

## *American Convention of Human Rights: Foundation Stone of Human Life Right of the Unborn Child in Latin America and the Caribbean.*<sup>1</sup>

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*Abstract:* States parties to the American Convention granted explicit protection of life from conception in article 4(1), protecting the unborn child, as subject of human rights, against any acts that intentionally cause his death or destruction. Although the Inter-American Court of Human Rights has had a benevolent approach to this provision, the Inter-American Commission on Human Rights has been inconsistent in its application, changing its position throughout the last decades, occasionally promoting the legalization of abortion or its recognition as a human right. However, a correct interpretation of article 4(1) by the Court or the Commission would apply international norms of treaty interpretation and conclude that article 4(1) supports the unborn child's protection from all forms of elective abortion or reproductive technologies that attempt against his life and that states parties have not only a duty to enforce this right but to prevent violations thereof.

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### 1. *Human Right to Life from the Moment of Conception in the American Convention and the Declaration of Human Rights.*

The American Convention of Human Rights (hereinafter convention or American Convention)<sup>2</sup> is frequently referred to by courts<sup>3</sup> and international jurists<sup>4</sup> as the best exponent of recognition of the human right to life of the unborn child<sup>5</sup> of any international treaty<sup>6</sup>.

By means of the adoption and subsequent ratification of the American Convention, 24 Latin American and Caribbean states<sup>7</sup> recognized that human life starts at the

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<sup>2</sup> Signed in San Jose, Costa Rica on November 22, 1969, at the Inter-American Specialized Conference on Human Rights. Available from <http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm>

<sup>3</sup> See, eg, European Court of Human Rights, *Vo v. France*, Judgement of July 8, 2004, para. 75. Available from HUDOC data base <http://www.echr.coe.int/ECHR/EN/Header/CaseLaw/Decisions+and+judgments/HUDOC+database/>

<sup>4</sup> For example, in 1987, Dinah Shelton, current commissioner in the Inter-American Commission, said that the American Convention is unique compared to other international human rights instruments due to the express recognition of a "right to prenatal life." See Dinah Shelton, *International Law and Protection of the Fetus in Abortion and Protection of the Human Fetus, Legal problems of a cross-cultural perspective.* (Stanislaw J. Frankowski, George F. Cole eds., 1987)

<sup>5</sup> In this Article, the expression "unborn child" or "unborn", the embryo, zygote, fetus, or any other term is used to designate the product of conception or fertilization.

<sup>6</sup> Besides the protection granted by the American Convention of Human Rights, the unborn's right to life and health are protected by other treaties and international law. For example, article 24 (2) (d) of the Convention on Children's Rights and Principle 4 of the Declaration of the Rights of the Child consider pre-natal medical health care as part of the child's right to health and development. This right is also recognized in Section VII of the American Declaration. Similarly, the International Covenant on Civil and Political Rights in article 6 (5) prohibits the imposition of the death penalty on pregnant women, thus giving protection to life of the unborn. A prohibition of similar characteristics against pregnant women's execution can be found in article 4 (5) of the American Convention. Also, the Convention's Preamble and the Declaration of the Rights of the Child, that according to article 31 (2) of the Vienna Convention on the Law of Treaties, are essential elements for treaties' interpretation, claim that the States have legal protection duty in favor of the unborn child, who due to its vulnerability "needs special safeguards and care, including appropriate legal protection, before and after birth".

<sup>7</sup> Before July of 2011, the following States had ratified the Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

See American Convention Signatories and Ratifications. Available from <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>

moment of conception and granted the unborn child its right to life, since it is a subject of rights, in article 4 (1) of the Convention.

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.

Also, in the American Declaration of Human Duties and Rights (hereinafter Declaration or American Declaration)<sup>8</sup>, in 1948, the O.A.S 's state members<sup>9</sup> recognized a universal right to life, when they declared: "Every human being has a right to life [...]" in article 1, its *travaux préparatoires* (preliminary activities) included the human right to life "from the moment of conception" in favor of "the unborn"<sup>10</sup>.

## 2. Court's Case law

Until now, the Inter-American Court of Human Rights (hereinafter Court or Inter-American Court) has not pronounced itself nor has it issued a sentence about the human right to life from the moment of conception, established in article 4(1) of the Convention. Nevertheless, the court will know in the future the case *Gretel Artavia Murillo vs. Costa Rica*. Through this trial, it seeks to create a human right to *in-vitro* fertilization and to artificial conception<sup>11</sup>. Such practices cause the destruction and loss of many embryos. However, until now, the Court has referred to unborn children as "children", "minors", "sons and daughters" and "babies" in, at least, three cases: *Gómez- Paquiyauri Brothers vs. Peru*<sup>12</sup>, in which the court granted the sister of one of the victims a compensation, because of the loss of her unborn child, Jorge Javier; *Miguel Castro-Castro vs. Peru*<sup>13</sup>; and *Giburú and others vs. Paraguay*<sup>14</sup>.

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<sup>8</sup> Adopted at the Ninth International American Conference (Bogotá, Colombia, 1948). Available from <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>

<sup>9</sup> Until July 2011, the following states are members of the OAS: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela .

See Charter of the Organization of American States, status of signatures and ratifications. Available at [http://www.cidh.oas.org/Basicos/English/Basic22b.CharterOAS\\_ratif.htm](http://www.cidh.oas.org/Basicos/English/Basic22b.CharterOAS_ratif.htm)

<sup>10</sup> See Inter-American Court HR., Resolution 23/81, Case 2141 (USA), March 6 (1981); OEA.Ser.L/V/II.54 (1980-1981). Henceforth *Baby Boy*, paras. 14 (a) & 19 (b). Available from <http://www.cidh.oas.org/annualrep/80.81eng/USA2141.htm>, citing Acts and Documents, Document CB-310/CIN-31, Vol V, p. 449.

<sup>11</sup> The date on which this paper was written *Artavia Murillo vs. Costa Rica* had not been resolved yet. In order to access to the complete case visit the following link : [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf)

<sup>12</sup> See Inter-American Court HR. Case of the *Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110. Para. 67 (x), 216 and note 62.

<sup>13</sup> See Inter-American Court HR. Case of the *Prision Miguel Castro Castro vs. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 197 (57) and 292. See also Opinion of Judge A.A. Cançado Trindade, para. 61, where also refers to the unborn as "children".

<sup>14</sup> See Inter-American Court HR. Case *Goiburú et al v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153., Para. 160 (b) (iii) and 161, where the Court indicates that *Mancuello Carlos Marcelo Rios* was a minor at the time of the forced disappearance of his parents and brother and para. 100 (b), where indicates that his mother *Esther Rivers Mancuello Gladis*, was pregnant at the time.

Also, the court referred to the induced abortions as “barbaric acts” in the case of the *Two Rs Massacre vs. Guatemala*<sup>15</sup>. Furthermore, in the *Aboriginal Community of Sawhoyamaxa vs. Paraguay* case, the Court made an observation and established that “children’s right to life (...) cannot be separated from the equally vulnerable pregnant women’s situation” and reiterated the obligation of the Convention’s State members to guarantee the woman’s access to pre-natal care<sup>16</sup>.

### 3. IACHR (*Inter-American Commission of Human Rights*)

The Inter-American Commission of Human Rights (hereinafter Commission or IACHR) had an inconsistent attitude with regard to the Human Right to Life from the moment of conception through the years, depending on the members of the Commission.

It is important to remember that the Commission, without prejudice of its prestige and political influence in the region, is not an international court, but a *quasi-judicial* organ of the Inter-American System. Among other faculties, it can be a mediator between State members to help to find a solution to a dispute, grant precautionary measures and to produce reports about individual petitions related to Human Rights violations in the member states of the Inter-American Convention<sup>17</sup>. Therefore, its function is mainly political and pragmatic since it functions as a forum for certain disputes, resolutions, and as a filter of the Inter-American Court<sup>18</sup>. Yet, the IACHR is unable to establish binding case law either on the Convention’s State members, or on the Court<sup>19</sup>. The Court cannot give sentences, only resolutions and reports - i.e. admission and end reports. To this day, the Commission has not published any significant report under article 50 of the Convention, one of its formal reports, related to the human right to life from the moment of conception. Nevertheless, the Commission has given less formal reports that were directly or indirectly related to article 4(1) of the American Convention.

#### *Baby Boy vs. United States (1981)*

Through the 2141 Resolution, the Commission expressed its opinion as regards abortion’s legalization, and it concluded that the abortion of Baby Boy, (a healthy six month-old male fetus)<sup>20</sup>, allowed by the American laws, did not constitute a violation of the American Declaration<sup>21</sup>.

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<sup>15</sup> See Inter-American Court HR. Case of the Slaughter of the Two ‘R’s v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 139.

<sup>16</sup> See Inter-American Court HR. Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment March 29 of 2006. Series C No. 146, para. 177.

<sup>17</sup> See articles 41-44 of the American Convention

<sup>18</sup> See Inter-American Court. Control of Legality in the Exercise of the Powers of the Commission on Human Rights (articles 41 and 44-51 of the American Convention on Human Rights). AO-19/05 Advisory Opinion of November 28, 2005. Series A No. 19.

<sup>19</sup> The Court has departed from the Commission's recommendations occasions in whole or in part, on several. See: Court HR, Case Las Palmeras v. Colombia. Fund. Judgment of December 6, 2001. Series C No. 90. Court HR, Case of the Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71. Court HR, Case Nogueira de Carvalho and other v. Brazil. Preliminary Objections and Merits. Judgment of November 28, 2006. Series C No. 161.

<sup>20</sup> See Commonwealth of Massachusetts v. Kenneth Edelin, 371 Mass. 497 (1976).

<sup>21</sup> See Baby Boy.

Nevertheless, the Commission accepted the unborn child as a subject of rights, implicitly accepting jurisdiction *ratione personae* on the victim, Baby Boy<sup>22</sup>. Even though the Commission expressed that it was in favor of the legalization of abortion in the United States of America in that specific case, the Commission did not find that it was necessary to legalize abortion generally. Moreover, the Commission indicated that “an abortion performed without a substantial cause that is based on the law could be against article 4”<sup>23</sup>. Due to the unusual nature of the requests against the United States of America, which had not ratified the American Convention, the Commission’s opinion was issued with a lower level of formality according to the procedure established in articles 53-57 of the IACHR rules of 1960 (which was in force at the time) and article 24 of the Commission Statute.

### *Paulina Ramirez vs. México (2007)*

In order to arrive at the resolution of this conflict in a pacific way, the Commission cooperated with a group of non-governmental associations (NGO) that promote the legalization of abortion in México, in urging the Mexican State of Baja California to grant remedies to Paulina del Carmen Ramirez Jacinto, a teenage mother, due to supposed violations of her reproductive rights. Such alleged violations consisted of exposing her to pro-life advice and information, which interfered with her supposed right to have an abortion after she had been sexually abused, and forcing her to give birth to her child, Isaac de Jesús Ramirez Jacinto<sup>24</sup>.

From 2002 to 2007, the IACHR facilitated meetings between the organizations: Center for Reproductive Rights and Grupo de Información de Reproducción Elegida (GIRE) [Group of Information on Elected Reproduction], among others and the government of the State of Baja California, that resulted in an agreement without a trial, in which the State conceded the petitioners claims and assumed several compromises. The State of Baja California provided Paulina with generous reparation due to the “emotional distress” that the birth of her unwanted child had caused her<sup>25</sup>. The State agreed to reform its law system in order to expedite access to abortion, to minimize the access to pro-life information and advice, and to publish a public apology in the most important journals, among others<sup>26</sup>. Later, the Commission controlled the observance of such compromises and was pleased since the State observed “the obligations agreed to in the treaties”, making vague references to the Belém do Pará Convention, women’s rights, abortions as a health care service and to equality and discrimination”<sup>27</sup>.

### *James Demers vs. Canada*

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<sup>22</sup> When commenting “Baby Boy”, Dinah Shelton, current commissioner of the Inter-American Commission, said that the admission of the petition against the United States of America meant an acceptance of the fetus as a “person”, opening the possibility to the future presentation of other cases of fetal death or injury based on this resolution. See Shelton, Dinah. Abortion and Right to Life in the Inter-American System: The Case of Baby Boy, 2 HUM. RTS. L. J. 309 (1981), p. 312.

<sup>23</sup> See Baby Boy, paragraph. 14 (c).

<sup>24</sup> Inter-American Commission HR, Report No. 21/07, Petition 161-02 (Friendly Settlement), Paulina del Carmen Ramírez Jacinto, Mexico, March 9 (2007), para. 11-12.

<sup>25</sup> *Ibid.*, Para. 16, subsections 1 & 9.

<sup>26</sup> *Ibid.*, Para. 5-8, 16. View Public Accountability Statement in Annexes

<sup>27</sup> *Ibid.*, Para.17–19.

This petition consists mainly of a formal complaint made in order to inform about violations to the right of freedom of speech of a pro-life activist, who was criminally condemned for peacefully protesting in front of an abortion clinic. Furthermore, the petition includes a formal complaint made against the violation of the human right to life of unborn Canadian children, based on the American Declaration (due to the fact that Canada is not part of the Convention)<sup>28</sup>. The first formal complaint was accepted, yet, the second one was declared unacceptable due to the lack of jurisdiction *ratione personae*. According to the Commission, a formal complaint in the name of “hundreds of thousands of unborn children and their mothers” and/or a minor and her mother referred on the petition were made *in abstracto*, as if it were an *action popularis*, and, as a consequence, the necessary requisite of the individualization and determination of the presumed victims was missing<sup>29</sup>.

On the other hand, the Commission did not deny the prohibition of voluntary abortion that was contained in article 4(1) of the Convention<sup>30</sup>, even if Canada repeatedly alleged that based on the decision of Baby Boy`s case “abortions performed according to legal procedures do not violate any right protected by such a declaration”. The Commission did not declare the formal complaint related to the right to life of the unborn children as “palpably unjustified and unsustainable”, as the State asked<sup>31</sup>. Also, the Commission accepted the unborn children as victims of violations under the Convention, as long as their names were individualized<sup>32</sup>.

*Gretel Artavia Murillo vs. Costa Rica (Previously, Ana Victoria Sanchez Villalobos vs. Costa Rica and Petition 12.361)*<sup>33</sup> and *Daniel Gerardo Gomez, Aída Marcela Garita and others vs. Costa Rica*<sup>34</sup>

In both of these petitions, a group of infertile couples alleged that Costa Rica violated their human rights, since its Supreme Court prohibited the in vitro fertilization practice (IVF) since 2000, due to the foreseeable destruction and loss of human embryos inherent in the procedure<sup>35</sup>.

In 2008, Ana Victoria Sanchez Villalobos and her husband Fernando Salazar Bonilla, the couple that represented the victims of the prohibition of IVF, withdrew the petition, explaining that they had learned about the procedure and had understood that embryos are human beings from the moment of conception and that IVF violates their right to life. They also advised other infertile couples to adopt a child instead of

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<sup>28</sup> Inter-American Commission HR, Report No. 85/06, Petition 225-04 (Admissibility), James Demers, Canada, October 21st (2006).

<sup>29</sup> Ibid. para. 40–45.

<sup>30</sup> For the purposes of this paper, the expression “voluntary abortion” means intentionally induced abortion, performed with mother’s consent both by a surgical or pharmacological method.

<sup>31</sup> Inter-American Commission HR. Report No. 85/06, Petition 225-04, Admissibility, James Demers, Canada, October 21, 2006, OEA / Ser L. / V / II. (Oct 21, 2006), para. 31, 38 & 39.

<sup>32</sup> Ibid. Para. 42 & 44.

<sup>33</sup> Inter-American Commission HR. Report No. 25/04, Petition 12.361 (Admissibility), Ana Victoria Sánchez Villalobos et al. Costa Rica, March 11 (2004), para. 69.

<sup>34</sup> Inter-American Commission HR. Report No. 156/10, Petition 1368-04 (Admissibility), Gerardo Gomez, Aida Marcela Garita and others, Costa Rica, 1st. November (2010).

<sup>35</sup> Inter-American Commission HR. Report No. 25/04, Petition 12.361 (Admissibility), Ana Victoria Sánchez Villalobos et al. Costa Rica, March 11th (2004), para. 2, 17 & 30.

producing a new human life in a test tube<sup>36</sup>. The Commission changed the name of the petition, it was now called Petition 12.361 and after that, *Gretel Artavia Murillo v. Costa Rica*, but the Commission did not mention what had happened in any following report or press statement. In 2004 and 2010, respectively, the Commission declared that aspects of both petitions relating to article 5(1) (human right to personal integrity), 11(2) (right to privacy), 17 (family protection) and 24 (Equality before the law), among others, of the American Convention were acceptable. Nevertheless, the Commission declared that aspects of both petitions relating to article 4(right to life) and 5 (2) (cruel, inhuman or degrading treatment) and article 8 (Judicial guarantees) were unacceptable, *inter alia*<sup>37</sup>.

In August of 2010, the IACHR published a merit report about petition 12.316 (that was not published until October of 2011) and, a year later, in August of 2011, it sent the case to the Inter-American Court, claiming that the constitutional prohibition on in-vitro fertilization in Costa Rica constituted an arbitrary interference in the right to have a private and a family life and to the right to form a family, as well as a violation of the right to equality of the victims, whose effects impacted each woman in a different way<sup>38</sup>.

Before the report was published, the IACHR had recommended that Costa Rica legalize and subsidize the practice of IVF, in spite of the protection of the embryo's life established in the American Convention<sup>39</sup>. According to national press, the IACHR established a series of deadlines for the Costa Rican Congress to approve a law that would legalize IVF and other techniques of artificial reproduction and the use of public funds to practice them, which the Congress did not do<sup>40</sup>. The case that is currently waiting in the Inter-American Court represents an attack on the American Convention which protects the human right to life from the moment of conception<sup>41</sup>.

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<sup>36</sup> View Woman understands that life begins at the moment of conception and removes lawsuit against Costa Rica, Aciprensa (2008). Available from <http://www.cidh.oas.org/Comunicados/Spanish/2011/91-11sp.htm>

<sup>37</sup> See Inter-American Commission HR, Report No. 25/04, Petition 12.361 (Admissibility), Ana Victoria Sanchez Villalobos et al. Costa Rica, March 11 (2004), Conclusions, para. 1 & 3 and Report No. 85/06, Petition 225-04, Admissibility, James Demers, Canada, October 21st of 2006, OEA / Ser L. / V / II. (Oct 21st, 2006), Conclusions, para. 1 & 2

<sup>38</sup> See Inter-American Commission HR, Press Release No. 91/11, Inter-American Commission presents the case of Costa Rica before the Court. Available from [http://www.oas.org/en/iachr/media\\_center/PReleases/2011/091.asp](http://www.oas.org/en/iachr/media_center/PReleases/2011/091.asp)

<sup>39</sup> See Murillo, Alvaro (2011). The Catholic sector of Costa Rica paralyzed in vitro fertilization, El País (San Jose, Costa Rica), July 12, 2011. Available from [http://www.elpais.com/articulo/sociedad/Costa/Rica/catolica/atasca/fertilizacion/in/vitro/elpepuintlat/20110712elpepusoc\\_12/Tes](http://www.elpais.com/articulo/sociedad/Costa/Rica/catolica/atasca/fertilizacion/in/vitro/elpepuintlat/20110712elpepusoc_12/Tes)

<sup>40</sup> Eg, Avendano, Carlos (2011), In-Vitro Fertilization: Express procedure, <http://www2.diarioextra.com/2011/marzo/15/opinion04.php> and "Commission Extends Deadline For Approval Of Law For In-Vitro Fertilization In Costa Rica" from <http://insidecostarica.com/dailynews/2011/february/24/costarica11022402.htm>

<sup>41</sup> *Artavia Murillo vs. Costa Rica* was resolved on November 28, 2012., The Court declared Costa Rica internationally responsible for having violated the right to private and family life and the right to personal integrity in relation to personal autonomy, sexual health, right to enjoy the benefits of scientific and technological progress and the principle of non-discrimination enshrined in Articles 5.1, 7, 11.2 and 17.2 in conjunction with Article 1.1 of the American Convention. In relation to Article 4.1 of the American Convention, the Court ruled that the term "conception" refers to the moment of "implantation", leaving without legal protection to every fertilized embryos not implanted yet.

It would be the first occasion in which an international court would affirm the existence of such an alleged right, since even the Strasburg Court of the European Court of Human Rights, which generally applies a less complete protection to the unborn child's life, has recently denied the existence of the human right to in-vitro fertilization in *S.H. and others vs. Australia*<sup>42</sup>.

### *MC43-10 "Amelia" (Nicaragua)*

Even though the Commission suggested in previously mentioned reports that abortion's legalization is compatible with the American Convention, in other occasions, such as in the case of *Amelia*, the Convention has refused to recognize the alleged human right to abortion. Recently, various NGO that are in favor of the legalization of abortion in Nicaragua (Catholics for the Right to Decide, among them)<sup>43</sup> asked the Commission to grant preliminary measures that would order an abortion to be performed on Amelia (pseudonym), a 27 year old Nicaraguan woman who suffered from metastasized cancer, and whose doctors would not give her chemotherapy due to the fact that she was pregnant<sup>44</sup>.

However, the Commission refused to order an abortion and imposed preliminary measures limited to medical health care treatment of the supposed victim, ordering the State of Nicaragua to "adopt the necessary measures to assure that the beneficiary has access to the medical health care treatment needed to treat her metastasized cancer"<sup>45</sup>.

The Commission avoided recognizing the supposed human right to "therapeutic" abortion, establishing that the supposed victim needed medical health care treatment, but she did not need an abortion.

The State of Nicaragua fulfilled its duties within the five days granted to answer by the IACHR, giving Amelia chemotherapy which killed her unborn son in her womb. Subsequently, the involved organizations, unsatisfied with the Court resolution, condemned the fact that Amelia carried her pregnancy to full term in the petition because they alleged that it was "inhuman". They also expressed that the unborn child had been "a load that was both non-viable and that took from her energy that she needed in order to fight against her disease"<sup>46</sup>.

Besides these preliminary measures, there are other reports in which the IACHR had condemned some forms of abortion, including voluntary induced abortion, and other acts of violence performed against pregnant women or unborn children, making reference to abortion as a violation of human rights. In its annual report of 1971, for example, the Commission expressed that "the use of abortion to help to solve

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This case will be covered in a new update that will be updated in 2015 to [defendiendovidas.org](http://defendiendovidas.org). That article will delve on the limited scope of the Court decision, which has binding effect only for Costa Rica.

<sup>42</sup> See European Court on Human Rights, Case of *S.H and Others v. Austria*, Judgment, April 1, 2010.

<sup>43</sup> Strategic Group for the Decriminalization of Abortion, Catholics for the Right to Decide, Leon Feminist Group, the Nicaraguan Center for Human Rights and Health Network of Latin American and Caribbean Women.

<sup>44</sup> See Precautionary Measures granted by the Inter-American Commission HR during 2010. Available from <http://www.cidh.org/medidas/2010.sp.htm>

<sup>45</sup> *Ibid.*

<sup>46</sup> See *Feminists in Resistance Honduras, Abortion in Central America: a region where injustice accumulates*, September 29, 2010, <http://feministascontraelgolpehn.blogspot.com/2010/09/aborto-centroamerica-una-region.html>



economic and subsistence problems that derive from continuous demographic explosion, would constitute and increase a flagrant violation of human rights”<sup>47</sup>. In the same way, in 1995 forced abortion was pointed out as a form of torture, making reference to “beatings on the woman’s chest or womb frequently inflicted to pregnant women with the intention to cause an abortion or to deteriorate their ability to conceive” as a means of “sexual torture”<sup>48</sup>.

#### 4. Application of the International Laws of Treaty Interpretation

##### 4.1 General Meaning of the Treaty’s Text

According to the Convention of Vienna<sup>49</sup> about Treaty Law (hereinafter Convention of Vienna), article 31, the interpretation of article 4 (1) of the American Convention must start with the treaty’s text. This Convention establishes that such interpretation must be made in good faith and 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. Such interpretation would certainly lead to the conclusion that article 4 (1) protects the unborn child against a voluntarily induced abortion, or any other voluntary act that would have as a result the destruction of the baby, since, the Convention clearly protects *in utero* human life, from the moment of conception, not from the moment of birth. In *Baby Boy*’s case Commissioner Monroy signaled that “if the international treaty’s interpretation must be in good faith, textual, according to the treaty’s object and purpose, there is no doubt that human’s life protection must start at the moment of conception” and that “abortion is against the right to life”<sup>50</sup>.

In such a sense, the State members have shown that they understand that the American Convention prohibits abortion and protects the unborn baby’s life from the moment of conception. In the pronouncements of reserve made in the International Conferences of Beijing and Cairo, for example, various countries such as El Salvador, Guatemala, Honduras, Nicaragua and Dominican Republic when rejecting the interpretation of certain terms related to reproductive health care that would include the supposed right to abortion, invoked the American Convention<sup>51</sup>.

##### 4.2 Non-Restrictive Interpretation of the Right to Life

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<sup>47</sup> See Inter-American Commission HR, Annual Report of the Commission on Human Rights, fields in which measures are to be taken in order to obtain the results that human rights are to produce according to what was prescribed by the American Declaration of the Rights and Duties of Man, OAS / Ser.L / V/II/27, Doc 11 rev, March 6th 1972, Part II, para. 1. Available from <http://www.cidh.org/annualrep/71sp/parte2.htm>.

<sup>48</sup> See Inter-American Commission HR, Annual Report of the Commission on Human Rights, Chapter IV: The Human Rights Situation in Haiti, para. 123. Available from <http://www.cidh.oas.org/women/Haiti95women.htm>

<sup>49</sup> Vienna’s Convention about treaty’s law, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, in force since January 27th of 1980.

<sup>50</sup> See *Baby Boy*, Dr. Marco Gerardo Monroy Cabra’s negative vote, paragraphs 6 and 9.

<sup>51</sup> See International conference about population and development’s report U.N. Doc A/CONF.171/13/Rev.1(1994), available from [http://www.unfpa.org/webdav/site/global/shared/documents/publications/2004/icpd\\_spa.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/publications/2004/icpd_spa.pdf) and Fourth International Women’s Conference’s report U.N. Doc. A/CONF.177/20/Rev.1(1996). Available from <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20S.pdf>

The Court has repeatedly expressed that the right to life is universal, inalienable, inviolable and essential to the exercise of any other human right, repeating that any restrictive vision of this right is unacceptable<sup>52</sup>.

As a universal human right, the right to life belongs to any person from the moment of conception, according to article 4 of the Convention. Therefore, it cannot be granted to certain categories of people but withheld from others: to the children that were born, but not to the unborn; to the children that were wanted, but not to the unwanted; to the healthy children, but not to the ones affected by congenital diseases. Such distinctions would clearly constitute arbitrary and discriminatory lines in the protection of human life and the arbitrary deprivation of this right is specifically prohibited in article 4(1).

Since this right is inalienable and is recognized in the American Convention<sup>53</sup>, the unborn's right to life from the moment of conception cannot be taken away or be suspended, its recognition cannot be reversed by the organs of the American system, according to the norms of interpretation of the American Convention that establish that "no provision of this Convention may be interpreted to allow any State, group, or person to suppress the enjoyment and exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein" or "precluding other rights or guarantees that are inherent to human beings".

Article 27 (2) of the Convention established that the right to life cannot be repealed, nor can the judicial guarantees that protect them. To such purpose, the Court has interpreted article 27 in the sense that the right to life cannot be repealed since it cannot be suspended in case of war, public danger or any other threats to independence or to the security of the State members<sup>54</sup>. The repeal of the right to life of the unborn child authorizing its death or destruction by a simple act of will of his parents would, therefore, be a violation of this principle. Similarly, the repeal of the right to life from conception based on calculations of proportionality between the life of the unborn and the supposed right to privacy or the right to personal integrity of women would undermine the Convention, since, according to the Court's case law "the right to life is a fundamental human right, and its enjoyment is a prerequisite for

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<sup>52</sup> See IDH Court. *Montero Aranguren and other's case (Retén de Catia) Vs. Venezuela*. Preliminar exception, Bottom, Remedies and Costs. Sentence of July 5th of 2006. Serie C No. 150, para. 60; IDH Court. *Community Case Sawhoyamaxa Vs. Paraguay*. Bottom, Remedies and Costs Sentence March, 29th of 2006. Series C No. 146, para. 150; Corte IDH. *Baldeón García Case Vs. Perú*. Bottom, Remedies and Costs. Sentence of April 6th of de 2006. Serie C No. 147, párr. 82-83; Inter-American Court HR. "Niños de la Calle" case (*Villagrán Morales and others*) Vs. Guatemala. Bottom. Sentence of November 19th of 1999. Serie C No. 63, paragraph 144; Corte IDH. "Masacre de Pueblo Bello Vs. Colombia" case. Bottom, Remedies and Costs. Sentence of January 31st of 2006. Serie C No. 140, paragraph. 120; Inter-American Court HR. *Case 19 Commerce traders Vs. Colombia*. Bottom, Remedies and Costs Sentence July 5th of 2004. Serie C No. 109, paragraph. 153; Inter-American Court HR. *Case Myrna Mack Chang Vs. Guatemala*. Bottom, Remedies and Costs. Sentence from november 25 of 2003. Serie C No. 101, paragraph. 82.

<sup>53</sup> See article 29 (c) of the American Convention.

<sup>54</sup> See Inter-American Court HR. *Baldeón García Vs. Perú* case Bottom, Remedies and Costs Sentencia of April 6th of 2006. Serie C No. 147, paragraph 82; Inter-American Court HR. *Masacre de Pueblo Bello Vs. Colombia* Case. Bottom, Remedies and Costs. Sentence of January 31st of 2006. Serie C No. 140, paragraph. 119.

the enjoyment of every other human right”<sup>55</sup>. Such is the reason why it prevails over any other lower interests.

Also, the Court has expressed that the “Human right to life cannot be conceived in a restrictive way, as it was in the past”<sup>56</sup> and that “any restrictive interpretation of this right is not admissible”<sup>57</sup>. Yet, in the case of *Baby Boy* the Commission, proposed a restrictive interpretation of the human right to life from the moment of conception, by suggesting that, by virtue of the expression “in general”, contained in article 4-1-, the Convention could allow the legalization of abortion in the domestic environment<sup>58</sup>. Such interpretations of the human right to life would be so restrictive that, if applied, they would eliminate the presumption of the unborn’s human right to life, turning it into an exception instead of recognizing it as a rule.

Even if the expression “in general” might indicate legitimate exceptions to the human right to life, or the right to life from the moment of conception in particular, as the Commission alleged in *Baby Boy*, such would be extremely limited, according to a non-restrictive interpretation of the right to life. Non-restrictive limitations of the right to life that would be included in the expression “in general” might include legitimate defense, recognized by every jurisdiction of the region, negligent murder, exceptions created by the international humanitarian right for armed conflict situations, or exceptions for involuntary abortion.

As regards legislative intention when introducing the expression “in general”<sup>59</sup>, it is important to mention that it was introduced by the IACHR (of which the Court reporter of *Baby Boy* was a member at the time) not due to any state initiative, nor due to their democratic agreement.<sup>60</sup> Moreover, there is no indication that any of the member states tried to create any exceptions to the human right to life as a way to legalize voluntary abortion through its inclusion in the final text of the Convention. The examination of the *travaux préparatoires* [preparatory acts] of the Convention reveals that the Latin-American states tried to grant the protection of the unborn child’s life from voluntary abortion since the beginning of the process of the adoption and ratification of the American Convention. The human right to life from the moment of conception was explicitly recognized since the first Project of the Convention, written by the Inter-American Juridical Committee<sup>61</sup> until the Specialized Conference on Human Rights, the San Jose Conference, where the State members rejected the suggestion to eliminate this protection in order to allow the countries to

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<sup>55</sup>See Inter-American Court HR. *Masacre de Pueblo Bello Vs. Colombia* case. Bottom, Remedies and Costs Sentence of January 31st of 2006. Serie C No. 140, paragraph. 120; Inter-American Court HR. *Case 19 Comerciantes [Merchants] Vs. Colombia*. Bottom, Remedies and Costs. Sentence of July 5th of 2004. Serie C No. 109, paragraph 153; and Court IDH. *Myrna Mack Chang Vs. Guatemala* case. Bottom, Remedies and Costs. Sentence of November 25th of 2003. Serie C No. 101, paragraph 152.

<sup>56</sup>See Inter-American Court HR. “Niños de la Calle” case (Villagrán Morales and others) Vs. Guatemala. Bottom. Sentence of November 19th of 1999. Serie C No. 63, paragraph 3.

<sup>57</sup> See Inter-American Court HR. “Niños de la Calle” case (Villagrán Morales and others) Vs. Guatemala. Bottom. Sentence of November 19th of 1999. Serie C No. 63, paragraph 14; Court IDH. *Baldeón García Vs. Perú* case. Bottom, Remedies and Costs. Sentence of April 6th of 2006. Serie C No. 147, paragraph. 82.

<sup>58</sup> *Baby Boy*, paragraph 25.

<sup>59</sup> The legislative intent of the States Parties to adopt the Convention could be considered if, according to Article 31 (4) and 32 of the Convention, the textual interpretation left ambiguous or obscure the meaning of the Convention or lead to a “manifestly absurd or unreasonable” result.

<sup>60</sup> *Baby Boy*, paragraph 25.

<sup>61</sup> *Baby Boy*, paragraph 21.

legalize “the most varied abortion cases”<sup>62</sup>, and they ratified the intention to protect the unborn child’s life<sup>63</sup>. Ecuador asked for the elimination of the expression “in general”, introduced by the Commission<sup>64</sup>. The President of the Work Commission, who was also a representative of Venezuela, indicated, as regards the Human Right to life from the moment of conception, that “there cannot be concessions”, considering “unacceptable a Convention that does protect such a principle”<sup>65</sup>. Also, various States such as Chile and El Salvador, supported projects aimed at protecting life from the moment of conception<sup>66</sup>. On the other hand, the evidence established that states debated the death penalty, which was considered by many of the states as a legitimate exception to the human right to life, at the time<sup>67</sup>. Uruguay’s remarks as regards the article about the human right to life illustrate the negotiations about the final draft and possible reasons for including the expression “in general”; regretting the death penalty’s inclusion as a legitimate exception to the human right to life, emerging limitations to such and recognizing that: “Nevertheless, it must be taken into account, that the before project is the result of inevitable transactions in the Commission that conceived it and that article 3 is the result of debates in which unyielding positions were opposed” and “Since such is the case, Uruguay considers that to attempt to improve such an article is the best that can be done in this case, since it is possible, because there is no consensus for death penalty suppression...”<sup>68</sup>. Also, the rest of article 4 that deals with the human right to life contains regulations related to the death penalty but not to abortion. Three states (Barbados, Guatemala and Trinidad and Tobago) have reservations as regards the death penalty, which is allowed by the law in their respective jurisdictions<sup>69</sup>.

If such is the case, a no restrictive interpretation of article 4(1) would apply general principle of the international law of human rights, as the *pro homine* principle<sup>70</sup>, also called *pro personae* principle, that is present in article 29 (b) of the Convention, and is

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<sup>62</sup> Documents and acts of the Inter-American Specialized Conference on Human Rights OAS/Ser.K/XVI/1.2, 121 (November 7th–22nd of 1969), page 121 and 160. Available from <http://www.corteidh.or.cr/tablas/15388.pdf>

<sup>63</sup> Ibid., page 121, 159–160.

<sup>64</sup> Ibid., page 160.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> See Documents and acts of the Inter-American Specialized Conference on Human Rights, OEA/Ser.K/XVI/1.2, 121 (7th–22th, November of 1969), Acts of the third and fourth sessions of Commission I, Doc. 38, Corr. 1 and Doc. 40, Corr.1, November 16th of 1969, page 163 to 168.

<sup>68</sup> See “Observaciones del Gobierno del Uruguay al Proyecto de Convención Interamericana sobre Derechos Humanos”, in Documents and acts of the Inter-American Specialized Conference on Human Rights OEA/Ser.K/XVI/1.2, 121 (November 7th–22th of 1969), page.36. Quoted in Bach de Chazal, Ricardo, Algunos Aspectos Relativos A La Tutela Del Derecho A La Vida En El Sistema Interamericano De Los Derechos Humanos, pages. 12–13.

<sup>69</sup> See signatures and ratifications from <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>.

<sup>70</sup> See Inter-American Court HR. Ticona Estrada and others Vs. Bolivia case Bottom, Remedies and Costs Sentence of November 27th of 2008. Serie C No. 191, paragraph 11; Court IDH. Raxcacó Reyes Vs. Guatemala case.Bottom, Remedies and Costs. Sentence of September 15th of 2005. Serie C No. 133, paragraph. 12. Inter-American Court HR. Acevedo Jaramillo and others case Vs. Perú. Sentence interpretation of preliminar exeptions Bottom, Remedies and Costs. Sentence of November 24th of 2006. Serie C No. 157, paragraph. 283; Inter-American Court HR. Cinco Pensionistas Vs. Perú case. Bottom, Remedies and Costs. Sentence of February 28th of 2003. Serie C No. 98, paragraph. 143.

applied, respectively, by the Convention and the Inter-American Court<sup>71</sup>. The Commission had recognized that such a principle established that, in the case of a doubt, the interpretation that grants a more extended protection to the human rights of the individual would be considered as prevalent, “It must be used as an interpretative principle of the Commission, and in general, as a way of interpreting laws of human rights”<sup>72</sup>.

The Court has signaled, to such respects, that “the fundamental criteria, is the one imposed by human rights, that obliges the interpretation of norms that recognize the nature of such principles in a wide way, and the ones that limit or restrict it in a restrictive way”<sup>73</sup>. In the same way, the Commission has declared that, to prevent the human rights exception turning into the rule, every limitation to human rights must be interpreted in a restrictive way, according to the *pro homine* principle<sup>74</sup>. Therefore, any limitation to the unborn children’s right to life, supposedly contained in the expression “in general” should be very restrictive, and the one that granted a wider and better protection to life from the moment of conception should prevail over other interpretations that try to limit or condition it.

#### 4.3. *United States of America’s practice and opinio juris*

According to article 31 (3) (c) of the Vienna Convention about treaty law, for interpretation purposes, “Any other subsequent practice followed in the application of the treaty by which the parties agreement as regards the interpretation of the treaty is stated”<sup>75</sup> also constitutes part of the treaty’s context. Because of that, the recognition of the human right to life from the moment of conception in such a region, as well as abortion’s legalization or it’s possible recognition as a human right, would also be relevant for the interpretation of article 4 (1) of the American Convention. In *Baby Boy* the Commission wrongly evaluated the previous practice in the treaty’s<sup>76</sup> adoption by using parameters that presented historical errors and considerable omissions<sup>77</sup>. Nevertheless, according to the Vienna Convention, only the practice subsequent to its adoption is relevant in order to make a correct interpretation of the treaty, not the previous one. An updated analysis of the *opinio juris* and contemporary practice as regards abortion in Latin-America and the Caribbean would reveal that, even though some countries have legalized some methods of abortion (i.e: Brazil, Argentina, Cuba, Panama) no state has legalized abortion in all circumstances and none of them, except for Colombia, have contemplated abortion as a human

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<sup>71</sup>See Inter-American Court HR. Control of Legalization in the Inter-American Human Rights Commission prerogatives’exercise (Articles 41 and 44 to 51 Of the American Convention on Human Rights). Plebiscito OC–19/05 Of November 28th of 2005. Serie A No. 19, paragraph 13 (c).

<sup>72</sup> See IACHR, Inform No. 137/99, Case 11.863, Andrés Aylwin Azócar and others, Chile, December 27th of 1999; IACHR Inform No. 66/06, case 12.001 (Bottom), Simone André Diniz, Brazil, October 21th of 2006, paragraph 23.

<sup>73</sup> See Inter-American Court HR. Callable Rectification Right (articles 14.1, 1.1 and 2 American Convention on Human Rights). Plebiscito OC–7/86 August 29th of 1986. Serie A No. 7, paragraph. 36.

<sup>74</sup> See ICHR, Inform No. 86/09, Case 12.553, Bottom, Jorge, José and Dante Peirano Basso, Oriental Republic of Uruguay, August 6th of 2009.

<sup>75</sup> Vienna Convention on Treaty’s law, 1155 U.N.T.S. 331, 8 I.L.M. 679.

<sup>76</sup> *Baby Boy*, paragraph 19(f).

<sup>77</sup> See De Jesús, Ligia M. 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, Florida Journal of International Law ().

right<sup>78</sup>. The great majority of the Latin-American and Caribbean states impose penalties for certain methods of voluntary abortion. Moreover, five countries of the continent prohibit abortion completely (El Salvador, Honduras, Nicaragua, Peru and Dominican Republic)<sup>79</sup>.

### *5. Potential Development of the Unborn Child's Rights in the Inter- American System*

Article 4 (1) of the American Convention contains a significant potential for protection of the unborn child's life against any method of abortion or voluntary destruction and presents a variety of possibilities for the future claim for respect of the unborn child's rights. Jointly with the Convention of Children's rights, the American Convention establishes a wide protection to life and to the development of the unborn child that stretches further than any other explicitly granted by any of the other regional systems of human rights.

#### *5.1 The Unborn Children's Rights*

Since the court has referred to unborn children as "children", "minors" and "babies", children's rights are the rights of the unborn children. Also, the Court adopted the definition of children from a definition given by the Convention of Children's Rights (article 1) as "every human being that is younger than 18 years old"<sup>80</sup>, establishing the eldest that a person can be in order to be considered a child, but not the youngest that he or she can be, including the unborn children in such a definition<sup>81</sup>.

On several occasions, the Inter-American Court has strongly condemned the violations of a child's right to life, signaling that such violations "have a special seriousness"<sup>82</sup>. Moreover, the Commission has highlighted the fact that there exists a sphere of special protection for children's rights, that is based on the recognition of the "vulnerability to which children are exposed and the fact that they depend on adults for the exercise of some of their own rights, their degree of maturity, their progressive development and their ignorance as regards their own human rights and of the mechanisms to demand the respect of such rights. This, therefore, makes it impossible to place children in the same situation as adults.

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<sup>78</sup> See informs from Centro de Derechos Reproductivos [ Reproductive Rights' Center], <http://reproductiverights.org/es/biblioteca-de-recursos/libros-e-informes>.

<sup>79</sup> Ibid.

<sup>80</sup> See Inter-American Court HR, "Niños de la Calle" case (Villagrán Morales and others) Vs. Guatemala. Bottom. Sentence November 19th of 1999. Serie C No. 63, paragraph. 188.

<sup>81</sup> See Argentinian Declaration when suscribing the Convention on Childrens Right, expresing its understanding of the term "child" as every human being rom the momento of conception until 18 years old Avalialable from [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>82</sup> See Inter-American Court HR. Servellón García and others Vs. Honduras case. Bottom, Remedies and Costs. Sentence of September 21st of 2006. Serie C No. 152, paragraph. 113. See Court IDH. Children's Judicial Condition and Human Right. Opinion Pol OC-17/02 of August 28th of 2002. Serie A No. 17, paragraph. 54 quoting Court IDH. Massacre of Ituango Vs. Colombia. Preliminar exeption, bottom, remedies and Cost. Sentence July 1st of 2006 Serie C No. 148, paragraph. 244; Court IDH. Massacre of Mapiripán Vs. Colombia case. Bottom, remedies and costs. Sentence of September 15th of 2005. Serie C No. 134, paragraph. 152; Court IDH. Yean and Bosico Children Vs. Dominican Republic case. Sentence Interpretation's Demand of preliminar exeptions Bottom, Remmedies and Costs. Sentence of November 3rd of 2006. Serie C No. 156, paragraph 33.

The court has also held that, when referring to the children's right to life, the state is obliged in two different ways under articles 4 (the duty to respect the children's right) and 19 (the prevention of any violation of this right) of the Convention<sup>83</sup>. A decision of the court about the right to life from conception should then rule on both articles, and recommend both punitive and preventive measures. Likewise, due to the application of the American Convention that, in article 5, prohibits the application of penal death to children under 18<sup>84</sup>, the Commission notes that "Every State member of OAS recognizes a *jus cogens* norm that prohibits the execution of minors"<sup>85</sup>.

Since voluntary abortion constitutes a form of execution that is significantly more severe than the death penalty, there is no legitimate reason to grant a lower standard of protection to the unborn child's life, which is protected from the moment of conception in the American Convention.

The American Convention as a whole is applicable to the protection of unborn children's lives, as the Court has expressed with regard to the born boy or girl<sup>86</sup>. Therefore, some other principles, such as the "children's superior interests" or equality under the law are also applicable to unborn children. The Court has signaled through the consultant opinion CO /17-2002 about the judicial condition and human rights of children, which is also applicable to unborn children, that the expression "children's superior interests" that was consecrated in article 3 of the Convention of Children's Rights implies that children's development and the full exercise of their rights should be considered as guiding criteria for the norms' elaboration and their application in every aspect of children's life<sup>87</sup>. It is not difficult to argue that between life and death, it would always be considered as in children's superior interest to live.

## 5.2 The Unborn Child's Juridical Personality

The text of article 4 (1) establishes that every person has the right to have his or her life protected from the moment of conception, which clearly indicates that the State members recognized the unborn baby as a person, from the moment of conception based on an interpretation of good faith according to the general sense that should be given to the treaty's terms as Rafael Nieto Navia, former judge and President of the Inter American Court of Human Rights, stated<sup>88</sup>. Article 1(2) of the Convention,

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<sup>83</sup> See Inter-American Court HR. Mssacre of Mapiripán Vs. Colombia case .Bottom, Remedies and Costs. Sentence of September 15 of 2005. Serie C No. 134, paragraph 162; Court IDH. Gómez Paquiyauri brothers Vs. Perú case. Bottom, Remedies and Costs. Sentence of July 8th of 2004. Serie C No. 110. Paragraphs 124 and 171; Inter-American Court HR. Bulacio Vs. Argentina case. Bottom, Remedies and Costs. Sentence of September 18th of 2003. Serie C No. 100, paragraph. 138. See also article XXX of the American Declaration.

<sup>84</sup> See identical prohibition on the international Agreement on Civil and Political Rights article 6(5) and Convention on Children's Rights, article 37(a).

<sup>85</sup> See ICHR, Inform N° 62/02, Case 12.285 (Bottom), Michael Domingues, United States of America October 22nd (2002).

<sup>86</sup> See ICHR, *La Infancia y sus Derechos en el Sistema Interamericano de Protección de Derechos Humanos* [Infance's Rigts on the Inter American System] (second edition), paragraph. 21. Available from <http://www.cidh.oas.org/countryrep/Infancia2sp/Infancia2cap1.sp.htm>

<sup>87</sup> See Inter-American Court HR. Children's Judicial Condition and Human Rights. Opinion Pol OC-17/02 on August 28th of 2002. Serie A No. 17, paragraph. 2.

<sup>88</sup> See Nieto Navia, Rafael. Aspectos Internacionales de la demanda contra la penalización del aborto, *Persona y Bioética* magazine, [International Aspects of the Demand of Abortion's Penalitation, Person and Bioethicts Magazine] Vol. 9, N° 1 (24), pp. 21-42, Colombia, 2005 Quoted in Ricardo Bach of Chazal,

indicates, that every human being is a person, granting, therefore, recognition of the unborn's human personality and that the unborn, since it is a person or human being, is a subject of rights in the Inter-American System. Also, the Convention's preamble signals that men's essential rights are a consequence of their human nature, not of any particular attribute or characteristic, nor the perception of people who, in this case, deny the juridical personality of the unborn child due to their immature state of development.

The Inter-American Court has ratified that "the lack of recognition of juridical personality of a person, damages human dignity, since it denies, in an absolute way, the subject of law and makes him vulnerable to the non-observance of his rights by the State or by private parties"<sup>89</sup>. Therefore, to deny the juridical existence of the unborn child would be a violation of this right contemplated in article 3 of the American Convention. To such respect, the Inter-American Court affirmed that even if children and other legally incapable individuals, cannot exercise their rights in a full way (i.e: the right to vote or the right to administrate their patrimony), they are entitled to inalienable rights inherent to every human being<sup>90</sup>. Consequently, the unborn child's civil incapacity is not an impediment for the enjoyment of his or her human rights, especially the human rights to life and to be recognized as an individual before the law.

### *5.3 The Unborn Child's Equality in front of the Law.*

Voluntary abortion's legalization leads to denying the right to life to a particular group of people: the unborn children, that would constitute a discrimination based on age or birth, forbidden by the American Convention in article 1 (1), the additional protocol of the American Convention about Human Rights as Regards Economic, Social and Cultural Rights (hereinafter "San Salvador Protocol")(article 3), in its preamble and in article 2 (1) the Convention about Children's Rights and the Children's Rights Declaration, principle 1<sup>91</sup>. As regards the handicapped children eliminated through therapeutic abortions, these children would be victims of a severe discrimination based on the principles established by the Inter-American Convention for the Elimination of Every Form of Discrimination Against every Handicapped Person.

The instruments of the Inter-American system were adopted based on the principle of "equality" of every human being. Article 24 of the Convention and article 2 of the

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Inconstitucionalidad y No Convencionalidad del Aborto Voluntario, Revista de Derecho de Familia y de las Personas [Inconstitutional and unconventional Voluntary Abortion. Family Rights's Magazine], Year III, number 6, July (2011), La Ley Editorial, page 36–39.

<sup>89</sup>See Inter-American Court HR. Yean and Bosico Children's case Vs. Dominican Republic. Preliminary Excepciones, Bottom, Remedies and costs. Sentence of September 8th of 2005. Serie C No. 130, paragraph. 179 and Inter-American Court HR. Bámaca Velásquez Vs. Guatemala Case. Bottom. Sentenc of November 25th of 2000. Serie C No. 70, paragraph 179.

<sup>90</sup> See Inter-American Court HR. Juridical Condition and children's Human Rights. Consultative opinion OC-17/02 of August 28th of 2002. Serie A No. 17, paragraph. 41.

<sup>91</sup> See also article 24(1) of the International Agreement of Civil and Political Rights, (Pacto Internacional de Derechos Civiles y Políticos) article/section 2(2) of the International Agreement of Economic, Social and Cultural Rights (Pacto Internacional de Derechos Económicos, Sociales y Culturales) and the article 2 of the Universal Declaration of Human Rights (Declaración Universal de Derechos Humanos) that forbid discrimination because of birth reasons.



Declaration, establish that every person, without any discrimination, must have the right to the same protection in front of the law. Since the unborn child is considered a person, according to the American Convention, children also enjoy the right to be equal before the law.

#### *5.4 Economic, Social and Cultural Rights.*

Not only do the States members of the Convention have the obligation to forbid different methods of abortion, but they are also obliged to prevent them. In this respect, the Court has established that “children’s right to life not only implies respect for the prohibitions that are related to the life’s protection, stated in article 4 of the American Convention, but also, to establish the conditions necessary to encourage minor’s development”<sup>92</sup>.

To grant the Economic, Social and Cultural Rights of the unborn children and their parents might be a preventive measure in situations where poverty is an important factor in the incidence of voluntary abortions. Sergio Garcia Ramirez, former judge of the American Court, in his article “Bio-Techniques and Human Rights protection of the Inter-American Jurisdiction”<sup>93</sup>, signaled the relation between Economic, Social and Cultural rights and article 26 of the Convention (progressive development) and bioethics topics, among these, he mentions *in-vitro* fertilization and embryo manipulation or life suppression, since human rights are indivisible, as established by the preamble of the San Salvador Protocol.

Also, article 15 (3) (a) of San Salvador’s Protocol establishes the right to pre-natal healthcare that would be enforceable by the Commission or the Court. Article 15 of the Protocol and article 6 (2) 24(2) and 27 (1) of The Convention on the Rights of the Child establish the right to have medical health care before birth, the right to survive and the right to physical development. Also, the declaration of the Rights of the Children, in its second principle, establishes that children have the right to a healthy physical development and establishes that “when enacting laws for such a purpose the fundamental principle taken into consideration would be the children’s superior interest”. The states members are, therefore, obliged according to their possibilities, to recognize, and to slowly grant these rights, according to article 26 of the Convention on progressive developments of economic, social and cultural rights and article 4 of the Convention on the Rights of the Child. In this sense, the Court signaled that “children’s full exercise of their economic, social and cultural rights has been related to the obliged state’s possibilities. The aforementioned state, must make a constant and deliberate effort to try to ensure children’s rights and their access to and enjoyment of such rights, avoiding any recession or unjustified delays and

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<sup>92</sup> See also Court HDI (Human Development Index). Case “Niños de la calle” (Villagrán Morales and others), sentence November 19th, 1999. Series C Nº 63, paragraph 144 and Court HDI. Kids’ Legal condition and Human Rights. Consultative Opinion CO-17/02 August 28th, 2002. Series A Nº 17, paragraph 34.

<sup>93</sup> Sergio García Ramírez, “Bioética y Protección de los Derechos Humanos ante la Jurisdicción Interamericana” (“Bioethics and Protection of the Human Rights before Inter-American Jurisdiction”) at “Hacia un instrumento regional interamericano sobre la bioética. Experiencias y expectativas” (2009) (“Towards an Inter-American Regional instrument for bioethics. Experiences and Expectations”) (2009). Available at <http://www.bibliojuridica.org/libros/libro.htm?l=2673>.

assigning to the fulfilling of these obligations the majority of the available resources”<sup>94</sup>.

Even if IACHR has no competence *ratione materiae* to pronounce in a particular case about violations to San Salvador’s Protocol, the Commission has previously indicated that, taking into account what has been established in articles 26 and 29 of the American Convention, the IACHR might consider the dispositions contained in such Protocol to be applied to the American Convention<sup>95</sup>.

## 6. Conclusions

The State members of the American Convention explicitly granted in article 4 (1) the right to life from the moment of conception, protecting the unborn child, as a subject of rights, from any act that might intentionally cause his or her death or destruction. The Inter-American Court has been benevolent with regard to this disposition, making reference to the unborn child as “child” or “minor”, recognizing voluntary abortion as a violation of human rights and recognizing, through its case law, that the child has the right to pre-birth medical health care, as has been indicated in article II.

Nevertheless, the Commission’s disposition with regard to the human right to life has been different depending on the historical moment and on the composition of the Commission. At different times, some of the country and thematic reports had promoted the unborn’s right to life, and condemned various methods of abortion, including voluntary abortion. Yet, since *Baby Boy vs. United States of America*, various Commission reports show a tendency to a restrictive interpretation of the right to life from the moment of conception and also, to the creation of a right to abortion and to artificial reproduction. The Commission has also published a resolution, a report of friendly solution and two admissibility reports, examined in article III, in which it promoted the legalization of voluntary abortion and *in vitro* fertilization. Even though, such reports are non-binding on both the States members and the Court, the Commission has used them to push some of the State members, such as Mexico and Costa Rica, to legalize acts that cause the death of unborn children, thereby contravening article 4 of the Convention.

A correct interpretation of the American Convention through IACHR or by the Court should apply international norms of treaty interpretation. An analysis about the actual meaning of the treaty, made in good faith, according to context, and taking into account the legislative intention of the members states when approving the Convention and the practice following the adoption of the Convention would lead us to the conclusion that article 4(1) protects the unborn child’s life against any kind of act, that would lead to its death or destruction.

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<sup>94</sup> Sergio García Ramírez, “Bioética y Protección de los Derechos Humanos ante la Jurisdicción Interamericana” (“Bioethics and Protection of the Human Rights before Inter-American Jurisdiction”) at “Hacia un instrumento regional interamericano sobre la bioética. Experiencias y expectativas” (2009) (“Towards an Inter-American Regional instrument for bioethics. Experiences and Expectations”) (2009). Available at <http://www.bibliojuridica.org/libros/libro.htm?l=2673>.

<sup>95</sup> See ICHR (Inter-American Commission on Human Rights), Report N° 156/10, Request 1368-04 (Admissibility), Gerardo Gómez, Aída Marcela Garita and others, Costa Rica, November 1st (2010), paragraph 49; Report N° 44/04, Laura Tena Colunga and others (Inadmissibility), México, October 13th, 2004. Paragraph 33-40; Report N° 29/01, Case 12.249, Jorge Odir Miranda Cortez and others (Admissibility), El Salvador, paragraph 36.

A resolution that is consistent with the unborn's recognition "as child" would stipulate that voluntary abortion is a severe violation of human rights, as is every violation against children's right to life. Such a resolution would recommend that abortion be fought out by the State members of the Convention, not legalized or celebrated as a human right. Also, the resolution would recommend preventive measures, including economic, social and cultural rights promotion.

The Inter-American System of Human Rights presents a considerable potential for the protection of the child's right to life. The progressive development of the recognition of the right to life from conception, framed by children's rights or as a means of anti-discrimination, could be the contribution made by the Inter-American System of Human Rights to the world in the field of international law of human rights, if the individuals that are part of the organs of the System honor the spirit and principles of the American convention.