Rican Supreme Court's decision, which states that even before gestation begins, the embryo is already entitled to all human rights to such an extent that these rights trump and nullify women's fundamental human rights. This characterization is impermissible under international human rights norms, as it inevitably infringes upon women's human rights as well as the principle of proportionality.

The Costa Rican Supreme Court decision relies on an incorrect understanding and interpretation of international human rights laws and norms in its decision to ban IVF. When the Supreme Court prohibited IVF in 2000,[1] it was based upon the interpretation that under the Costa Rican Constitution, a zygote is a person entitled to all fundamental human rights, particularly the right to life; the Court claimed that there were no permissible exceptions to the right to life, even though this position is not coherent with the Court's later decision in 2004 which affirmed that the right to access abortion under certain circumstances is constitutional.[2] The Supreme Court in its 2000 decision interpreted the right to life by stating that "the embryo is subject to the law and not a mere object, and **should be protected equally with any other human being.** Only the opposite view would permit it to be frozen, sold, subject to experimentation, and even thrown away."[3] The Court´s understanding of the scope of the right to life which identifies embryos as rights holders heavily relies upon the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and numerous other international human rights to which it is a State party. The State's determination that the right to life begins at conception is a misinterpretation of international human rights law.

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[1] Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court], Sala Constitucional marzo 15, 2000, Expediente No. 95-001734-0007-CO, Voto No. 2306-00 (Costa Rica) [hereinafter C.S.J., Expediente No. 95-001734-0007-CO, Voto No. 2306-00].

[2] C.S.J., Sala Constitucional marzo 17, 2004, Expediente No. 02-007331-0007-CO, Voto No. 2792-04 (Costa Rica) [hereinafter C.S.J., Expediente No. 02-007331-0007-CO, Voto No. 2792-04].

[3] C.S.J., Expediente No. 95-001734-0007-CO, Voto No. 2306-00, *supra* note 1 ("el embrión es sujeto de derecho y no un mero objeto, debe ser protegido igual que cualquier otro ser humano. Solamente la tesis contraria permitiría admitir que sea congelado, vendido, sometido a experimentación e incluso, desechado") (emphasis added).

An accurate interpretation of article 4 of the Convention follows the mandate set forth in article 29 of the Convention that states that no provision of the Convention can be interpreted as restricting the enjoyment or exercise of any rights recognized by virtue of other Conventions to which the said State is a party to. This is often what the Court has referred to as the *corpus iuris*, a body of law that is used to give content and scope to the Convention itself.[4] Contrary to the Costa Rican Supreme Court's assertion, international human rights norms do not recognize a right to life at conception. The evolution of international human rights law, granting personhood or unconditional protection of the developing life prior to birth has been rejected, and furthermore has clearly been understood under diverse circumstances as a gateway for human rights violations. Not only do the international and regional human rights treaties to which Costa Rica is a State party not extend the right to life to the moment of conception, but through their interpretations and jurisprudence, they actually obligate State parties to respect, protect, and fulfill women's human rights, which requires them to prioritize these obligations over the State's interest in the viability of life prior to gestation or birth, particularly when a woman´s right to life, health, and intimacy is at stake. The next sections will address how such protections are understood and recognized by the international human rights *corpus iuris*.

A. The Universal Declaration of Human Rights

Article 1 of the Universal Declaration of Human Rights (UDHR) states that "[a]ll human beings are born free and equal in dignity and rights."[5] The history of the UDHR indicates that this statement was designed to signify that the right to liberty and equality were "inherent from the moment of birth."[6] An amendment to the UDHR which would have deleted the word "born" was proposed and rejected.[7] The rejection of this amendment, which it is argued was intended to protect life from the moment of conception,[8] demonstrates that the drafters consciously determined that human rights accrue at birth. Article 1 adopted this language with 45 affirmative votes and nine abstentions,[9] demonstrating a clear lack of opposition.

B. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) 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."[10] During the drafting of the ICCPR, an amendment was proposed and rejected which would have changed this article to state "the right to life is inherent in the

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[4] *Inter alia*, Juridical status and human rights of the child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17 (Aug. 28, 2002); The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999).

[5] Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, art. 1, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[6] *See* U.N. GAOR, 3d Sess., 99th plen. mtg. at 116, U.N. Doc. A/C.3/SR.99 (Oct. 11, 1948).

[7] *Id.* at 117-124.

[8] *See id.* at 124.

[9] U.N. GAOR, 3d Sess., 183d plen. mtg. at 933, U.N. Doc. A/PV.183 (Dec. 10, 1948).

[10] International Covenant on Civil and Political Rights, art. 6, para. 1, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

human person from the moment of conception."[11] When the drafters of the ICCPR made the decision not to extend the right to life to the moment of conception, 55 States voted in favor of excluding this language, 0 States voted against it, and 17 States abstained from voting.[12] As such, protections of the right to life from the moment of conception were explicitly rejected during the drafting of the ICCPR.[13]

C. The Convention on the Rights of the Child

Article 6 of the Convention on the Rights of the Child (CRC) states that "every child has the inherent right to life" and "States Parties shall ensure to the maximum extent possible the survival and development of the child."[14] The history of the negotiations of the CRC (*travaux préparatoires*) and the interpretations of the CRC set forth by the Committee on the Rights of the Child demonstrate that the recognition of the right to life in the CRC begins at birth. Philip Alston, an established international law professor and currently the United Nations Special Rapporteur on extrajudicial, summary and arbitrary executions, provided draft treaty commentary of the CRC for UNICEF and stated that while the CRC recognizes that the developing child has some protections prior to birth, it does not recognize a pre-birth right to life.[15]

The preamble to the CRC utilizes the language set forth in the United Nations Declaration on the Rights of the Child, stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before and after birth."[16] This language, though, does not indicate that the CRC protects a *right to life* prior to birth, as it is clear from the drafting history that this was not the statement's intention. Proponents of the former language providing for safeguards before birth made clear that "the purpose of the amendment was not to preclude the possibility of abortion,"[17] thereby demonstrating that the right to life was not being instilled prior to birth and such protections prior to birth are limited by other rights and interests. The CRC's Working Group agreed to place a statement in the *travaux préparatoires* stating that "in adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision

[11] U.N. GAOR Annex, 12th Sess., Agenda Item 33, at 113, U.N. Doc. A/C.3/L.654 (1957) [hereinafter U.N. GAOR Annex, 12th Sess., Agenda Item 33]; U.N. GAOR, 12th Sess., Agenda Item 33, at 199(q), U.N. Doc. A/3764 (1957) [hereinafter U.N. GAOR, 12th Sess., Agenda Item 33].
[12] U.N. GAOR, 12th Sess., Agenda Item 33, *supra* note 11, at 119(q).
[13] U.N. GAOR Annex, 12th Sess., Agenda Item 33, *supra* note 11, at 96; U.N. GAOR, 12th Sess., Agenda Item 33, *supra* note 11, at 113. The Commission ultimately voted to adopt Article 6, which has no reference to conception, by a vote of 55 to nil, with 17 abstentions. *Id.* at 119(q).
[14] Convention on the Rights of the Child, *adopted* Nov. 20, 1989, art. 6, paras. 1-2, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990) [hereinafter CRC].
[15] Philip Alston, *The Unborn Child and Abortion under the Draft Convention on the Rights of the Child*, 12 HUMAN RIGHTS QUARTERLY 156, 178 (1990).
[16] CRC, *supra* note 14, Preamble.
[17] U.N. Commission on Human Rights, *Question of a Convention on the Rights of the Child: Rep. of the Working Group*, U.N. Doc. E/CN.4/L.1542 (1980). *See also* U.N. Commission on Human Rights, *Rep. of the Working Group on a Draft Convention on the Rights of the Child*, at 11, U.N. Doc. E/CN.4/1989/48 (1989) [hereinafter *Rep. of the Working Group on a Draft CRC*].

of the Convention by States Parties."[18] Article 1 of the CRC states that, for the Convention's purposes, "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."[19] As such, it is clear from the drafting history that the rights enumerated in the CRC do not begin until birth. This does not prevent States from taking certain measures to protect all stages of human life, though such measures must take into account and respect individuals' human rights.

D. The Convention on the Elimination of All Forms of Discrimination against Women

While the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not contain an article dedicated to the right to life, its preamble reaffirms the right to life in international law, including in the Universal Declaration of Human Rights, which does not establish a right to life prior to birth.[20] As will be demonstrated in section II(D), CEDAW obligates State parties to prioritize the rights of women over the State's interest in protecting developing human life, thereby prohibiting States from providing absolute protection for fetal interests during gestation.

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

The text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) draws heavily from the Universal Declaration of Human Rights and the drafting history demonstrates that a right to life from conception was not even considered.[21] Further evidencing that the ECHR does not contemplate protection of the right to life from conception, the European Commission and Court of Human Rights have explicated in several cases that fetuses are not human beings under article 2 of the ECHR (which protects the right to life), and therefore fetuses are not subject to the protections of the right to life. Furthermore, the European human rights system recognizes the inherent infringement on the rights of women resulting from the recognition of absolute fetal rights.

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[18] UNITED NATIONS CHILDREN'S FUND (UNICEF), IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 85 (3rd ed., 2007) (*citing Rep. of the Working Group on a Draft CRC*, *supra* note 17, at 8-15; SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 55 (1999).

[19] CRC, *supra* note 14, art. 1.

[20] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Preamble states "the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights . . . the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights." CEDAW, *adopted* Dec. 18, 1979, Preamble, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW].

[21] *See* Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPRODUCTIVE HEALTH MATTERS 120, 123-124 (2005) (*citing* Committee on Legal and Administrative Questions Report, sec. 1, para. 6 *in* COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PREPARATOIRES", VOL. 1: PREPARATORY COMMISSION OF THE COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, CONSULTATIVE ASSEMBLY 11 MAY-8 SEPTEMBER 1949, 194 (1975).

In the 1980 case of *Paton v. United Kingdom*,[22] the European Commission explicitly rejected the petitioner's claim that the fetus was entitled to the right to life as it is enshrined in article 2 of the ECHR. The Commission recognized the inherent connection between the rights of the woman and the alleged rights of the fetus, noting that:

> The life of the fetus 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 fetus 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 fetus would be regarded as being of a higher value than the life of the pregnant woman.[23]

The subsequent cases of *R.H. v. Norway*[24] and *Boso v. Italy*,[25] which sought to invalidate laws permitting abortion, affirmed this decision. More recently, in the 2004 case of *Vo v. France*, the Court refused to extend the right to life to a fetus prior to birth, affirming that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention."[26] Furthermore, the Court reaffirmed that even "if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests."[27] The Court's refusal to extend the right to life prior to birth affirms that women's right to access reproductive health services may not be impeded based on notions of fetal rights.

The ECHR has heard several cases concerning in vitro fertilization. In such cases the Court has followed its precedent around the scope of the right to life asserting that the embryos created during the in vitro process are not subject to Article 2 protection. In the case of *Evans v. United Kingdom*, the petitioner argued that the legally-mandated destruction of her preserved embryos upon her partner's withdrawal of consent for their use violated Article 2 of the ECHR.[28] The Court ruled that the embryos were not subject to protection under Article 2 and therefore there was no violation of that provision.[29] In a subsequent case concerning regulation of IVF, the Court accepted without argument that IVF is permissible under the ECHR and does not violate the right to life.[30]

While the European Court of Human Rights has given special consideration to the margin of appreciation[31] in cases related to the scope of protection that each State provides to prenatal life,

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[22] Paton v. The United Kingdom, No. 8416/78, Eur. Comm'n H.R. (1980).
[23] *Id.* para. 19.
[24] R.H. v. Norway, decision on admissibility, No. 17004/90, Eur. Comm'n H.R. (1992).
[25] Boso v. Italy, No. 50490/99, Eur. Comm'n H.R. (2002).
[26] Vo v. France, No. 53924/00, Eur. Ct. H.R., para. 80 (2004).
[27] *Id.*
[28] Evans v. The United Kingdom, No. 6339/05, Eur. Ct. H.R. (2007).
[29] *Id.* paras. 53-56.
[30] *See* S.H. and Others v. Austria, No. 57813/00, Eur. Ct. H.R. (2010).
[31] The margin of appreciation doctrine affords States a limited measure of discretion in their domestic implementation of human rights.

examining whether there is consensus or not among the States Parties to the Convention in regard to the beginning of life, it is indisputable that every time that the Court (and the now-extinct Commission) has been asked to declare that IVF or abortion violate the right to life of the embryo or even the fetus, it has refused to find such a violation, repeating in the different cases that prenatal stages of human life are not entitled *per se* to a right to life under the Convention. This has been the result in *Paton v. UK*,[32] *R.H. v. Norway*,[33] and *Boso v. Italy*.[34] While there may be a margin of appreciation in determining how to protect life prior to birth, this margin cannot impute an extension of the right to life prior to birth into the Convention, nor can it preclude women's exercise of their fundamental rights. As the Court has noted, "the life of the fetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman."[35]

Abiding by international human rights standards that have established that there is no absolute protection for the right to life prior to birth, all European countries except one have legalized abortion at least under some circumstances.[36] In almost every country in Europe, women are legally permitted to have abortions without restriction as to reason during the first trimester of their pregnancy.[37] Of the countries which do have restriction as to reason, nine permit abortion for a broad range of reasons, such as to preserve the mental and physical health of the woman or based on the woman's age or capacity to care for a child. One of the two countries in Europe with a strict abortion law is Ireland, and even Ireland permits abortion when continuing the pregnancy threatens the life of the woman.[38] Furthermore, no country in Europe has banned the use of IVF,[39] demonstrating that the trend globally is to increase protection of potential life as the pregnancy develops.

Thus, even if the Court has not instructed States on how to regulate the circumstances in which women's human rights collide with the State's interest in protecting the development of human life, it has systematically refused to grant a right to life to prenatal stages of human life, and under no circumstance has it accepted that such protection can be absolute and allow nullification of women's fundamental rights.

F. African Charter on Human and People's Rights

The African Union's Protocol on the Rights of Women in Africa explicitly protects the right of women to access abortion in certain circumstances, therefore excluding the possibility that it

[32] Paton v. The United Kingdom, No. 8416/78, Eur. Comm'n H.R. (1980).
[33] R.H. v. Norway, decision on admissibility, No. 17004/90, Eur. Comm'n H.R. (1992).
[34] Boso v. Italy, No. 50490/99, Eur. Comm'n H.R. (2002).
[35] *Paton*, No. 8416/78, para. 19.
[36] Malta does not currently have any exceptions to the ban on abortion. For more information on European abortion laws, *see The World's Abortion Laws 2011*, CENTER FOR REPRODUCTIVE RIGHTS (2011), *available at* http://worldabortionlaws.com/index.html [hereinafter *The World's Abortion Laws 2011*].
[37] The only countries in Europe with restriction as to reason are Ireland, Northern Ireland, Great Britain, Poland, Finland, Ireland, Moldova, Luxemburg and Andorra. *Id.*
[38] For more information on European abortion laws, *see id.*
[39] *Regulating, Reporting & Validating ART*, MALPANI INFERTILITY CLINIC, http://www.drmalpani.com/regulating-ivf.htm; *Fertility treatment bans in Europe draw criticism*, FOX NEWS (Apr. 13, 2012), http://www.foxnews.com/world/2012/04/13/fertility-treatment-bans-in-europe-draw-criticism/.

provides a prenatal right to life.[40] The African Charter on the Rights and Welfare of the Child states that "every child has an inherent right to life. This right shall be protected by law."[41] When the African Charter is read in conjunction with the Protocol on the Rights of Women in Africa, it is clear that the right to life does not apply prior to birth or in order to protect a fetus when such protection would contradict women's rights or interests.

As the aforementioned synopsis demonstrates, under the United Nations human rights framework and regional human rights frameworks, human rights, including the right to life, do not begin prior to birth, even if the zygote, the embryo, and later on the fetus are objects worthy of gradual protections. Under international human rights law, protecting the interest in potential life does not equate to being a rights-holder.

II. INTERNATIONAL HUMAN RIGHTS NORMS PROHIBIT UNCONDITIONAL PROTECTIONS OF THE RIGHT TO LIFE BEFORE BIRTH AND OBLIGATE STATES TO PRIORITIZE THE RIGHTS AND INTERESTS OF WOMEN OVER STATES' INTEREST IN PROTECTING DEVELOPING HUMAN LIFE.

Not only does international human rights law not extend the right to life to the moment of conception, to the contrary, it has repeatedly expressed that unconditional protections from the moment of conception implicitly interfere with and infringe upon the human rights of women. In balancing any interest that the State may have during the prenatal period, the State may not nullify the rights of others through this recognition. Accordingly, international human rights law, through its developing jurisprudence, obligates States to guarantee the protection of women's human rights above protecting the viability of developing human life during or prior to gestation.

A. International Covenant on Civil and Political Rights and the Human Rights Committee

The ICCPR does not protect the right to life from conception and its provisions are clearly compatible with States permitting IVF. Furthermore, if the State granted absolute protection of the right to life from the moment of conception without exceptions to ensure the rights of women, such action would be contrary to the ICCPR, which does not contemplate any situation in which the human rights of an individual can be derogated. Such a situation would occur if there was a conflict between the absolute protection of life before birth, which would deny the respect, protection and fulfillment of women's fundamental human rights.

The Human Rights Committee's (HRC) commentary and jurisprudence demonstrate that the rights and interests of women must be prioritized over a State interest in the prenatal developing stages of human life. The HRC has not only established that under the ICCPR abortion may be legalized, but has repeatedly called upon States to revise rigid and absolute restrictions on abortion and to liberalize such laws so that they do not prohibit or create obstacles to abortion in

[40] Article 14(2)(c) of the Protocol on the Rights of Women in Africa recognizes the duty of States to take "all appropriate 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 mother or the life of the mother or the fetus." Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, *adopted* July 11, 2003, art. 14, para. 2(c).

[41] African Charter on the Rights and Welfare of the Child, *adopted* July 1, 1990, art. 5, para. 1, O.A.U. Doc. CAB/LEG/24.9/49 (1990) (*entered into force* Nov. 29, 1999).

ways that violate women's rights. The HRC has emphasized that the ICCPR's protection in this respect is not limited only to women who live in countries where abortion is legal, as demonstrated by its expressions of concern about the incompatibility of the ICCPR with laws and judicial orders which absolutely prohibit or penalize abortion.[42]

The HRC has called upon countries to liberalize their abortion laws to, at the very least, provide exceptions that prioritize women's human rights over the State's interest in the gestational life in order to prevent violations of women's human rights including the right to be free from torture, cruel, inhuman, and degrading treatment,[43] and the right to equality in the exercise of their human rights.[44] Furthermore, the HRC has instructed States with strict abortion laws that do not provide exceptions when the pregnancy endangers the woman's life[45] or when the pregnancy results from sexual assault, to revise such legislation.[46]

To fulfill the right to life under the ICCPR, State parties are obligated to take positive measures to ensure the right to life,[47] including measures to ensure that women "do not have to undergo life-threatening clandestine abortions."[48] This standard makes clear not only that the right to life is not extended prior to birth under the ICCPR, but also that the unfettered extension of the right to life prior to birth contradicts the ICCPR.

In 2005, in the case of *K.L. v. Peru*, the HRC addressed the State's failure to provide legal abortion services to a woman whose fetus suffered a malformation incompatible with life outside of the womb and which threatened the woman's life and health.[49] The HRC found that the State's denial of the provision of a legally permissible abortion violated the right to intimacy (Art. 17); the right to be free from torture and other cruel, inhuman, or degrading treatment (Art. 7); the rights of the child (Art. 24) and the right to access effective recourse (Art. 2).[50] The HRC determined that the medical authorities' denial of services to the petitioner after she followed the proper legal requisites amounted to an arbitrary intrusion into her private life, in violation of the

[42] Human Rights Committee, *Concluding Observations: Colombia*, para.13, U.N. Doc. CCPR/CO/80/COL (2004); *Guatemala*, para. 19, U.N. Doc. CCPR/CO/72/GTM (2001); *Mauritius*, para. 9, U.N. Doc. CCPR/CO/83/MUS (2005); *Peru*, para. 20, U.N. Doc. CCPR/CO/70/PER (2000); *Sri Lanka*, para. 12, U.N. Doc. CCPR/CO/79/LKA (2003).

[43] *See* K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, para. 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

[44] Human Rights Committee, *General Comment No. 28*: *Article 3 (The equality of rights between men and women)*, (68th Sess., 2000), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 228, paras. 5, 20, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 28*].

[45] Human Rights Committee, *Concluding Observations: Colombia*, para. 13, U.N. Doc. CCPR/CO/80/COL (2004); *Kuwait*, paras. 15-16, U.N. Doc. CCPR/CO/69/KWT (2000). *See also* Committee on Economic, Social and Cultural Rights (ESCR Committee), *Concluding Observations: Nepal*, para. 55, U.N. Doc. E/C.12/1/Add.66 (2001).

[46] Human Rights Committee, *Concluding Observations: Argentina*, para. 14, U.N. Doc. CCPR/CO/70/ARG (2000).

[47] Human Rights Committee, *General Comment No. 6: Article 6 (Right to life)*, (16th Sess., 1982), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at176, para. 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).

[48] Human Rights Committee, *Gen. Comment No. 28*, *supra* note 44, para. 10.

[49] For further information on this case, *see* K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).

[50] *Id.* paras. 6.3-6.6.

ICCPR.[51] In respect to the rights enshrined in article 7 of the ICCPR (right to be free from cruel, inhuman and degrading treatment), the HRC established that these rights are violated when the State obligates a petitioner to submit to the psychological pain that the petitioner in this case suffered, watching her child's death due to tremendous malformations and the continuation of a pregnancy that put her life at risk.[52]

In the 2011 case of *L.M.R. v. Argentina*,[53] the Human Rights Committee built upon the precedent in *K.L. v. Peru*, again holding a State accountable for its failure to guarantee the right to terminate a pregnancy in accordance with the State's domestic law. In this case, a mentally disabled young woman was impregnated as a result of sexual abuse; under these circumstances, abortion is legally permissible in Argentina.[54] Although her guardian sought abortion services for her, including obtaining a judicial order, the medical practitioners refused to provide such services and she was forced to have a clandestine abortion. The HRC ruled that the State's failure to guarantee her right to terminate the pregnancy constituted a violation to the right to be free from torture or cruel, inhuman and degrading treatment,[55] and her right to privacy.[56]

The cases of *K.L. v. Peru* and *L.M.R. v. Argentina* exemplify the conflicts which arise when States prioritize their interest in developing life over the rights of women. While both cases differ from the present case in the sense that they address access to abortion instead of access to in vitro fertilization, the resulting legal principle remains applicable – it is a clear violation of the ICCPR to protect prenatal stages of human life when it entails the nullification of women's human rights.

B. International Covenant on Social, Economic and Cultural Rights (ICESCR) and the Committee on Economic, Social and Cultural Rights (ESCR Committee)

Although the ICESR does not contain a provision protecting the right to life, it does protect "right of everyone to the enjoyment of the highest attainable standard of physical and mental health,"[57] which includes sexual and reproductive health.[58] Through its recommendations and comments, the ESCR Committee has made clear that the right to health does not begin prior to birth and that State parties are obligated to prioritize this right over any interest they may have in protecting potential life. To this end, the ESCR Committee has consistently expressed its concern about high maternal mortality rates due to unsafe, clandestine abortions, and has therefore

[51] *Id.* para. 6.4.
[52] *Id.* para. 6.3.
[53] L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
[54] *Id.* para. 9.2.
[55] *Id.* para. 9.4.
[56] *Id.* para. 9.3.
[57] International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 12, para. 1, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].
[58] ESCR Committee, *General Comment No. 14: The right to the highest attainable standard of health (art. 12),* (22nd Sess., 2000), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 78, paras. 8, 14, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).

encouraged States to ensure access to safe abortion.[59] Further, the ESCR Committee has recommended to States that they revise restrictive legislation on abortion when the pregnancy poses a threat to the life[60] or health of the woman,[61] and when the pregnancy results from rape or incest.[62] Therefore, it is clear that the various human rights enshrined in the ICESCR constitute protections that accrue at birth and State parties must prioritize women's human rights over any State interest in prenatal life.

C. CRC and Committee on the Rights of the Child (CRC Committee)

In regards to granting unconditional protection of the right to life prior to birth, the Committee on the Rights of the Child has repeatedly stated that absolute prohibitions on abortion constitute violations of the rights of the child and the CRC. The CRC Committee has repeatedly noted the causal link between high maternal mortality rates among adolescents and illegal, unsafe abortions.[63] The CRC Committee has instructed State parties that in order to be in compliance with the CRC, they must permit exceptions to abortion for pregnancies that result from rape or incest and when the pregnancy puts the life of the woman at risk.[64] As such, the CRC Committee has demonstrated that the physical and mental health of women cannot be sacrificed in order to advance an interest in protecting prenatal stages of life.

D. CEDAW and the CEDAW Committee

The CEDAW Committee, which is charged with overseeing States' compliance with the CEDAW Convention, has clarified that the unconditional protection of gestational life to the detriment of the respect and protection of women's human rights violates State parties' obligations under CEDAW. State parties are obligated under CEDAW to take measures to respect, protect, and fulfill women's rights; the measures which have been enumerated by the CEDAW Committee are clearly incompatible with protections of prenatal life that nullify women's human rights.

General Recommendation No. 24 recognizes that "when possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortions."[65] The CEDAW Committee has condemned the criminalization of abortion[66]

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[59] ESCR Committee, *Concluding Observations: Bolivia*, paras. 23, 43, U.N. Doc. E/C.12/1/Add.60 (2001); *Panama*, paras. 20, 37, U.N. Doc. E/C.12/1/Add.64 (2001).

[60] *See* ESCR Committee, *Concluding Observations: Nepal*, para. 55, U.N. Doc. E/C.12/1/Add.66 (2001).

[61] ESCR Committee, *Concluding Observations: Dominican Republic*, para. 29, U.N. Doc. E/C.12/DOM/CO/3 (2010).

[62] *See* ESCR Committee, *Concluding Observations: Chile*, para. 53, U.N. Doc. E/C.12/1/Add.105 (2004); *Malta*, para. 41, U.N. Doc. E/C.12/1/Add.101 (2004); *Nepal*, para. 55, U.N. Doc. E/C.12/1/Add.66 (2001); *Costa Rica*, paras. 25, 46, U.N. Doc. E/C.12/CRI/CO/4 (2008).

[63] *See* Committee on the Rights of the Child (CRC Committee), *Concluding Observations: Armenia*, para. 38, CRC/C/15/Add.119 (2000); *Chad*, para. 30, U.N. Doc. CRC/C/15/Add.107 (1999); *Chile*, para. 55, U.N. Doc. CRC/C/CHL/CO/3 (2007); *Kenya*, para. 49, U.N. Doc. CRC/C/KEN/CO/2 (2007).

[64] *See* CRC Committee, *Concluding Observations: Honduras*, para. 61, U.N. Doc. CRC/C/HND/CO/3 (2007); *Mozambique*, para. 46, U.N. Doc. CRC/C/15/Add.172 (2002); *Nicaragua*, para. 19, U.N. Doc. CRC/C/15/Add.36 (1995).

[65] Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20th Sess., 1999), *in* Compilation of

and has analyzed the consequences of unsafe, illegal abortions in regard to the right to life and the right to health of women.[67] Calling for abortion procedures to be legalized, the CEDAW Committee has explicitly stated that "laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" create inappropriate barriers that violate women's right to access health care.[68] Additionally, the CEDAW Committee has clearly established that absolute prohibitions on abortion violate CEDAW's provisions,[69] as does the criminalization of abortion in certain circumstances.[70] The CEDAW Committee has also called upon States to introduce exceptions to prohibitions on abortion in cases of rape, incest and fetal malformations.[71]

In the case of *L.C. v. Peru*,[72] the CEDAW Committee found that the prioritization of a State's interest in protecting potential life at the expense of the pregnant woman's health violates CEDAW's provisions. In this case, L.C., and adolescent, was first raped by an older man in her neighborhood when she was nine years old. This vicious crime continued for four years, until she found out she was pregnant. Devastated, L.C. threw herself from the roof of her neighbor's building - but her suicide attempt failed.

The broken spine she suffered could have been repaired, but doctors ignored the value of L.C.'s well-being and chose instead to protect her pregnancy.[73] Two months later, L.C. miscarried. The surgery she needed was finally performed another month after. But it was too late. The enormous delay dramatically diminished the success of the intervention, and L.C. is quadriplegic as a result. The CEDAW Committee found that the prioritization of the State's interest in the fetus over L.C.'s physical and mental well-being constituted a violation of the right to health,[74] as well as of the State's duty to modify stereotypes that are based on the idea of women's inferiority, such as the stereotype "that protection of the fetus should prevail over the health of the mother."[75] This clearly demonstrates that States' interest in protecting prenatal life does not trump their duties to respect and protect women's human rights.

Under those same lines, when addressing issues of violence against pregnant women, the CEDAW Committee, following the doctrine of international human rights bodies, has recognized

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General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 358, para. 31(c), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].

[66] *Id.* paras. 14, 31(c); CEDAW Committee, *Concluding Observations: Chile*, para. 158, U.N. Doc. A/50/38 (1995); *Mexico*, para. 408, U.N. Doc. A/53/38/Rev.1 part I (1998). *See also* CEDAW Committee, *Concluding Observations: Poland*, para. 25, U.N. Doc. CEDAW/C/POL/CO/6 (2007).

[67] CEDAW Committee, *Concluding Observations: Dominican Republic*, para. 337, U.N. Doc. A/53/38/Rev.1 part I (1998); *Portugal*, paras. 345-346, U.N. Doc. A/57/38 part I (2002).

[68] CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 65, para. 14; CEDAW Committee, *Concluding Observations: Chile*, para. 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006); *Pakistan*, paras. 40-41, U.N. Doc. CEDAW/C/PAK/CO/3 (2007).

[69] CEDAW Committee, *Concluding Observations: Chile*, para. 228, U.N. Doc. CEDAW/A/54/38/Rev.1 (1999).

[70] CEDAW Committee, *Concluding Observations: Nepal*, para. 147, U.N. Doc. CEDAW/A/54/38/Rev.1 (1999).

[71] CEDAW Committee, *Concluding Observations: Jordan*, paras. 180-181, U.N. Doc. CEDAW/A/55/38 part I (2000); *Nepal*, para. 147, U.N. Doc. CEDAW/A/54/38/Rev.1 (1999); *Sri Lanka*, para. 283, U.N. Doc. A/57/38 part 1 (2002).

[72] L.C. v. Peru, CEDAW Committee, Commc'n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

[73] For more information on the background of this case, *see id.*

[74] *Id.* para. 8.15.

[75] *Id.*

such violence as an infringement of the rights of the pregnant woman, not on the rights of the fetus. The CEDAW Committee addressed this issue in the context of involuntary abortion, recognizing this as a violation of women's human rights. The CEDAW Committee stated "compulsory… abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children."[76]

E. Convention against Torture and the Committee against Torture

The Committee against Torture, which is charged with overseeing States' compliance with the Convention against Torture, has established that absolute protection of prenatal development violates the right to be free from torture and cruel, inhuman, and degrading treatment. The Committee against Torture advised Nicaragua, which has an absolute ban on abortion, to review its legislation on abortion in order to consider instances wherein abortion should be legal, such as for therapeutic reasons and in instances when the pregnancy results from rape or incest.[77] The Committee against Torture has also advised Paraguay, which only permits abortion to save the life of the woman, to revise its abortion laws in order to permit therapeutic abortion and to permit abortion when the pregnancy results from rape.[78] Furthermore, the Committee against Torture condemned the denial of access to legally-permissible medical services in Chile as a potential violation of the Convention in addressing the practice of conditioning post-abortion care to women on their provision of information as to how they received the abortion.[79] As such, the Committee against Torture has demonstrated that provisions which negate women's human rights in order to favor the State's interest in developing stages of life may constitute torture or cruel, inhuman, and degrading treatment.

F. European Court of Human Rights

In addition to refusing to extend the right to life under article 2 of the ECHR prior to birth, the European Court of Human Rights has consistently confirmed that State parties must prioritize human rights over any State interest in protecting prenatal viability. In the 1980 case of *Paton v. United Kingdom*,[80] in rejecting the petitioner's claim that the fetus was entitled to the right to life under the ECHR, the Commission noted that if the right to life were to incorporate the fetus and

[76] CEDAW Committee, *General Recommendation No. 19*: *Violence against women*, (11th Sess., 1992), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 331, para. 22, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008). Along this same vein, the United Nations Special Rapporteur on violence against women has described the practice of forced abortion as a violation of "a woman's right to physical integrity and security of person, and the rights of women to control their reproductive capacities." *See* Special Rapporteur on violence against women, its causes and consequences, *Rep. of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44 – Addendum – Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women*, para. 49, U.N. Doc. E/CN.4/1999/68/Add.4 (Jan. 21, 1999).

[77] Committee against Torture (CAT Committee), *Concluding Observations: Nicaragua*, para. 16, U.N. Doc. CAT/C/NIC/CO/1 (2009).

[78] CAT Committee, *Concluding Observations: Paraguay*, para. 22, U.N. Doc. CAT/C/PRY/CO/4-6 (2011).

[79] CAT Committee, *Concluding Observations: Chile*, paras. 6(j), 7(m), U.N. Doc. CAT/C/CR/32/5 (2004).

[80] Paton v. The United Kingdom, No. 8416/78, Eur. Comm'n H.R., para. 19 (1980).

provide absolute protection for this right, "[t]his would mean that the 'unborn life' of the fetus would be regarded as being of a higher value than the life of the pregnant woman."[81]

In *A, B and C v. Ireland*, the Court 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 woman's right to respect for her private life is of a lesser stature."[82] This demonstrates that States may not automatically defer to their interest in prenatal life over the rights of women.

Additionally, in the case of *Vo v. France*, the Court addressed whether the right to life under the European Convention on Human Rights extended prior to birth. In finding that it did not, the Court noted that "[i]f the unborn do have a 'right' to 'life,' it is implicitly limited by the mother's rights and interests."[83]

As has been established, international human rights norms do not grant fetal rights or extend rights prior to birth, though they do permit States in certain circumstances to advance their interest in promoting prenatal development. While States should establish protections for pregnant women to ensure their health throughout pregnancy, such measures should never be designed to advance or force a gestation to the detriment of the pregnant women's fundamental rights, particularly her right to life and health.[84] There is an indelible obligation to effectuate the State interest in developing human life in a manner that is reasonably calibrated with respect to the human rights of those who indisputably are human beings and are entitled to the full exercise and protection of their fundamental rights. The differences between these two concepts is critical, as it demonstrates that prior to birth, human rights are not vested in the individual, but the State may take actions to advance its interest in the protection of these prenatal stages of life, so long as such advancements do not trump women's human rights.

G. *Oliver Brustle v. Greenpeace* (European Court of Justice)

It is important to bring the Court's attention to the case of *Oliver Brustle v. Greenpeace e. V.,*[85] even though this case was not decided by a human rights court, due to the relevance of the precedent. On July 6, 1998, the European Parliament issued Directive 98/44/EC, regulating legal protections for biotechnological inventions. The Directive's goal is to protect biotechnological inventions, as it considers them to be of fundamental importance for the European Union Community's industrial development[86] given that "in the field of genetic engineering, research and development require a considerable amount of high-risk investment and therefore only

[81] *Id.*
[82] A, B and C v. Ireland, No. 25579/05, Eur. Ct. H.R., paras. 237-238 (2010).
[83] Vo v. France, No. 53924/00, Eur. Ct. H.R., para. 80 (2004).
[84] According to the World Health Organization, "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." World Health Organization, Constitution of the World Health Organization, *signed* July 22, 1946 (*Off. Rec. Wld Hlth Org*., 2, 100), *entered into force* April 7, 1948, Preamble. Under the ICESCR, "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." ICESCR, *supra* note 57, art. 12, para. 1.
[85] Case C-34/10, Oliver Brüstle v. Greenpeace, E.C.R. (2011).
[86] Council Directive 98/44/EC, 1998 O.J. (L 213/13) Preamble, para. 1 (EC).

adequate legal protection can make them profitable."[87] Patents confer upon the creator of an invention the sole right to make, use, and sell that invention for a set period of time. The Directive deals with the patentability of inventions in biotechnology of human, animal, and vegetal origin and result.

The Directive is open as to what kind of biotechnological inventions can receive a patent. Article 3 of the Directive establishes: "inventions which are new, which involve an inventive step and which are susceptible of industrial application shall be patentable even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used."[88] However, given that it is scientifically possible to invent hybrids with plants and animals, including human beings, and given that cloning of human beings is theoretically possible, even without the creation of embryos, some limitations were made on the patentability and the consequent industrialization and commercialization of such industrial and intellectual property.

Article 4 of the Directive establishes a prohibition on patenting plants and animal varieties,[89] and article 6 prohibits granting a patent "where their commercial exploitation would be contrary to **ordre public** or morality," banning patentability of "(a) processes for cloning human beings; (b) processes for modifying the germ line genetic identity of human beings; (c) uses of human embryos for industrial or commercial purposes; (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes."[90] It is therefore crucial to understand that "the purpose of the Directive is not to regulate the use of human embryos in the context of scientific research. It is limited to the patentability of biotechnological inventions,"[91] including human embryos.

In 2010, the organization Greenpeace sought the annulment of a German patent held by Mr. Oliver Brüstle, which related to neural precursor cells, the processes for their production from embryonic stem cells and their use for therapeutic purposes in patients with Alzheimer's disease. Greenpeace argued that the use of stem cells was enough reason to bar the invention from enjoying industrial property, given the prohibition contemplated by article 6 on patent uses of human embryos for industrial or commercial purposes.[92] The Court was tasked with interpreting whether article 6(2)(c) of Directive 98/44/EC included in its definition of human embryo the stem cells that can be extracted from it ("whether the human embryonic stem cells which serve as base material for the patented processes constitute 'embryos' within the meaning of Article 6(2)(c) of the Directive").[93]

The Court decided that it was necessary to develop a definition of human embryo for all members of the European Union, because the "lack of a uniform definition of the concept of

[87] *Id.* Preamble, para. 2.
[88] *Id.* art. 3, para. 1.
[89] "1. The following shall not be patentable: (a) plant and animal varieties; (b) essentially biological processes for the production of plants or animals." *Id.* art. 4, para. 1.
[90] *Id.* art. 6 (emphasis added).
[91] Case C-34/10, Oliver Brüstle v. Greenpeace, E.C.R., para. 40 (2011).
[92] *Id.* para. 19.
[93] *Id.* para. 22.

human embryo would create a risk of the authors of certain biotechnological inventions being tempted to seek their patentability in the Member States which have the narrowest concept of human embryo and are accordingly the most liberal as regards possible patentability, because those inventions would not be patentable in the other Member States. **Such a situation would adversely affect the smooth functioning of the internal market which is the aim of the Directive**."[94] The Court's definition of human embryo for the purpose of providing patentability was: "any human ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo.'"[95]

Thus, as a consequence of this, European scientists are currently barred from obtaining patents for inventions involving human embryos, which for the purpose of the Directive includes even "non-fertilized ovums." That does not mean that the Court banned experimenting with human embryos in the context of scientific research,[96] but only that those experiments cannot receive a patent and therefore be used for commercial or industrial purposes,[97] because otherwise there would be a violation of the dignity and integrity of the person.[98]

The scope of this decision is only limited to the morality of conferring a patent to an invention involving human embryos which, it must be repeated, **includes non-fertilized** ovum for the purpose of the Directive. The decision makes no ruling around whether human embryos are vested of the right to life. If this decision had intended to grant a right to life to embryos, then non-fertilized ovums would also be considered human beings entitled to fundamental rights, and the Court should have established a prohibition on experimenting with them, which it did not. In regard to the element of human dignity in prohibiting patents on experiments with human embryos, such a decision is in line with a surging common principle that understands that commercialization and industrialization of the human body must not be permitted. Thus, for example, the WHO principles on "Human organ and tissue transplantation"[99] establish a prohibition on giving or receiving money in exchange for cells, tissues, or organs for transplantation, as well as any other commercial dealings, **even if they belonged to a deceased person**.[100] That, of course, does not mean that human organs or tissues of a deceased person are entitled to human rights. It only means that it has been understood by many legal systems, that any part of the human body, at any stage of development, must not be turned into a commodity that can therefore be owned as property, including through intellectual and industrial property (patents).

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[94] *Id.* para. 28 (emphasis added).
[95] *Id.* para. 37.
[96] "[T]he purpose of the Directive is not to regulate the use of human embryos in the context of scientific research. It is limited to the patentability of biotechnological inventions." *Id.* para. 40.
[97] *Id.* para. 46.
[98] *Id.* para. 32.
[99] WORLD HEALTH ORGANIZATION, HUMAN ORGAN AND TISSUE TRANSPLANTATION (2009).
[100] Guiding Principle 5: "Cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value. Purchasing, or offering to purchase, cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned". *Id.* at 11.

In conclusion, this decision is in line with an understanding that the dignity of human beings implies that, in general terms,[101] our biological processes cannot become a commodity. Further, this decision protects human embryos and even non-fertilized ovum, in line with WHO and human rights principles.

The preceding compilation of the international human rights standards clearly determine that unconditional protections from the moment of conception implicitly interfere with and infringe upon the human rights of women. In balancing any interest that the State may have during the prenatal period, the State may not nullify the rights of others through this recognition. Accordingly, international human rights law, through its developing jurisprudence, obligates States to guarantee the protection of women's human rights above protecting the viability of developing human life during or prior to gestation.

III. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS DOES NOT ESTABLISH UNCONDITIONAL PROTECTION OF LIFE FROM THE MOMENT OF CONCEPTION.

Article 4.1 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. No one shall be arbitrarily deprived of his life."[102] The history of the drafting of the American Convention demonstrates that Article 4 was not intended to dictate national-level policy with respect to reproductive health, including assisted reproductive technologies such as in vitro fertilization (IVF).

While article 4(1) calls for States to protect the right to life prior to birth, it does not enshrine a right to life prior to birth, nor does it permit the protection of prenatal life to trump human rights. Furthermore, article 4(1) does not preclude States from taking all necessary measures to protect the legitimate rights of its citizens, including the right to form a family, the right to health, the right to privacy, and the right to nondiscrimination; indeed, the Convention, in addition to various other international human rights instruments, requires that States protect and guarantee these rights.

The prohibition on in vitro fertilization constitutes an impermissible manner of protecting the right to life because it turns the creation of a group of human cells with the potential of becoming a human being into a condition that nullifies the exercise of fundamental human rights for the persons who need to access in vitro fertilization. This level of protection of life from conception was not envisioned by the drafters of the American Convention on Human Rights and does not comply with the currently evolving Inter-American human rights framework.

[101] We don't present this as a categorical prohibition, because there are instances in which, for example, we believe a person could sell her or his hair without affecting the dignity of human life.

[102] American Convention on Human Rights, *adopted* Nov. 22, 1969, art. 4, para. 1, 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) (emphasis added) [hereinafter American Convention].

A. The American Convention on Human Rights does not provide absolute protection of life prior to birth.

The proceeding section will follow the rules of interpretation in the Vienna Convention to examine the meaning and scope of article 4(1)'s protection of the right to life. Thus, first it will analyze the literal meaning of article 4 and the subsequent practices and interpretation of it within the Inter-American system. Second, it will analyze the *travaux préparatoires*, as a supplementary mean of interpretation. Finally it will analyze the content of the right to life in the American Declaration on the Rights and Duties of Man, an instrument that the Convention itself mandates, must be taken into account when interpreting its own meaning.

Article 4(1) 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. No one shall be arbitrarily deprived of his life."[103] The insertion of the phrase "in general" during the drafting of the American Convention was intended to permit States to take measures to protect their interest in potential life and not to create an absolute right to life prior to birth.

In accordance with the Vienna Convention on the Law of Treaties, treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[104] The literal meaning of this text shows that the extension of Article 4(1) to the moment of conception is not categorical, as the phrase "in general" demonstrates that it is subject to exceptions. In interpreting a treaty, the treaty's context and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be considered.[105] In this regard, it must be noticed that the Inter-American Commission on Human Rights has interpreted the phrase "in general" as qualifying the protection of prenatal potential life, demonstrating that the clause signifies that the right to life and protections to life from the moment of conception are not absolute.

The literal meaning of article 4 is straightforward. There is a protection to the right to life from the moment of conception, but that protection ought to have room for exceptions. Besides the literal and ordinary meaning of the text, the Vienna Convention on the Law of Treaties also establishes as the main elements of interpretation "any subsequent practice in the application of the treaty."[106] The practice of the Inter-American Commission and the Inter-American Court of Human Rights clarifies even further what the text already makes clear, this is, that the American Convention does not grant absolute protections to life before birth.

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[103] *Id.*
[104] Vienna Convention on the Law of Treaties art. 31, para. 1, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].
[105] *Id.* art. 31, para. 3(b).
[106] *Id.*

1. *Baby Boy v. United States*

The case of *Baby Boy v. United States (Baby Boy)*, presented before the Inter-American Commission on Human Rights, addressed whether the right to life in the American Declaration and the American Convention on Human Rights applied prenatally. The petitioners in *Baby Boy* alleged that the United States Supreme Court case of *Roe v. Wade*, which legalized abortion without restriction as to reason prior to fetal viability, violated the right to life as it is enshrined in the American Declaration and in the American Convention. The Inter-American Commission utilized the Vienna Convention's norms on treaty interpretation and the *travaux préparatoires* to determine that neither the American Declaration nor the American Convention provide absolute protections of the right to life prior to birth. The Commission rejected the idea that the right to life starts at the moment of conception and affirmed that a broad legalization of abortion as the one made by the United States is completely compatible with the Inter-American system's protection of human rights, specifically including the right to life.

The petitioners in *Baby Boy* alleged that article 1 of the American Declaration on the Rights and Duties of Man (American Declaration) protects the right to life from conception. The Commission determined that the petitioner's claim that the American Declaration protected life from conception was not supported by the Declaration's legislative history.[107]

After examining the relevant portions of the *travaux préparatoires*, the Inter-American Commission ruled that "[t]he 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."[108] As such, the Commission ruled that the American Declaration was not altered by the American Convention, and that the American Convention did not enshrine an absolute right to life from the moment of conception. As a result, the Commission determined that laws permitting abortion without restriction as to reason in the first trimester and part of the second trimester were in conformity with the human rights protections in the American Convention.

The Commission further ruled that "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.'"[109] As a result of this decision, the Commission ruled that the other rights which the petitioners alleged were violated – the right to equality before the law,[110] the right to protection for mothers and children,[111] and the right to the preservation of health and to well-being[112] – had "no direct relation to the facts set forth."[113]

Therefore, the Commission determined that the phrase "in general" was inserted in order to guarantee that laws permitting abortion were permissible. It is clear therefore that during the

[107] Baby Boy v. United States, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, para. 18 (1981).
[108] *Id.* para. 30.
[109] *Id.*
[110] American Convention, *supra* note 102, art. 2.
[111] *Id*. art. 7.
[112] *Id*. art. 11.
[113] *Baby Boy*, No. 2141, para. 33.

drafting of the American Convention, States **parties did not intend to create an absolute right to life from the moment of conception**.

In several cases subsequent to the decision in *Baby Boy*, the Commission has reaffirmed **that the right to life and an absolute protection to life under the American Convention does not begin at conception**. In interpreting a treaty, the treaty's context and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be considered.[114] These subsequent cases establish that the Inter-American system's jurisprudence does not protect life from the moment of conception but, to the contrary, obligates States to prioritize women's health over any State interest in potential life.

2. *Paulina Ramírez v. Mexico*

The case of *Paulina Ramirez v. Mexico*,[115] filed before the Inter-American Commission in 2002, reasserted the precedent that the right to life does not extend unconditionally prior to birth. In this case, Paulina was denied a legally permitted abortion by state health and law enforcement officials for a pregnancy that was the result of rape. In 2006, the petitioners reached a friendly settlement with the Mexican government; a component of this settlement was the State's commitment to issue a decree regulating guidelines for access to abortion for rape victims.[116]

In accepting the friendly settlement agreement, the Commission "underscore[d] the importance of the adoption, by the member states, of criminal, civil, or administrative measures in order to ensure that incidents such as the one described in this case are duly sanctioned and do not enjoy impunity."[117] The Commission further highlighted that "women cannot fully enjoy their human rights without having a timely access to comprehensive health care services, and to information and education in this sphere."[118] The Commission's acceptance of the friendly settlement agreement and its statements concerning access to comprehensive reproductive health care clearly affirm that the right to life does not begin prior to birth, as the Commission would have rejected a proposed settlement which violated human rights, particularly those enshrined in the American Convention.

Prior to approving friendly settlements the Commission "will verify whether the victim of the alleged violation or, where appropriate, their heirs, have given their consent in the friendly settlement agreement. In all cases, the amicable settlement must be based on respect for human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments."[119]

As the Court has noted, "the Commission has jurisdiction, under the terms of the powers conferred by Articles 41 and 42 of the Convention, to declare if any State party's rule of law

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[114] Vienna Convention, *supra* note 104, art. 31.
[115] Paulina del Carmen Ramírez Jacinto v. Mexico, Case 161.02, Inter-Am. Comm'n H.R., Report No. 21/07, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007).
[116] *Id.*
[117] *Id.* para. 26.
[118] *Id.* para. 19.
[119] *Annual Report 2000: Artículo 41, Solución amistosa*, INTER-AM. COMM'N H.R., *available at* http://www.cidh.org/annualrep/2000sp/cap.7a.htm.

violates the obligations it has assumed by ratifying or acceding to it"[120] and can therefore recommend that this rule be repealed or reformed, for which "**it is sufficient that the ruling has been reached by any means to it, whether or not applied in a particular case**. This determination and recommendation may be made by the Commission directly to the State (Article 41.b) or in the reports referred to in Articles 49 and 50 of the Convention" (emphasis added).[121]

As such, the Commission has jurisdiction to determine the compatibility of a rule with the Convention regardless of how this rule has come to its attention, whether it be through their thematic reports, annual reports, or country-specific reports; this also applies in the context of individual petitions in the report such as the publication of friendly settlements, and in preliminary background reports that are sent to States containing the Commission's analysis and recommendations regarding the case.

Additionally, the Commission oversees the implementation of friendly settlement agreements in order to ensure that they are appropriately and adequately effectuated. This demonstrates the Commission's involvement in the friendly settlement process, which it views as a non-litigious way for petitioners and States to guarantee that human rights are respected.[122] Considering the Commission's involvement, it is clear that the Commission would not have approved such a friendly settlement if it violated the American Convention.

3. *Gelman v. Urugu*ay

Decided by the Inter-American Court of Human Rights in 2011, the case of *Gelman v. Uruguay*[123] highlighted the importance of the victim's pregnancy as a factor which increased the gravity of the violations against her human rights without reference to any separate impact on the rights of the fetus. In this case, María Claudia García, who was approximately 7 months pregnant, was arrested by Argentinian and Uruguayan forces along with her husband, Marcelo Ariel Gelman.[124] María Claudia García was then held in a clandestine detention center separated from her husband[125] and in solitary confinement due to her pregnancy.[126] After giving birth to and breastfeeding the baby for approximately 2 months, María Claudia García's daughter was forcibly removed from her care and María Claudia García was murdered.[127]

The Court found that María Claudia García's state of pregnancy "constituted a condition of particular vulnerability."[128] However, disregarding this state of vulnerability, María Claudia García

[120] International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, para. 38 (Dec. 9, 1994).
[121] *Id.* para. 39.
[122] *See* Amilcar Menéndez, Juan Manuel Caride, et al. (Social Security System) v. Argentina, Case 11.670, Inter-Am. Comm'n H.R., Report No. 168/11 (2011) (demonstrating the Commission's involvement in the friendly settlement process).
[123] Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).
[124] *Id.* paras. 80-81.
[125] *Id.* para. 82.
[126] *Id.* paras. 85, 97.
[127] *Id.* paras. 88-89.
[128] *Id.* para. 97.

was isolated in solitary confinement, which represented cruel and inhuman treatment,[129] for the express purpose of using "her body in order to give birth" so that her daughter could be given to another family.[130] This coercive use of a woman's body and forced compliance with official state objectives was seen by the Court as "a particular conception of women that threatens freedoms entailed in maternity, that forms the essential part of the free development of the female personhood."[131]

In contrast, the Court did not find that María Claudia García's enforced disappearance and extrajudicial confinement while pregnant resulted in any violations to the fetus. The violations to the right of personal integrity experienced by María Claudia García's daughter, María Macarena Gelman García, could only have occurred as early as the "circumstances around her birth and her first weeks of life."[132] The violations of the daughter's rights did not occur until her birth in solitary confinement, the forcible removal from her mother, and her loss of identity and that of her parents.

4. The Commission's granting of precautionary measures in favor of Amelia (Precautionary Measure 43, 2010).

Further demonstrating the Commission's affirmation that the American Convention does not provide unhindered protection of the right to life from conception, in 2010 the Commission granted precautionary measures for a woman in Nicaragua who has denied access to chemotherapy and radiation treatment for cancer based on her pregnancy.[133] The young woman, "Amelia," had been advised by medical professionals that she should urgently begin radiation or chemotherapy, yet the hospital refused to administer the treatment because it could induce an abortion. Nicaragua's domestic laws forbid abortion under all instances, even to save the life or health of the woman. The Inter-American Commission intervened, instructing the State of Nicaragua to ensure Amelia access to the proper medical treatment. As such, the Commission's instructions demonstrate that despite domestic provisions prioritizing the State's interest in protecting fetal life, the Commission requires that States adopt measures which guarantee women's rights to life and health, prioritizing these rights over the interest in protecting potential life.

5. IACHR Human Rights Reports

In 1999, in the Commission's *Third Report on the Situation of Human Rights in Colombia*,[134] the Commission "considers it necessary to refer to abortion, as it constitutes a very serious problem for Colombian women, not only from a health perspective, but also considering their rights as women, which include the rights to personal integrity and to privacy."[135] At this time, as the

[129] *Id.* para. 94.
[130] *Id.* para. 97.
[131] *Id.*
[132] *Id.* para. 118.
[133] *Precautionary measures granted by the IACHR, 2010, MC 43-10 – "Amelia", Nicaragua (February 26, 2010)*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/women/protection/precautionary.asp.
[134] INTER-AM. COMM'N H.R., THIRD REPORT ON THE SITUATION OF HUMAN RIGHTS IN COLOMBIA, OEA/Ser.L/V/II.102, doc. 9 rev. 1 (1999), *available at* http://www.cidh.oas.org/countryrep/colom99en/table%20of%20contents.htm .
[135] *Id.* ch. XII, para. 49.

Commission notes, Colombia's Criminal Code "define[d] abortion as a crime against life and personal integrity" with a penalty of one to three years imprisonment for a women who undergoes an abortion and with no exceptions for pregnancies resulting from rape.[136] The Commission's comments clearly demonstrate its concern about Colombia's restrictive abortion laws at the time, evidencing the duty to protect and guarantee women's rights even when the State's interest in protecting potential life is at stake; the Commission's concern about the abortion law would clearly not be appropriate if the American Convention protected life from conception in an absolute manner.

In its publication *Access to Justice for Women Victims of Sexual Violence in Mesoamérica*, the Commission points to the abortion bans in Nicaragua and El Salvador in its section on the lack of articulation between the health and justice sectors, emphasizing that they do not permit therapeutic abortions and force girls and women to become impregnated as a result of rape.[137] In the report *Access to Maternal Health Services from a Human Rights Perspective*, the Commission reaffirmed that abortion is both a public health and human rights issue.[138] Furthermore, in its recent report *Access to Information on Reproductive Health from a Human Rights Perspective*, the Commission highlighted a number of U.N. treaty monitoring body decisions concerning abortion as a human rights issue, including the Committee against Torture's finding that the denial of access to legal abortion can constitute cruel, inhuman, and degrading treatment.[139]

In conclusion, the constant applications of article 4 in the Inter-American human rights system established by numerous cases and reports, clarify even further the meaning and scope of the right to life, instituting that: i) It is not vested prior to birth; ii) the protection of the interest of life cannot be absolute and must give room to exceptions; and iii) States are obligated to take measures in order to respect, protect, and fulfill human rights, without turning pregnancies or fertilization into a condition that allows for the suppression in the enjoyment or exercise of the rights and freedoms recognized in the American Convention, *vis à vis* article 29(a) of this instrument.

B. The *Travaux Préparatoires* of the American Convention evidence that the American Convention does not provide absolute protection to life prior to birth.

In accordance with the Vienna Convention, the *travaux préparatoires* are supplementary means of interpretation that may be utilized to interpret a treaty if the meaning of the treaty is

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[136] *Id.* ch. XII, para. 50.

[137] INTER-AM. COMM'N H.R., ACCESS TO JUSTICE FOR WOMEN VICTIMS OF SEXUAL VIOLENCE IN MESOAMERICA, OEA/Ser.L/V/II., doc. 63, para. 242 (2011), *available at* http://www.oas.org/en/iachr/women/docs/pdf/WOMEN%20MESOAMERICA%20ENG.pdf.

[138] INTER-AM. COMM'N H.R., ACCESS TO MATERNAL HEALTH SERVICES FROM A HUMAN RIGHTS PERSPECTIVE, OEA/Ser.L/V/II., doc. 69, para. 42 (2010), *available at* http://cidh.org/women/SaludMaterna10Eng/MaternalHealth2010.pdf [hereinafter INTER-AM. COMM'N H.R., ACCESS TO MATERNAL HEALTH SERVICES FROM A HUMAN RIGHTS PERSPECTIVE].

[139] INTER-AM. COMM'N H.R., ACCESS TO INFORMATION ON REPRODUCTIVE HEALTH FROM A HUMAN RIGHTS PERSPECTIVE, OEA/Ser.L/V/II., doc. 61, para. 84, *available at* http://www.oas.org/en/iachr/women/docs/pdf/ACCESS%20TO%20INFORMATION%20WOMEN.pdf.

ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[140] Use of the *travaux préparatoires* is auxiliary to the literal meaning, which must be the first element to interpret a treaty,[141] along with contextual significance and any subsequent treaty interpretations and applications. Indeed, The Inter-American Court has noted that "in the case of human rights treaties… objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;' rather 'their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States."[142]

Even though the literal meaning as well as the subsequent interpretations and applications of article 4 of the Convention are very clear in that the Convention does not confer absolute protections to life prior to birth, a look at the *travaux préparatoires* (a supplementary mean of interpretation) confirms this standard. In the *travaux préparatoires* of the American Convention, it is clear that the intention was not to create a categorical protection of the right to life before birth. Instead, the *travaux préparatoires* demonstrate that in drafting the American Convention, a guiding principle was the coexistence of the United Nations international human rights treaties and a regional agreement. To the authors of the American Convention, it was clear that a definition of the right to life from the moment of conception that did not contemplate exceptions would be in contradiction with article 6 of the ICCPR.[143]

The history of the negotiations leading up to the American Convention demonstrate that there was ample consideration of the terminology utilized to define the right to life, and that various States advocated on behalf of the right to life from conception while others advocated that the right to life in the American Convention could not begin from the moment of conception. The *travaux préparatoires* evidence that the term "in general" was inserted as an agreement amongst the States parties, and therefore is not designed to provide absolute protection of the right to life from the moment of conception. The following will set forth the negotiations' process in chronological order.

While Article 4(1) of the Convention protects the right to life "in general, from the moment of conception,"[144] the phrase "in general" was adopted to ensure the Convention was in accordance with laws permitting abortion in member States.[145]

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[140] Vienna Convention, *supra* note 104, art. 32.
[141] *Id.* art. 31, para. 1.
[142] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, para. 50 (Sept. 8, 1983).
[143] *See* Carlos A. Dunshee de Abranches, *Estudio comparativo entre los Pactos de las Naciones Unidas sobre derechos civiles, politicos, economicos, sociales y culturales y lo Proyectos de Convencion Interamericana sobre Derechos Humanos*, INTER-AM. YEARBOOK ON HUMAN RIGHTS 18 (1968).
[144] American Convention, *supra* note 102, art. 4, para. 1.
[145] Baby Boy v. United States, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, paras. 28-31 (1981).

All articles of the Convention were first drafted by a Commission that then had to submit its language selected to State parties for commentary.[146] Article 4 was drafted in a series of different forms before its content was agreed upon and finalized. While at one point it stated that the right to life should be protected "by law from the moment of conception,"[147] this draft was changed "to accommodate the views that insisted on the concept 'from the moment of conception'… based on the legislation of American States that permitted abortion, *inter alia*, to save the mother's life, and in case of rape, the IACHR, redrafting article 2 (the right to life), decided, by majority vote, to introduce the words 'in general.'"[148]

As such, the majority of the Commission determined the term "in general" should be inserted. It was in this form that all parties who signed onto the American Convention were clearly aware of the reason why it was ultimately drafted in its current form, and were in agreement with this language, and the specific protections it contains.

During the negotiations, it was proposed that the phrase "in general, from the moment of conception" be deleted in its entirety due to the abortion laws in place in the majority of American States,[149] which permitted abortion in certain instances. The *travaux préparatoires* indicates that, in response to this suggestion, "The Commission believed that for reasons of principle it was fundamental to state the provision on the protection of the right to life in the form recommended to the Council of the OAS in its Opinion."[150]

The text in the *travaux préparatoires* only provides this one sentence concerning the clause's inclusion and the "reasons of principle" which are referred to may have concerned respecting the draft which was submitted to the Commission, amongst numerous other possible considerations. The various States' comments concerning the text of this draft, as will be elaborated upon below, clearly demonstrate that at this point, there was no clear consensus among States parties as to when the right to life begins and as to how the right to life should be enshrined in the American Convention.

After the Commission prepared the above described, written statements were submitted by the State parties. The *travaux préparatoires* contain these written statements concerning the draft American Convention on Human Rights.[151] These comments demonstrate the diverse

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[146] Commission I (in Spanish *Comisión I*), *"Materia de la Protección,"* was led by delegates from México, Venezuela and Ecuador. During the deliberations of this Commission, delegates from El Salvador, Colombia, Trinidad y Tobago, Estados Unidos, Honduras, Paraguay, Panamá, Argentina, Brasil, Chile, Uruguay, Guatemala, Nicaragua, Perú, Venezuela, and Costa Rica were present. *Conferencia Especializada Interamericana sobre Derechos Humanos, Actas y Documentos*, San José, Costa Rica, Nov. 7-22, 1969, at 133-134, OEA/Ser.K/XVI/1.2 (1969) [hereinafter *Actas y Documentos*].

[147] *Baby Boy*, No. 2141, para. 22 (*citing* Organization of American States, INTER-AM. YEARBOOK ON HUMAN RIGHTS, 1968, 67, 273 (1973)).

[148] *Id.* para. 25.

[149] *Id.* para. 26; *see also* INTER-AM. COMM'N H.R., REPORT ON THE WORK ACCOMPLISHED DURING ITS NINETEENTH SESSION (SPECIAL): 1 TO 11 JULY 1968, OEA/Ser.L/V/II.19, doc. 51, at 19 (1969), *available at* http://www.wcl.american.edu/humright/digest/documents/nineteenthsession.pdf.

[150] *Id.*

[151] At this point, the article in the draft concerning the right to life read almost exactly as the version which was adopted, stating: "1. Toda persona tiene derecho a que se respete su vida. Este derecho estará protegido por la ley y,

perspectives concerning how the right to life should be enshrined in the American Convention. The Colombian delegate suggested this phrase "the right to life is inherent in the human person" ("el derecho a la vida es inherente a la persona humana") be added to this clause,[152] to which El Salvador agreed.[153] Uruguay and Panama expressed disagreement at this suggestion, stating that is was unnecessary.[154] Only the delegate of Ecuador suggested removing "in general," which was then seconded by the delegate of El Salvador.[155]

The United States and the Dominican Republic each independently suggested that the language be changed to be in accordance with article 6 of the ICCPR,[156] which states, "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."[157] As noted previously, the right to life in the ICCPR does not extend prior to birth, and as such the statements by the United States and the Dominican Republic can be understood as indicative of the States' intention not to extend the right to life prior to birth. The Brazilian delegate also recommended deleting the phrase "in general, from the moment of conception" entirely.[158]

Despite the varied opinions concerning how the right to life should be enshrined in the American Convention, the text in the draft submitted by the IACHR was adopted and approved by the Council of the OAS; this text then became the current text of article 4(1) of the American Convention.[159]

It is clear that the addition of the phrase "in general" was not designed to enshrine an absolute right to life from the moment of conception. Furthermore "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.'"[160] This also demonstrates the irrelevance of articles which have hypothesized the meaning of article 4(1) if the term "in general" had not been inserted.[161] This is in line with the record in the *travaux préparatoires*, which demonstrates that during the drafting of the American Convention, State parties did not intend to create an absolute right to life from the moment of conception.

Furthermore, a primary consideration during the drafting of the American Convention was its coherence with United Nations International Human Rights Conventions and norms. The comity

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en general, a partir del momento de la concepción. Nadie podrá ser privado de la vida arbitrariamente." *See Actas y Documentos*, *supra* note 146, at 14.

[152] *Id.* at 159.

[153] *Id.* at 160.

[154] *Id.*

[155] *Id.* at 159.

[156] *Id.* at 104, 159.

[157] ICCPR, *supra* note 10, art. 6.

[158] *Actas y Documentos*, *supra* note 146, at 141.

[159] Baby Boy v. United States, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, para. 22 (1981).

[160] *Id.*

[161] *See* Ligia M. De Jesus, *Revisiting Baby Boy V. United States: Why the IACHR Resolution Did Not Effectively Undermine the Inter-American System on Human Rights' Protection of the Right to Life from Conception*, 23 FLORIDA JOURNAL OF INTERNATIONAL LAW 221-276 (2011).

between the human rights frameworks would be fundamentally disrupted by an interpretation of article 4 of the Convention, as granting a right to life from the moment of fertilization.

The drafting history of the Inter-American Convention on Human Rights and the negotiations preceding the creation of the Inter-American Court demonstrate a preoccupation among the parties involved concerning how the Inter-American system would correspond to and interact with the international human rights treaties and system within the United Nations. Conflicting jurisprudence between these two parallel systems would result in grave consequences concerning international human rights norms and States' abilities to uphold their international legal commitments under the multiple human rights treaties to which they may be States parties.

In order to prevent such a serious conflict, it is paramount that, while respecting the individuality of regional human rights systems, the jurisprudence in these systems does not directly conflict. Extending the right to life to the moment of conception under the American Convention would have grave results for these systems' ability to act in comity; permitting States to recognize the right to life prior to birth with undue regard for the rights and interests of those of us who have been born would seriously undermine these systems' complementary functionality.

Throughout the *travaux préparatoires*, this interest in coherence with other human rights treaties is emphasized. The *travaux préparatoires* indicate that the Secretary General "emphasized the importance of having… [the Commission] include consideration of the draft Inter-American Convention on Human Rights, from the standpoint of its future coordination with the covenants on human rights adopted by the United Nations General Assembly."[162] During the negotiations of the American Convention's text, the Commission instructed the Secretariat to "make a comparative study of the Draft Convention on Human Rights prepared by the Inter-American Council of Jurists, the international covenants on human rights of the United Nations and the change proposed by the Inter-American Commission on Human Rights to the draft convention."[163]

The following year, as a result of a study on the need for and viability of two human rights systems, the Commission determined that the forthcoming Inter-American convention on human rights "should be autonomous rather than complementary to the United Nations covenants, although it should indeed be coordinated with those covenants. To this end, the substantive part of the Convention could coincide in certain respects with the United Nations Covenants on Civil and Political Rights with such additions as are necessary and it could, in addition, include other rights that are not contemplated in that covenant, but the international protection of which is demanded because of conditions peculiar to the Americas."[164]

The Commission further noted that in regards to the economic, social and cultural rights, the definitions in the relevant United Nations covenants had already essentially been incorporated

[162] INTER-AM. COMM'N H.R., REPORT ON THE WORK ACCOMPLISHED DURING ITS SEVENTEENTH SESSION: OCT. 9 THROUGH 20, 1967, OEA/Ser.L/V/11.18, doc. 25, para. 4 (1968) *available at* http://www.wcl.american.edu/humright/digest/17.cfm.
[163] *Id.* para. 51.
[164] INTER-AM. COMM'N H.R., REPORT ON THE WORK ACCOMPLISHED DURING ITS EIGHTEENTH SESSION: APR.1 THROUGH 17, 1968, OEA/Ser.L/V/II.19, doc. 30, at 34 –35 (1968), *available at* http://www.wcl.american.edu/humright/digest/documents/eighteenthsession.pdf.

into the Protocol of Amendment to the Charter of the OAS, making their reproduction in the treaty itself unnecessary.[165] This further demonstrates the Commission's consideration concerning the compatibility of the various human rights treaty frameworks and ensuring their cohesiveness.

During the final negotiations concerning the American Convention's individual articles, it was repeatedly recommended that various articles be altered so that they reflect the ICCPR, including the right to life,[166] which would have made the text "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."[167] This further demonstrates the individual States' interest in ensuring that the rights enshrined in the American Convention correspond to and are compatible with the United Nations human rights framework.

The preceding analysis of the *travaux préparatoires* of article 4 of the American Convention indicate that the article was clearly not drafted with the intention of enshrining the right to life prior to birth. Additionally, the negotiations leading up to the adoption of the American Convention demonstrate that article 4 was drafted in such a way that carefully considered the right to life, and intentionally rejected absolute protection of the right to life prior to birth.

C. The American Declaration on the Rights and Duties of Man does not confer a right to life prior to birth.

The American Declaration is a central instrument in the Inter-American human rights system. Both the Court and the Commission have acknowledged that it constitutes *jus cogens*,[168] and article 29(d) of the Convention mandates that its content is not interpreted in a way that excludes or limits the effect of the American Declaration. Therefore, a systematic reading of the Inter-American human rights system would be incomplete without looking into the American Declaration.

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[165] *Id*.

[166] The Dominican Republic recommended that the American Convention should employ the right to life as it is drafted in the ICCPR (*Actas y Documentos*, *supra* note 146, at 104); Argentina suggested that the language on nationality be altered in order to replicate that of the ICCPR (*Actas y Documentos*, *supra* note 146, at 47); Chile also pointed out that a number of the clauses, including the rights to family and to private property, were different from those in the UN human rights framework (*Actas y Documentos*, *supra* note 146, at 40) and recommended using the language of the ICCPR in lieu of other language (*Actas y Documentos*, *supra* note 146, para. 13).

[167] ICCPR, *supra* note 10, art. 6, para. 1.

[168] Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989) (stating that the American Declaration creates erga omnes obligations); Oscar Vila-Masot v. Venezuela, Case 11.216, Inter-Am. Comm'n H.R., Report No. 87/98, OEA/Ser.L/V/II.95 Doc. 7 rev. para. 21 (1998) ("The Commission deems itself competent to enforce all rules relating to the inter-American human rights system, of which the Declaration is a part, with the status of a mandatory rule of *jus cogens* or international customary law").

Article 1 of the American Declaration states "every human being has the right to life, liberty, and security of his person."[169] Drafters of the American Declaration specifically rejected a proposal to adopt language which stated "Every person has the right to life. This right extends to the right to life from the moment of conception."[170]

The draft of the American Declaration underwent numerous revisions before being adopted in its final form. One version explicitly included that the "right to life extends to the moment of conception."[171] This version was rejected and altered to read "Every human being has the right to life, liberty, security and integrity of this person."[172] There were significant alterations of this article as a compromise between a number of States due to the conflict existing between their domestic laws and the provisions in the draft declaration.[173]

It has been noted by the Inter-American Commission that "in connection with the right to life, the definition given in the Juridical Committee's draft was incompatible with the laws governing the death penalty and abortion in the majority of American States. In effect, the acceptance of this absolute concept – the right to life from the moment of conception – would imply the obligation to derogate the articles of the Penal Codes in force in 1948 in many countries because such articles excluded the penal sanctions: A – when necessary to save the life of the mother; B- to interrupt the pregnancy of the victim of a rape; C – to protect the honor of an honest woman; D – to prevent the transmission to the fetus of a hereditary on [*sic*] contagious disease; E – for economic reasons (angustia economica)."[174]

A number of American States, including Argentina, Brazil, Costa Rica, Cuba, Mexico, Ecuador, Nicaragua, Paraguay, Peru, Uruguay, and the United States all had laws in force which permitted abortion in certain instances when the American Declaration was being drafted and signed;[175] as such, protection of the right to life from the moment of conception was not conceived of nor embraced by the States parties to the American Declaration. Conversely, protection of the right to life from conception was specifically addressed during the drafting process, resulting in the deliberate exclusion of the right to life from conception in the American Declaration.

The preceding analysis of the scope of the protection established by article 4 of the American Convention determines that the American Convention on Human Rights does not provide absolute protection of life prior to birth. Such conclusion is reached as: i) the literal meaning of article 4 is clear about establishing exceptions; ii) the applications of article 4 in the Inter-American human rights system established by numerous cases and reports institute that: a) the

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[169] American Declaration of the Rights and Duties of Man, art. 1, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, at 17, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992).

[170] Baby Boy v. United States, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, para. 18(b) (1981) (*citing Novena Conferencia Internacional Americana, Actas y Documentos Vol. V*, Bogotá, Colombia, 1948, at 449 (1953)).

[171] This version read "Every person has a right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." *Id.*

[172] *Baby Boy*, No. 2141, para. 18(c).

[173] *Id.* para. 18(d).

[174] *Id.* para. 18(e).

[175] *Id.* para. 18(f).

right to life is not vested prior to birth; b) the protection of the interest of life cannot be absolute and must give room to exceptions; and c) States are obligated to take measures in order to respect, protect and fulfill human rights, without turning pregnancies or fertilization into a condition that allows for the suppression in the enjoyment or exercise of the rights and freedoms recognized in the American Convention, vis à vis article 29(a) of this instrument; iii) the travaux préparatoires of Article 4 of the American Convention indicate that the Article as such was clearly not drafted with the intention of enshrining the right to life prior to birth; and finally iv) the American Declaration deliberately excluded the right to life from conception.

The previous understanding of the right to life of the American Convention and the Inter-American human rights system as a whole are in tune with the universal and the European human rights system in its rejection to grant a right to life before birth and make absolute protections of developing human life, in a way in which any balancing or proportionality effort is trumped, and in which a person's human rights and fundamental freedoms are suppressed.

IV. LEGAL FRAMEWORKS WORLDWIDE, INCLUDING IN COSTA RICA, HAVE HISTORICALLY RECOGNIZED THE DIFFERENT DEVELOPMENTAL STAGES OF LIFE IN DETERMINING APPROPRIATE PROTECTIONS DURING THE PRENATAL PERIOD.

The development of human life relies upon a number of various factors in order to successfully result in a live birth. While reproduction inherently relies upon the fertilization of a woman's egg by a man's sperm, with the advent of in vitro fertilization, this process can now occur outside of a woman's womb. Yet while a pre-embryo can be created outside a woman's body, it is critical for that pre-embryo's development that it be transferred into a woman's womb within a short period of time – generally between two to three days. Scientifically, it has been shown that if a blastocyte is permitted to continue developing outside the womb after that short time frame, it will not develop nor will it be viable if transferred into the woman's uterus.[176] As such, the woman's body remains a critical factor in the development of human life, as there are no other possible mechanisms for the pre-embryo to continue developing into a fetus, and further on, into a human being. It is within the woman's uterus and through the woman's biological functions that the developing human life receives nutrients and oxygen and is protected from bacteria and infections. As such, the developing life must be viewed in tandem with its inherent dependency upon the woman's body and health, as they are inextricably linked.

The Supreme Court of Nepal has noted this paradox, stating 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."[177]

[176] Peter Singer and Karen Dawson, *IVF Technology and the Argument from Potential*, 17 PHILOSOPHY AND PUBLIC AFFAIRS 2, 89 (1988).

[177] Lakshmi v. Government of Nepal, Writ No. 0757, 2067 (2007) (Supreme Court of Nepal), at 2 (unofficial translation on file with the Center for Reproductive Rights).

Human life has different stages, starting with the cells forming a zygote − which before implantation does not constitute a pregnancy[178] − which then develops into an embryo. Following the second month of gestation, after the embryo has successfully implanted in the walls of the uterus and has begun developing, the fetal stage begins,[179] which requires months of complete dependence on the pregnant woman's body in order to develop the cognitive, motor and functional abilities required for an independent existence as a human being.[180]

This biological reality is undeniable, and laws must recognize and regulate these various stages of development, as well as the fact that human beings only come into existence because a woman decided to spend nine months gestating the pregnancy. Although in very different ways, almost all legal systems worldwide recognize this reality and assume different ways of protecting the State's interest in the viability of prenatal life, without actually equating this interest with the obligation to protect prenatal life as though it were a live-born human being. Adopting the former framework upholds and reinforces the human rights of women.

The prioritization of protection for women's fundamental rights over the protection of developing potential life is demonstrated by the legalization of abortion without restriction as to reason in 58 countries worldwide;[181] this shows the understanding that the State's interest in granting certain types of protections for unborn life could result in nullifying the rights of pregnant women to rule over their own bodies, develop their life projects, and decide on the spacing and number of children they want to bear.[182] It also demonstrates the requisite respect that States must afford women's human rights to privacy and autonomy. Within this group of 58 States, there are different regulations regarding the right to abortion, many linked to differences in the gestational limit within which an abortion is permitted. In these countries, women's freedom to decide on their reproductive capacity is limited, but not severed, based on the advancing level of development and independence throughout the gestational period.[183] In addition to this group, there are 58 other countries where voluntary termination of pregnancy is legal when the life or physical or mental health of the pregnant woman is in danger.[184] In addition to these grounds for terminating a pregnancy, 15 other countries permit women to elect to end a pregnancy due to socioeconomic reasons that make it difficult for the woman to have a

[178] *See* CUNNINGHAM, BMA, ET AL., ABORTION TIME LIMITS: A BRIEFING PAPER FROM THE BMA (2005); *see also* WORLD HEALTH ORGANIZATION ET AL., FACT SHEET: LEVONORGESTREL FOR EMERGENCY CONTRACEPTION (2005), *available at* http://www.cecinfo.org/what/pdf/WHO_EC_factsheet_English.pdf.
[179] *See*, *inter alia*, *Definition of Embryo*, MEDICINENET.COM, http://www.medterms.com/script/main/art.asp?articlekey=3225; *Definition of Fetus*, MEDICINENET.COM, http://www.medterms.com/script/main/art.asp?articlekey=3424.
[180] *See*, *inter alia*, *Definition of Pregnancy*, MEDICINENET.COM, http://www.medterms.com/script/main/art.asp?articlekey=11893.
[181] *The World's Abortion Laws 2011*, *Questions*, CENTER FOR REPRODUCTIVE RIGHTS (2011), *available at* http://worldabortionlaws.com/questions.html [hereinafter *The World's Abortion Laws 2011: Questions*].
[182] CEDAW Committee, *Gen. Recommendation No.* 24, *supra* note 65, para. 31(c); CEDAW, *supra* note 20, arts. 2, 3, 5, 12, 16.
[183] *The World's Abortion Laws 2011: Questions*, *supra* note 181.
[184] *Id.*

child.[185] Finally, another 68 countries only permit abortion if the pregnant woman's life is in danger.[186]

In Latin America and the Caribbean, only five States ban abortion in all circumstances. This starkly contrasts from the other 29 countries wherein abortion is legal under certain circumstances. Eighty-eight percent of countries in Latin America permit abortion in order to save the life of the pregnant woman.[187] Furthermore, 58% of States permit abortion to preserve the physical health of the woman, while 52% permit abortion to preserve the woman's mental health.[188] Additionally, 36% of States in Latin America permit abortion in instances of rape or incest,[189] while 24% permit abortion in instances of fetal impairment.[190] Finally 18% of Latin American States permit abortion for economic reasons, while 9% permit abortion without restriction as to reason.[191]

A comparative examination of laws and jurisprudence concerning States' interest in protecting gestational life demonstrate that generally, States' interest during the prenatal period increases as the pregnancy advances. For example, most States that permit abortion without restriction as to reason limit the point during the pregnancy wherein the woman can obtain an abortion. Commonly, the point in which such laws begin to restrict access to abortion is around the twelfth week of the pregnancy.[192]

This progression of States' interest in potential life and the legal conflict that arises between the protection of women's fundamental rights and abstract protections of the value of life during the prenatal period has been recognized in high court decisions worldwide. Such decisions clearly distinguish between human beings as rights holders and the life that exists prior to birth. In the United States, in the case of *Roe v. Wade*, the Supreme Court set forth a framework for understanding the extent of the State's interest during the different stages of a pregnancy.[193] In accordance with *Roe v. Wade*, the State's interest is minimal during the first trimester of a pregnancy, and the State may not interfere with a woman's decision concerning the progression of the pregnancy during this period.[194] Following the end of the first trimester, the State may impose certain restrictions, but these restrictions must always permit for termination of the

[185] In practice, these abortion laws are usually interpreted liberally to permit women to obtain abortions for factors such as their age, economic status, or marital status. *Id.*
[186] *Id.*
[187] WORLD HEALTH ORGANIZATION, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS, SECOND EDITION 25 (2012).
[188] *Id.*
[189] *Id.*
[190] *Id.* Subsequent to this publication, Brazil legalized abortion for instances of fetal impairment, resulting in the percentage increasing from 21%, as reported in the publication, to 24%.
[191] *Id.*
[192] For an overview of States' laws on abortion, *see The World's Abortion Laws 2011*, *supra* note 36.
[193] Roe v. Wade, 410 U.S. 113 (1973). This description of *Roe v. Wade* is utilized to demonstrate the balancing of the State's interests and women's rights, thought it should be noted that *Roe v. Wade* has been amended by the decision in *Planned Parenthood of Se. Pa. v. Casey* (505 U.S. 833 (1992)), which retains the balancing of women's rights and interests by permitting abortions without restriction as to reason prior to fetal viability and through the duration of pregnancy if the pregnancy threatens the woman's life or health.
[194] *Id.* at 163.

pregnancy if the life of the woman is at risk.[195] The Court noted that the decision "leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests."[196] This demonstrates that even though the State's interest in potential life may increase at the pregnancy progresses, the women's life must always take priority over any interest in potential life.

The Colombian Constitutional Court also emphasized the different stages of a pregnancy and the State's interest in potential life in the case which legalized abortion in certain circumstances in Colombia. The Colombian Constitutional Court emphasized that "life and the right to life are different phenomena. Human life takes place in stages and takes different forms, which in turn have different legal protection. The law, if it is true, which provides protection to the unborn child, does not grant it in the same degree and intensity as that of human person."[197] This established that the absolute criminalization of abortion was unconstitutional, basing its decision, *inter alia*, on the distinction of life as a relevant constitutional value and the right to life as a subjective right of a fundamental nature. This distinguished the prenatal stages of life as being a beneficiary of increasing protections, and the women as being entitled to life as a fundamental right.[198]

The Supreme Court of Mexico, in creating jurisprudence in accordance with the Political Constitution of the United Mexican States, considered the decriminalization of abortion within the first three months, in the Federal District of Mexico, to be a measure "appropriate to safeguard the rights of women."[199] Implicit in these decisions is the fact that the highest interpreters of different legal systems accept and apply in the legal context the biological reality that separates a human being from the various prenatal stages of human life.

Very recently, Brazil's highest court determined that abortion must also be legal for instances of anencephaly, wherein the fetus is unable to survive upon delivery outside of the womb.[200] In its decision, the Brazilian Supreme Court noted that the rights to dignity, liberty, autonomy, and health required that the woman be permitted to induce labor instead of carrying a nonviable fetus to term. Furthermore, the Court noted that since the fetus would not be able to survive, there was no conflict of fundamental rights between the woman and the fetus. Therefore, the Court determined that the woman may not be forced to carry the pregnancy to term.

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[195] *Id.* at 163-164.
[196] *Id.* at 165.
[197] Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/2006 (Colom.). ("Conforme a lo expuesto, la vida y el derecho a la vida son fenómenos diferen-tes. La vida humana transcurre en distintas etapas y se manifiesta de diferentes formas, las que a su vez tienen una protección jurídica distinta. El ordenamiento jurídico, si bien es verdad, que otorga protección al nasciturus, no la otorga en el mismo grado e intensidad que a la persona humana.")
[198] *Id.*
[199] Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007, *relativas al* Decreto de Reformas que Despenalizan el Aborto en el D.F. antes de la semana 12 de gestación, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Página 174 (Mex.).
[200] S.T.F.J., Argüição de Descumprimento de Preceito Fundamental 54, Relator: Min. Marco Aurélio, 12.04.2012 (Braz.).

The Argentina Supreme Court also recently clarified its laws on abortion, determining that abortion is legal in all instances of rape.[201] The Court reflected upon the American Declaration, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, finding that none of these documents support a narrow interpretation of abortion restrictions.[202] Furthermore, in concluding that all victims of rape must have the right to terminate a pregnancy resulting from rape, the Court determined that this right implicates the rights to equality, nondiscrimination, and dignity.[203]

These comparative legal trends demonstrate that the State's interest in prenatal life develops as the pregnancy progresses. In this instance, Costa Rica is asserting a strong State interest at a point when a pregnancy has not even been initiated and is extensively removed from the possibility of developing into a human being, which is only possible if a woman disposes her body so this biological entity is implanted and the resulting pregnancy successfully continues and develops inside a woman's body for a period of approximately nine months. As such, Costa Rica is diverging in an extreme manner from the principle of a progressively developing State interest in fetal development. The State has failed to adopt a position that adequately considers women's fundamental human rights, while granting complete protection for potential life prior at an impermissibly early stage in human development.

Criminal law is also grounded in the principle of proportionality. Even in those jurisdictions that penalize acts which interrupt a pregnancy through the crime of abortion, they are never punished with the same severity with which crimes such as infanticide or homicide are punished, with the latter two (infanticide and homicide) being punished in a far more severe manner. The reason for this distinction is that the legal offenses in these three scenarios are not identical, although the value which is being defended in all three is the protection of life. As such, in differentiating between prenatal stages of life and those stages wherein there is a human being, there is great significance in the different legal systems' consideration of what constitutes a legal offense, resulting in different degrees of reproach for different acts in a proportional manner.

The aforementioned legal standards as well as the principle of proportionality, wherein the rights of developing life are not the same as the rights of people, are already in force in Costa Rican law, in both its law on abortion and its penal code. These laws demonstrate both how Costa Rica's protection of an embryo which has not yet been implanted into the womb starkly contrasts with both general legal trends and Costa Rica's own codified laws. Costa Rica has already developed a framework wherein a balance has been struck between the State's interest in developing life and the woman's fundamental human rights. In the balance that it has created, it has established that at any point prior to birth, the development of an embryo and a fetus can be interrupted if it conflicts with the enjoyment of women's fundamental rights to life and health. Under Costa Rican law, abortion is permissible at any point during the pregnancy if the woman's life or health is in danger.[204]

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[201] Corte Suprema de Justicia de la Nación, [CSJN] [National Supreme Court of Justica], 13/03/2012, "F, A L s/ Medida Autosatisfactiva", Centro de Información Judicial (CIJ) (2012-Expediente Letra "F", N° 259, Libro XLVI) (Arg.).

[202] *Id.* paras. 9-13.

[203] *Id.* paras. 15(2)-15(4).

[204] CÓDIGO PENAL (Criminal Code), Law No. 4573, art. 121 (1970) (Costa Rica). ("No es punible el aborto practicado con consentimiento de la mujer por un médico o por una obstétrica autorizada, cuando no hubiere sido

Costa Rica's penal code recognizes the increased protections for potential life as the gestational period progresses. The Costa Rica penal code criminalizes abortion in certain instances, and in this law the punishment for the person performing an abortion without the woman's consent is generally three to ten years, though if the fetus has not yet reached six months, the penalty is two to eight years.[205] When the person has the woman's permission to perform the abortion, the punishment is generally one to three years imprisonment, but it is only six months to two years if the gestational period has not yet reached six months.[206] Finally, the penalty for the woman who procures the abortion is generally one to three years, yet it is only six months to two years if the gestational period has not yet reached six months.[207] This framework is in accordance with comparative legal trend wherein the State's interest increases as the pregnancy progresses. As such, it is clear that the State's interest in the potential life of an embryo is extremely limited and certainly does not justify infringing upon women's human rights.

The Costa Rican Supreme Court of Justice stated that "the embryo is subject to the law and not a mere object, and should be protected **equally** with any other human being. Only the opposite view would permit it to be frozen, sold, subject to experimentation, and even thrown away."[208] Yet this is clearly not how legislation in Costa Rica portrays rights and interests prior to birth. On March 17, 2004, Costa Rica´s Supreme Court, through its Sala IV which also issued the IVF decision, decided a case in which it was asked to ban all exceptions for the criminalization of abortion, as well as the differentiated punishments existent in the penal code for cases of abortion, based on the degree of advancement of the gestation, as well as the article in the civil code that distinguishes between a person and a fetus or nasciturus, granting with legal personhood only the person. The basis in which all of these provisions were asked to be declared unconstitutional was the own Court's interpretation of the right to life of zygotes, established in the 2306 decision issued in 2000, in which it banned IVF.[209] The Court had established in 2000 that all forms of human life were inviolable, and that any exception or limitation between the stages of life would destroy the content of the right to life. Therefore, the plaintiff argued, exceptions and distinctions could not be made in the realm of abortion, and the civil code should recognize full personhood to the embryo from the moment of conception,[210] because otherwise a discriminatory treatment was being given to the embryo in the area of abortion as opposed to the treatment received in regard to IVF.

The Court refused to declare any of the articles from the penal or civil code which were challenged to be unconstitutional. In the Court's own words: "*[F]irst of all, the [Constitutional] Division recognizes that even when in both cases there is a human being, it is also true that they are in stages of development clearly differentiated … [S]econd of all, in the case of the unborn*

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posible la intervención del primero, si se ha hecho con el fin de evitar un peligro para la vida o la salud de la madre y éste no ha podido ser evitado por otros medios.")

[205] *Id.* art. 118.

[206] *Id.*

[207] *Id.* art. 119.

[208] C.S.J., Expediente No. 95-001734-0007-CO, Voto No. 2306-00, *supra* note 1 ("el embrión es sujeto de derecho y no un mero objeto, debe ser protegido igual que cualquier otro ser humano. Solamente la tesis contraria permitiría admitir que sea congelado, vendido, sometido a experimentación e incluso, desechado") (emphasis added).

[209] C.S.J., Expediente No. 02-007331-0007-CO, Voto No. 2792-04, *supra* note 2.

[210] *Id.* secs. I-III.

there is a case of a particular dependent relationship to a second person, that entails that during the first stages of development it could not survive any other way and during the last stages of development before birth, ...[T]hird of all, it must be added that in favor of the legitimacy of differentiating in the intensity of the punishments, the fact that it responds, as it was indicated, to a concrete perception, experience and emotions existent not only in our society but, in all societies that are part of our cultural environment, which can be confirmed after a simple revision of the form in which other countries in Latin America and Europe have legislated on the same issue, choosing every time for a decreasing the State's punishment when is the unborn's life that was harmed".[211]

In regard to the constitutionality of therapeutic abortion to protect women's health and life, the Court explained that its decision to not declare unconstitutional the legalization of therapeutic abortion was "*consistent with the doctrine and comparative law on the subject, it should be noted that when one speaks of danger to the health of the mother, it is a grave and serious threat that although may not directly pose a risk to her life… presents a danger of injury to her dignity as a human being of such magnitude that, by itself, society is in no position to demand that she submits to it, under the threat of penalization… [therefore] it is not at all erroneous and even less unconstitutional that the legislature refrained from sanctioning the preference it made for women´s health*".[212]

In 2000, the Supreme Court completely disregarded the right to health of unfertile couples, as well as their fundamental rights to privacy, equality, and the right to form a family because of a superior protection of a right to life of embryos -with no attempt at proportionality or balance whatsoever. However, four years later it adopted a completely different position examining the balance made by the legislator in regard to therapeutic abortions, as well as in regard to providing differentiating reproaches and therefore protections to the different stages of human life when criminalizing abortion. If the Supreme Court in Costa Rica would have been consistent

[211] *Id.* sec. VI. ("En primer lugar, reconoce la Sala que aunque en los dos casos se trata de seres humanos, es también verdad que se encuentran en etapas de desarrollo claramente diferenciadas, no solo desde el punto de vista médico, sino desde una perspectiva social, de modo que existe una base objetiva y perceptible para diferenciar. En segundo lugar, se presenta en el caso de la persona no nacida una particular relación de absoluta dependencia con una segunda persona, la cual incluso se traduce en que en los primeros estadios de su desarrollo no podría incluso sobrevivir de otra forma y en los últimos estadios del desarrollo antes de nacer, esa relación de dependencia es, si no vital, por lo menos considerada la ideal y apropiada; esto acarrea una nueva circunstancia diferenciadora con otras situaciones que puede y debe ser válidamente tomada en consideración (de una u otra manera) en el tanto en que se hacen presentes y deben tenerse en cuenta, los derechos fundamentales de la madre, cosa que no ocurre en el caso de los homicidios en donde falta esa específica relación con otras personas y sus derechos fundamentales. En tercer lugar, cabe agregar a favor de la validez de la diferenciación en la intensidad de la sanción, el hecho de que ella responde, como se indicó, a una concreta percepción, vivencia y sentimiento existente no solo de nuestra sociedad sino, en todas aquellas que componen nuestro entorno cultural, como puede apreciarse de la simple revisión de la forma en que otros países latinoamericanos y europeos han legislado sobre el punto, siempre optando por una disminución en la reacción penal del Estado ante la lesión del derecho a la vida del no nacido.")

[212] *Id.* sec. VII. (". . . en consonancia con la doctrina y legislación comparada sobre el tema, debe anotarse que cuando se habla de un peligro para la salud de la madre, se trata de una amenaza grave y seria que aún cuando no pone directamente en riesgo su vida (caso en que sería de aplicación el otro supuesto normativo), representa un peligro de lesión a su dignidad como ser humano de tal magnitud que -por ello mismo- el cuerpo social no está en situación de exigirle que la soporte, bajo la amenaza de una penalización . . . . no resulta en absoluto desacertado ni menos aún inconstitucional que el legislador se haya abstenido de sancionar la preferencia que se haga por la salud la mujer.")

with its initial position that gestating zygotes is more important than respecting a person's human rights (even saying that zygotes were human beings), all of the challenged norms of the penal code that allow for abortion (when the life or health of women are in danger), as well as those that impose different punishments according to the level of development of human life before birth, should have been declared unconstitutional.

Costa Rica's defense of the Supreme Court decision that banned IVF is a defense of a legal standpoint in which developing human life cannot be harmed under any circumstance, and where the rights of the zygote have more weight than the rights of human beings, as can be seen by the lack of balancing conducted by the Supreme Court. This intentionally ignores the fact that Costa Rica's own legal system has already made distinctions between the different stages of human life granting them different protections. It also ignores that under Costa Rican law, the State and the Supreme Court itself already struck a balance between protecting prenatal life and protecting the fundamental rights to life and health of women – in which it decided to favor women's rights protections. As such, it is an incredibly contradictory position for the State to ignore women's fundamental rights and their own legal system just for the purpose of banning IVF.

In conclusion, States have historically adopted legal frameworks which progressively advance any State interest in developing life in a balanced manner that respects and protects women's human rights. In doing so, their constitutional and criminal legal frameworks have used the principle of proportionality in protecting the different stages of human life prior to birth, while assuring respect and protection of women's human rights every time they are in conflict. Costa Rica's failure to do so by banning in vitro fertilization on the basis of an absolute right to life to embryos from the moment of conception is contradictory to its own domestic legislation and to the Costa Rican Supreme Court's subsequent decisions. More importantly, it is incoherent with the mandates of international human rights law, including the American Convention.

V. DEEMING THE RIGHT TO LIFE TO BE EXTENDED TO CONCEPTION AND THE BAN ON IVF TO BE PERMISSIBLE WOULD VIOLATE THE PRINCIPLE OF JUDICIAL CERTAINTY.

A primary consideration concerning the recognition of the right to life prior to birth is the effect that such a protection would have on the principle of judicial certainty and its stability in the whole region. It is clear that only a decision deeming the ban on IVF to be impermissible will preserve the principle of judicial certainty, satisfying the agreement on behalf of States to respect and guarantee the right of access to justice.

The State of Costa Rica seeks to extend the right to life to the moment of fertilization and therefore consider an unimplanted embryo existing outside a woman's womb to be equivalent to a born human being for all legal purposes. This constitutional protection manifested in absolute terms, which is not conceived of any international human rights protections, has as an *ipso iure* contradiction with the human rights of both pregnant women and women that have chosen to have their ova fertilized for the purposes of IVF in all circumstances in which these rights may be compromised by the categorical protection bestowed upon pre-embryonic life.

In creating the American Convention, the existence of and the various degrees of rights were formulated, as were their scope and application. Thus, while the right to equality was enshrined without any qualification, other rights are drafted with warnings as to their limitations. For example, the American Convention protects the right to personal liberty, and taking into account the obvious assumption that the State will need to limit or suspend this right, the American Convention also includes general exceptions to it.

This example could also apply to other rights, such as freedom of expression or political rights. The point is that in human rights, there is a need for precision and logic in determining the exceptions to these rights and the various nuances in guaranteeing these rights. Various rights will inevitably result in judicial questions such as how the right will be applied, particularly when it is in conflict with the realization of other human rights, or in this case, in conflict with a State interest.

The present case is undoubtedly one in the category of norms which requires the express statement of their limitations, exceptions and clarifications. Due to various medical, psychological or sociological reasons, women's liberties and human rights will eventually be in conflict with the interests of the State to advance the development of human life prior to birth, while the woman is pregnant, or when she has chosen to have her own ova fertilized for IVF. There are obvious contradictions between the protection of the embryo as an autonomous body with rights and the respect and guarantee of women's rights.

Examining the reasoning of the Supreme Court, it becomes clear that the decision to grant personhood to embryos does not provide a solution to the conflicts that inevitably occur between protecting women's rights and protecting the development of an embryo, because they open the door for the elimination of women's rights when they choose to use their reproductive capacity to conceive children.

The American Convention only allows for the suspension of certain rights under very limited terms, as enumerated in article 27; these terms include during times of "war, public danger, or other emergency that threatens the independence or security of a State Party."[213] Further, this provision does not authorize suspension of a number of articles, including the rights of the family.[214] To permit a State to suspend women's fundamental rights such as her personal integrity (in the case of women who are infertile), privacy, equality, and the right to start a family, because of a pregnancy, violates article 27 of the American Convention. Suspending those rights because of the exercise of women's reproductive capacity by creating an embryo through IVF also results in a violation of this provision.

Although the Costa Rican Court's decision did not derogate the exceptions to abortion that are currently in place in the Costa Rican penal code, the Court's decision and the Court's changing positions as to the consequences of the interpretation of the right to life made in the 2000 and 2004 decisions, are a contradiction between the boundaries and scope of the right to life, causing substantial judicial uncertainty. In stating that an embryo has the same rights as a human being, a number of legal dilemmas arise surrounding the coherence of different criminal provisions and

[213] American Convention, *supra* note 102, art. 27.
[214] *Id.*

the Court's decision in the IVF case, failing to explain or analyze how such contradictions may be resolved. As noted previously, Costa Rica's Court decision also inherently conflicts with Costa Rica's penal code, which clearly draw distinctions between the constitutional protections afforded to potential life and human beings through the differing penalizations of homicide, fetal homicide, and abortion (where abortion is not legal), with the latter two generally carrying a lesser punishment. These laws sanction women who willingly undergo illegal abortions with one to three years imprisonment,[215] and sanction homicide with twelve to thirty-five years imprisonment.[216] This evidences that Costa Rican law does not view prenatal rights to be on par with human rights.

The Court has noted that a climate of judicial uncertainty can constitute a violation of the right of judicial guarantees and protection when the judicial uncertainty results from the non-recognition of rights. In effect, in the case of *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) v. Peru*,[217] the Court, recognizing the jurisprudence of the European Court of Human Rights in *Akdivar v. Turkey*,[218] established that the confusion in the practice which generated distinct administrative norms, with respect to the possibility of bringing certain resources, contributed to "promote a climate of absence of judicial protection and legal security that, to a great extent, prevented or hindered the persons affected from determining with reasonable clarity the appropriate proceeding to which they could or should resort to reclaim the rights they considered violated."[219] Based on this finding, the Court ruled that Peru had violated articles 8 and 25 of the American Convention.

A similar situation would result if Costa Rica enshrined human rights in embryos. Costa Rica's law permits abortion in certain instances, and where it recognizes abortion as a crime, it does not equate abortion with homicide, clearly demonstrating that its laws do not instill the same protections prior to birth.

In conclusion, taking into account the aforementioned discussion, the severity of the recognition of a prenatal right to life should be considered by the Court and understood as an act that is not only contrary to the State's international responsibility, but that also results in a violation of the right to judicial protection for women living in Costa Rica, while also threatening access to basic reproductive health services throughout the hemisphere. This is particularly true in countries that, under the same premise as Costa Rica, have banned forms of contraception and access to abortion even in cases where the life or the health of the pregnant women is in danger.[220]

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[215] CÓDIGO PENAL (Criminal Code), Law No. 4573, art. 118 (1970) (Costa Rica).
[216] *Id.* arts. 111-112.
[217] Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006).
[218] Akdivar v. Turkey, No. 21893/93, Eur. Ct. H.R., paras. 66, 69 (1996).
[219] *Aguado Alfaro et al.*, para. 120.
[220] Several countries in Latin America, such as Honduras and Peru, have enacted regulations or laws which hinder access to emergency contraception (*See* Martin Hevia, *The Legal Status of Emergency Contraception in Latin America*, 116 INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS 87-90 (2012)). Several countries in Latin America have highly restrictive abortion laws, some of which do not even permit abortion when the life of the woman is in danger, such as in Nicaragua, El Salvador and Chile. For more information on abortion laws worldwide, s*ee The World's Abortion Laws 2011*, *supra* note 36.

The restoration of legal certainty for women in Costa Rica can be achieved through the Court's finding that this law is impermissible under the American Convention. Such a determination would allow women's human rights to be preserved in line with the State's international legal obligations. Such a ruling would make clear that under the American Convention, States' interest in protecting prenatal rights cannot be implemented through the granting of human rights prior to birth at the expense of women's rights. This honorable Court has been entrusted with the task of putting an end to this judicial uncertainty. However, if the Court finds that life prior to birth must be given absolute protection, prioritizing it over the protection of a person's human rights, it will deepen the instability and judicial uncertainty that surround reproductive rights in Costa Rica and it will have a dramatic impact in the region.

VI. THE AMERICAN CONVENTION AND THE UNITED NATIONS HUMAN RIGHTS TREATIES OBLIGATE STATES TO TAKE AFFIRMATIVE MEASURES TO PROTECT THE RIGHTS OF WOMEN, INCLUDING OFFERING REPRODUCTIVE HEALTH SERVICES THAT RESPECT, PROTECT, AND FULFILL HUMAN RIGHTS.

In accordance with the American Convention ratified by Costa Rica on March 2, 1970, States must respect, protect, and fulfill the right to life of all individuals[221] and their physical, psychological and moral integrity.[222] All women living in Costa Rica have the right to enjoy the highest level of physical, mental, and social well-being, free from discrimination under the Protocol of San Salvador, ratified by Costa Rica on September 29, 1999.[223]

Furthermore, the interpretation of human rights norms must take into account the broader objectives of the legal instrument in question. The interpretation of human rights norms that guarantee rights must be integral and systematic. In this regard, article 29 of the American Convention, on "Restrictions Regarding Interpretation," ensures that international norms are interpreted harmoniously. Article 29(b) reads: "No provision of this Convention shall be interpreted as: restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."[224]

The jurisprudence of the Inter-American Court has established that the right to life not only obligates State parties to prevent from violating the right to life, but also to guarantee the existence of conditions that prevent violations of this right.[225] The Inter-American Court has

[221] American Convention, *supra* note 102, arts. 1.1, 4.
[222] *Id.* art. 5.
[223] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," *adopted* Nov. 17, 1988, art. 3, O.A.S.T.S. No. 69, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Off. Rec. OEA/Ser.L.V/11.82 doc. 6 rev.1, at 67 (1992) (*entered into force* Nov. 16, 1999).
[224] American Convention, *supra* note 102, art. 29.
[225] Ximenes-Lopes v. Brazil, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, para. 125 (July 4, 2006). *Cfr.* Baldeón García v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, para. 83 (Apr. 6, 2006); Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, para. 151 (Mar. 29, 2006); Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, para. 120 (Jan. 31, 2006); Huilca-Tecse v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 121, para. 65 (Mar.

found that "the fundamental right to life includes... the right that [every person] will not be prevented from having access to the conditions that guarantee a dignified existence…"[226] This last aspect of dignity, highlights an obligation that States have *vis à vis* the right to life and the right to personal integrity, that has to do with health care. The Court has stated that it "considers that the States are responsible for regulating and supervising at all times the rendering of services and the implementation of the national programs regarding the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment."[227]

The Inter-American Court has also established the connection between the right to personal integrity, the right to life, and the right to health.[228] In the case of *Albán Cornejo and others v. Ecuador*[229] the Court stated that "[p]ersonal integrity is essential for the enjoyment of human life. In turn, the rights to life and humane treatment are directly and immediately linked to human health care."[230] As a result, the Court established that "States are responsible for regulating and supervising the rendering of health services, so that the rights to life and humane treatment may be effectively protected."[231] Along the same lines, the Inter-American Commission has repeated the words of the Special Rapporteur on the right to the highest attainable standard of health, expressing recently that "States have the legal obligation to adopt deliberate, concrete measures intended to realize the right to health for all."[232] Furthermore, in its report *Access to Maternal Health Services from a Human Rights Perspective*, the Commission explained that "the provision of adequate and timely maternal health services is one of the principal ways to ensure women's right to personal integrity."[233] Futhermore in *Gelman v. Uruguay*, the Court stressed that pregnancy is a "condition of particular vulnerability" which creates a special obligation for the state to protect the pregnant woman.[234]

3, 2005); "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, para. 156 (Sept. 2, 2004); Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, para. 128 (July 8, 2004); 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, para. 153 (July 5, 2004); Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, para. 152 (Nov. 25, 2003); Juan Humberto Sánchez v. Honduras, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, para. 110 (June 7, 2003); "Street Children " (Villagran-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, para. 144 (Nov. 19, 1999).

[226] *Villagran-Morales*, para. 144.

[227] *Ximenes-Lopes*, para. 99.

[228] Albán-Cornejo et al. v. Ecuador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 171, paras. 117-130 (Nov. 22, 2007); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, paras. 203-208 (Aug. 24, 2010).

[229] *Albán-Cornejo et al.*

[230] *Id.* para. 117.

[231] *Id.* para. 121 (*citing Ximenes-Lopes*, para. 99).

[232] INTER-AM. COMM'N H.R., ACCESS TO MATERNAL HEALTH SERVICES FROM A HUMAN RIGHTS PERSPECTIVE, *supra* note 138, para. 104 (*quoting* United Nations, *Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Implementation of General Assembly Resolution 60/251*, March 15, 2006, Titled "Human Rights Council," January 17, 2007).

[233] *Id.* para. 23.

[234] Gelman v. Uruguay, Merits and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 221, para. 97 (Feb. 24, 2011).

In the case of *Xakmok Kasek Indigenous Community v. Paraguay*, the Court emphasized that "States must design appropriate health-care policies that permit assistance to be provided by personnel who are adequately trained to attend to births, [and] policies to prevent maternal mortality with adequate pre-natal and post-partum care."[235] In conclusion, international and comparative legal standards dictate that where States adopt measures to protect an interest in prenatal life, such measures must guarantee women's human rights. International standards support prenatal development through measures ensuring safe pregnancy and enabling effective family planning. While CEDAW recognizes that measures to protect prenatal life must be pursued consistently with women's human rights,[236] the abolition of assisted reproductive technology is not a measure that fits this criterion.

The United Nations General Assembly has noted that "all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner, without prejudice to the implementation of each of these rights and freedoms."[237] As such, the State's interest in protecting prenatal life must be effectuated in such a way that it does not infringe upon the rights of women and men. Therefore, respect, protection, and fulfillment of the right to equality, privacy, and the right to form a family, as well as respect, protection, and fulfillment of the rights to life and health of women who decide to use IVF, should be set as the unbreakable guideline principles for forth coming regulations on access to IVF and reproductive health care services in general.

VI. CONCLUSION

As set forth in this amicus brief, neither the Universal, European and Inter-American human rights frameworks recognize the right to life from the moment of fertilization. The recognition of the right to life from fertilization would imply a departure from the established standards set by the Inter-American system. Moreover, it would create an incompatibility between the Inter-American and the universal system. Considering that almost all of the States which are parties to the American Convention are also bound by at least one other international human rights treaty within the United Nations, such a large contradiction would prove itself to be unworkable. Furthermore, during the drafting of the American Convention, the cooperation of a regional and international human rights system was a primary concern of States parties. In order to respect this concern and maintain the comity amongst the various human rights frameworks, it is critical that the American Convention be interpreted in a manner that is in accordance with the existing *corpus iuris* of the right to life, including human rights treaties as well as other human rights bodies' jurisprudence.

Furthermore, State parties to the American Convention did not intend for article 4 to confer an absolute right to life to fertilized ova, and to the contrary, it was drafted with consideration and

[235] Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, para. 233 (Aug. 24, 2010).
[236] *See, e.g.*, CEDAW Committee, *Gen. Recommendation No.* 24, *supra* note 65, para. 31(c).
[237] Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. Doc. A/RES/53/144 , at 3 (Dec. 9,1999).

deference to domestic laws at the time which permitted abortion safeguarding women´s rights, and therefore needed exceptions to the protection of prenatal life. To infuse a right to life from the moment of fertilization into the American Convention would also contradict the treaties' subsequent interpretations by the Commission and the Court. While article 4(1) calls for States to protect the life prior to birth, it does not enshrine a right to life prior to birth, nor does it permit the protection of prenatal life to be absolute and mighty enough to trump human rights. Article 4(1) does not preclude States from taking all necessary measures to protect the legitimate rights of its citizens, including the right to form a family, the right to health, the right to privacy, and the right to nondiscrimination; indeed, the Convention, in addition to various other international human rights instruments, requires that States protect and guarantee these rights.

Under the United Nations and regional human rights frameworks, human rights, including the right to life, do not begin prior to birth, and protecting an interest in potential life does not equate to being a rights-holder. Indeed, permitting the recognition of the right to life from the moment of fertilization would contradict the principles set forth in article 29 of the American Convention, including a mandate to interpret the Convention in a manner that is compatible with the American Declaration, other human rights treaties, and the fundamental rights and freedoms that have been recognized by States laws. The vast majority of States in the hemisphere –including Costa Rica- have historically acknowledge that life prior to birth has different stages of development that are worthy of different levels of protection, in a balanced manner that also respects and protects women's human rights. The balancing of rights and interests responds to the principle of proportionality, which is contravened when granting an unconditional right to life to embryos. A reading of the Convention where States must guarantee a right to life to fertilized ova, would deepen the judicial uncertainty that surrounds reproductive rights in different legal systems in the region and would also put in danger access to abortion even in cases of rape, incest or when women's health and life are compromised by a pregnancy; as it was explained before, it could also put in danger access to various contraception methods.

Finally, it is necessary to take into account that reproductive health services must be provided as part of the positive measures that States must take in order to protect, respect, and fulfill the human right to personal integrity, life, equality, and the right to family, as well as fundamental freedoms such as the right to privacy. Access to in vitro fertilization is one of these reproductive health services. When the provision of those services conflict with the State interest in advancing prenatal life, the principle of proportionality must be taken into account in a way that there is a balance in which women and men's human rights are not sacrificed.

Sincerely,

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