

Peruvian Congress Debates Bill to Decriminalize Abortion.

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On September 26, 2014, the bill No. 3839-2014-IC was introduced in the Congress of the Republic of Peru. This was a legislative initiative to decriminalize abortion in cases of pregnancies resulting from rape, artificial insemination, or transfer of eggs without consent.

After a long debate the bill was shelved in the Committee on Justice and Human Rights of the Congress, but was sent to the Committee on Constitution, which is pending further discussion.

I. Background

Rape causes a woman who has been a victim of such crime to undergo high threats to her physical and mental health. This leaves her in a condition of vulnerability that is very hard to overcome. These hardships are not unknown to the Peruvian State.

The consequences of rape can be even more serious when the woman becomes pregnant as a result of such crime. In this case, the woman faces not only the consequences of the violent act that was perpetrated against her, but also the difficulty of conducting a pregnancy in such circumstances and, often without the support of others.

In this situation, both the pregnant woman and unborn child are victims. The devastating effects of rape affect the well being and normal development of both. Faced with this critical situation, it is imperative for the Peruvian State to provide and ensure a framework for protection of the rights of Peruvian women and children conceived as a

result of rape. This should not only include responsive actions for the protection of the women and child, but also preventive actions aimed at reducing the high rates of rape in the country.

One possible threat to children conceived as a result of rape is the violation of their right to life. It is an alarming fact that many victims of rape, who become pregnant, undergo clandestine abortion practices. The lives of children are further threatened with the intention of decriminalizing abortion in cases of rape.

Until recent years, the Peruvian state firmly upheld a legal framework which protected the right to life of every human being. As such, until 2014 the Peruvian legal system did not allow the practice of abortion under any circumstances.

Even though in 1924, the Peruvian Criminal Code decriminalized the "therapeutic abortion" this legal provision¹ was not enforced at that time, and therefore not effective.

It was only on June 27, 2014, that the "Protocol on Therapeutic Abortion"² was enacted. The Protocol enforces Article 19 of the Criminal Code, which decriminalized abortion in cases when it was the only means to save the life of the mother or to avoid a serious and permanent harm to her health. This Protocol opened the door to the legal practice of abortion in Peru. It is worth noting that the Protocol limited abortions to before twenty-two weeks of gestation. .

The decriminalization of "therapeutic abortion" became the first step for further demanding "free abortion." On September 26, 2014, the bill No. 3839-2014-IC was introduced in the Congress of the Republic of Peru. This legislative initiative would decriminalize abortion in cases of pregnancy resulting from rape, artificial insemination, or transfer of eggs without consent. It was prompted by feminist organizations, such as

¹ Article 119 of the Peruvian Criminal Code:

"Abortion shall not be punished when it is performed by a doctor with the consent of the pregnant woman or her legal representative, if any, provided that it is the only way to save the life of the pregnant woman or to avoid a serious and permanent damage to her health."(Translation by the author.)

² National Technical Guide for the standardization of the procedure of the Comprehensive Assistance of pregnant women in the Voluntary Interruption by Therapeutic Indication of Pregnancy lesser than 22 weeks with informed consent under the provisions of Article 119 of the Criminal Code, approved by Ministerial Resolution No. 486-2014/MINSA.

Manuela Ramos³, DEMUS⁴, PROMSEX⁵, Flora Tristán⁶ and Católicas por el Derecho a Decidir⁷.

II. The Content of the Bill

The bill No. 3839/2014-IC (hereafter, the “bill”) would amend the Criminal Code to decriminalize abortion in cases of rape, artificial insemination, or transfer of eggs without consent.

Particularly, , the proposed legislative amendment provides the following:

“Article 119.-Abortion shall not be punished when it is practiced with the consent of the pregnant woman or her legal representative, in the following cases:

- 1. When it is the only way to save the life of the pregnant woman or to avoid a serious and permanent damage to her health;*
- 2. When the pregnancy is the result of an act of (rape), or of an act of artificial insemination, or transfer of fertilized eggs without consent.*

In the case of a minor, the consent will be given by her legal representative.” (Translation by the author and emphasis added.)

³ Manuela Ramos is a Peruvian feminist non-profit organization founded in 1978 that promotes the exercise of "sexual and reproductive rights" of women. See: <<http://www.manuela.org.pe/manuela-ramos/>> (last access: May 17, 2015.)

⁴ DEMUS is a Peruvian feminist organization founded in 1987 that promotes the belief that women are owners of their bodies and sexuality, and advocates for a secular State in which "sexual rights and reproductive rights" are exercised. See: <<http://www.demus.org.pe/pagina.php?id=31>> (last access: May 17, 2015).

⁵ PROMSEX is a feminist organization founded in 2005 in Peru. Their mission is "to advance the integrity and dignity of people in the access to sexual and reproductive health, justice and human security, through advocacy, educational outreach, and coordination with other organizations of civil society" (translation by author). See: <<http://www.promsex.org/acerca-de-promsex/mision-y-vision.html>> (last access: 17/05/2015).

⁶ Flora Tristán is a feminist institution, founded in 1979, that "seeks to expand the citizenship of women and to influence the policies and processes of development, in order to ensure that they meet criteria and results of gender equity and justice"(translation by author). See: <http://www.flora.org.pe/web2/index.php?option=com_content&view=article&id=197&Itemid=120> (last access: May 17, 2015).

⁷ Católicas por el Derecho a Decidir (Catholics for the right to choose) is a feminist movement that affirms the existence of a women’s right to make decision about their own body and sexuality without restrictions, and, as part of it, to have an abortion. See: <<http://www.cddperu.org/acerca-de-cdd/carta-de-principios>> (last access: May 17, 2015).

III. Contrary to Existing International and National Law

The bill directly opposes binding international law and Peruvian national law, both of which protect the right to life of every human being from conception.

1. International Legal Framework

Article 3 of the *Universal Declaration of Human Rights* provides that “everyone has the right to life...”

Article 6, paragraph 1, of the *International Covenant on Civil and Political Rights* states that “every human being has the inherent right to life. ...”

Article 4 of the *American Convention on Human Rights (Pact of San Jose)* affirms “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. ...”⁸.

First, the aforementioned articles show that the international law binding on Peru recognizes and protects the right to life of human beings.

Second, these international documents recognize the unborn as a human BEING. This is evident in Article 6 of the *Universal Declaration of Human Rights*, which states that

⁸ The Inter-American Court of Human Rights, in the case *Artavia Murillo s v. Costa Rica* interpreted the term "conception" in the *Pact of San Jose* and in national laws to refer to the implantation of the embryo. However, the Court neglects the abundant scientific evidence that recognizes the zygote as a human living organism that holds all the genetic instructions for the development of the embryo (The embryologists Ronan O' Rahilly and Fabiola Muller consider that “although life is a continuous process, fertilization [...] is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is formed when the chromosomes of the male and female pronuclei blend in the oocyte. This remains true even though the embryonic genome is not actually activated until 2-8 cells are present at about 2-3 days. [...]. Despite the various embryological milestones, however, development is a continuous rather than a saltatory process, and hence the selection of prenatal events would seem to be largely arbitrary.” See: Ronan O'Rahilly and Fabiola Muller. *Human Embryology & Teratology*. Third edition. Wiley-Liss, New York, 2001, p. 8.), and contradicts the meaning of Article 4 of the *American Convention on Human Rights*, which recognizes and protects the right to life of every human being from the moment of fertilization. The Court also fails to recognize that most of the States parties to the *Pact of San Jose* recognize the right to life from conception to refer to fertilization. Thus, State parties shall, in exercise of their sovereignty and in accordance with their true international duties, preserve the legal protection to human life as they have done before the Court's misinterpretation..

"everyone has the right to recognition everywhere as a person before the law," and in Article 1, paragraph 2, of the American Convention on Human Rights, which states that "for the purposes of this Convention, 'person' means every human being."⁹

Finally, under the cited legal documents, no distinction is made between human beings that are born and those yet to be born, since such conduct would constitute an act of discrimination outlawed by the same legal texts. Accordingly, Article 1 of the *Universal Declaration of Human Rights* provides that "all human beings are born free and equal in dignity and rights. (...)" Article 2 of the same *Declaration* states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as (...) birth..." Furthermore, Article 2, paragraph 1, of the *International Covenant on Civil and Political Rights* expresses that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as (...) birth..." Finally, Article 1, paragraph 1, of the *American Convention on Human Rights* declares that "the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of (...) birth..."

2. National Legal Framework

⁹ The Inter-American Court in *Artavia Murillo vs. Costa Rica* has considered that "the historic and systematic interpretation of precedents that exist in the inter-American system confirms that it is not admissible to grant the status of person to the embryo." *Fundament* 223. However, we believe that this statement directly opposes a literal and teleological interpretation of Article 1, paragraph 2, of the *Convention*, which expressly states that "for the purposes of this Convention, 'person' means every human being". This statement must be interpreted in the light of scientific evidence, which has shown that the embryo is a living human being.

Furthermore, the judgment in the case *Artavia Murillo v. Costa Rica* ordinarily only binds the parties involved. However it may be noted that the interpretations made by the Inter-American Court would be binding for Peru. The Peruvian Code of Constitutional Procedures Law N° 28237- regulates International Jurisdiction and in particular the jurisdiction of the Inter American Court of Human Rights and Article 115 establishes that the IACHR's decisions are binding for Peru and regulates the procedure for their enforcement by the Judiciary. Article 115 is intended to ensure the enforcement and effectiveness of international treaties. Under the *pro homine* principle Inter American Court of Human Rights' decisions cannot be binding if they provide less protection than the local law or the Constitution.

Article 2, paragraph 1, of the Peruvian Constitution expressly states that “*all persons have the right to life*” (translation by the author.) Article 1, paragraph 2, of the Peruvian Civil Code disposes that “*human life starts at conception*” (translation by the author.)
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Article 1 of the Code for Children and Teenagers affirms “*the child and the teenager have the right to life since the moment of conception*” (translation by the author.)

First, following the analysis made with international law,, Peruvian national law expressly recognizes the right to life of human beings.

Second, Peruvian national law recognizes the unborn as a person and, therefore, as a subject of law. This can be seen in Article 2, paragraph 1, of the *Constitution*, which declares that “*the unborn are subjects of law for everything that favors them*” (translation by the author); in Article 1, paragraph 2, of the *Civil Code*, which reiterates that “*the unborn are subjects of law for everything that favors them*” (translation by the author); and in Article II of the *Preliminary Title of the Code for the Children and the Teenagers*, which affirms that “*the child and the teenager are subjects of rights, liberties and specific protection*”, specifying in article I of the same section that “*every human being shall be considered as a child from conception (...)*”(translation by the author).

Finally, the Peruvian legal framework recognizes the right to equality of all persons, prohibiting any unjustified discrimination. In that sense, Article 2, paragraph 2, of the *Constitution* establishes the right of all persons “*to equality before the law*” (translation by the author), specifying that no one shall be discriminated against for any reason. Furthermore, Article 3 of the *Civil Code* provides that “*all persons have the enjoyment of their civil rights, except in the cases expressly stated by law.*” (Translation by the author) Finally, Article III of the *Preliminary Title of the Code for the Children and the Teenagers* states that “*when interpreting and applying this Code, one shall consider the equality of opportunities and non-discrimination to which every child and teenager have right (...)*”(translation by the author).

Therefore, it is evident that both the international and the national Peruvian law recognize and protect the right to life of every human being from the moment of conception. It is now follows to review the arguments laid out by the bill for the decriminalization of abortion in the cases stated above.

IV. The Refutation of the Arguments in the Bill

It was demonstrated above that the bill is contrary to the Peruvian law, both in its domestic and international spheres. We will now refute the arguments presented in the Explanatory Memorandum of the bill in order to leave no doubt of its lack of a legal basis.

To accomplish this task, we will follow the structure found in the bill itself. In this regard, the main arguments presented by the bill are summarized as follows: (i) The right to life of the unborn may be limited; (ii) The banning of abortion threatens women's dignity; (iii) The banning of abortion threatens women's right to the free development of their personality; (iv) The banning of abortion threatens women's right to equality and non-discrimination; (v) The banning of abortion threatens women's right to health; and (vi) The international Human Rights framework would force the Peruvian State to approve the Bill.

1. The argument that the right to life of the unborn can be limited is untenable

Based on a decision of the Peruvian Constitutional Court, the bill argues that fundamental rights *"are not absolute."* *This has been recognized also by the Constitutional Court, because they may be limited, that is, restricted or displaced when they conflict with other constitutional rights or goods.*¹⁰ The bill claims that fundamental rights, including the right to life of the unborn, may be limited because they are not absolute.

However, if we examine the Court decision itself, it stated, *"fundamental rights (...) have not the quality of absolute (...). Therefore, (...) the legislator is empowered to vary the content of fundamental rights, always provided that the general conditions set forth in the*

¹⁰ Bill No. 3839/2014-IC which intends the decriminalization of abortion in cases of pregnancies resulting from a sexual violation, artificial insemination or transfer of eggs without consent, p. 8 (freely translated by author).

Constitution are respected, and that their 'essential content' is not violated."¹¹ The Court added that "*... it is one thing, in fact, to limit or restrict the exercise of a constitutional right, and quite another to decrease it or delete it. The limitation of a right does not entail its reduction or elimination, but only establishes the conditions under which it applies. . Hence, the Constitutional Court has been emphatic in saying that one cannot destroy the content of a right on the pretext of limiting it or, perhaps, deleting it, since the purpose of such limitations is only to define the essential content of the right.*"¹² (Emphasis added).

Therefore, following the Supreme Interpreter of the Constitution, and the jurisprudence cited by the bill itself, we can affirm that although it is legally permissible to limit the exercise of a constitutional right, this may never be to the point of destroying its essential content.

The right to life has an essential juridical value and is of a foundational nature since it must be presupposed for the enjoyment of all other rights. Thus, according to the above principle, no limitation shall be arbitrarily imposed on its exercise. The right to life cannot be restricted "to a lesser or greater extent." It is a *sui generis*¹³ right, which must be either fully enjoyed or suppressed. Its arbitrary suppression is an act contrary to law.

2. The argument that the banning of abortion threatens the women's dignity is untenable

In addition, the bill asserts that its proposal is necessary to preserve women's dignity. The Explanatory Memorandum of the bill states: "*The imposition of a pregnancy resulting from rape threatens the autonomy and dignity of a woman, to whom the State treats not as a "subject of law" but as a "means" to safeguard the life or health of another human being.*"¹⁴

¹¹ Peruvian Constitutional Court. Ruling on the File No. 0050-2004-AI, fundament 38 (freely translated by author).

¹² Peruvian Constitutional Court. Ruling on the File No. 014-2002-AI/TC, fundament 93 (freely translated by author).

¹³ Mawson, C. O. Sylvester (1975). "sui generis". Dictionary of Foreign Terms (2 ed.). New York: Thomas Y. Crowell Company. p. 328. ISBN 0-690-00171-1: *Sui generis* is a Latin phrase, meaning "of its (his, her, or their) own kind; in a class by itself; unique"

¹⁴ Bill No. 3839/2014-IC, Cit., p. 5 (freely translated by author).

First, while it is argued that “*the imposition of pregnancy*” violates the dignity of women, no explanation of this statement is offered. There is no explanation of how requesting a pregnant mother to carry her unborn child to full-term threatens her dignity as a human person or as a subject of the law. For that argument to be sustainable, we would need to verify the existence of a right to abortion. However, if there is a right to life for every human being, there can be no right that arbitrarily suppresses it.

Human dignity is a good of such great value that its preservation is one of the ultimate goals of the Peruvian State¹⁵. It guides all its actions and, in particular, that of its legal system. Therefore, the recognition of women’s dignity is already protected by the national legislature, without any distinction made between men and women and with an express establishment of the right of equality and non-discrimination.

When the bill alleges that there is a threat against the dignity of women, it intends to “create” a new right for women, the right to abortion. However, it fails to recognize that the creation of such right would conflict with existing national law which protects the right to life of every human being. Moreover, it would oppose the ultimate aim of the State which is to defend the dignity of the human person, among whom are the unborn.

In other words, the bill appeals to the dignity of the pregnant woman to justify the violation of the dignity of another human being, the unborn. However, the Explanatory Memorandum of the bill does not provide any explanation for why the dignity of women would be more valuable than the dignity of the unborn. Instead, we believe that both dignities have the same juridical value and deserve the same protection. Thus, the law prohibits the violation of the right to life of both the unborn and women with laws that criminalize abortion and homicide.

Notwithstanding that both dignities, of the unborn and of the pregnant women, have the same value, the principle “*favor debilis*”¹⁶ prevails to protect the weaker party when there is a conflict of rights. While we deny the existence of a conflict of rights in the case

¹⁵ Article 1 of the Peruvian Constitution.

¹⁶ As the Peruvian Constitutional Court has stated, the principle *favor debilis* dictates that in situations of conflict between fundamental rights, special consideration must be taken to the weaker party, which is in a position of inferiority and not of equality with the other. See: Peruvian Constitutional Court. Ruling on the file No. 02095-2009-PC/TC, October 16, 2009, fundament 34.

proposed, we defend that in such a conflict the life of the unborn should be protected, as it is the weaker party.

Therefore, in the tragic case of rape, it is necessary to protect the dignity and fundamental rights of both the unborn and the woman. Thus, the State must defend the life of the unborn child. Also, the State must safeguard the health and safety of women victims of rape through reactive and preventive measures.

3. The argument that the banning of abortion threatens the woman's right to the free development of her personality is untenable

The bill contends that *“forced pregnancy as a result of an act of rape profoundly affects the life plan of the pregnant woman, aggravating the aftermath of the crime”*¹⁷.

First, while the pregnancy may constitute a memory of the rape, and generate pain and distress to women, studies show that the consequences of abortion to women's physical and psychological health can also be very severe¹⁸. In this regard, an abortion would further gravely affect the already vulnerable state of a woman victim of rape.

Second, despite the fact that pregnancy alters the life plans of a woman, such alteration does not violate her right to the free development of her personality. In fact, the bill offers an erroneous understanding of the content of this right.

The right to free development of personality is recognized in Article 2, paragraph 1, of the Constitution, and has been defined by the Constitutional Court as follows: *“The right to free development guarantees a general freedom of action to the human being with respect to each sphere of personal development.”*¹⁹

The bill states that *“one of those areas of freedom in which there can be no State interference (...) is the choice of life plans, which include, in the case of women, the free*

¹⁷ Bill No. 3839/2014-IC, Cit., p. 6 (freely translated by author).

¹⁸ Elizabeth Ring-Cassidy and Ian Gentles. *Women's Health after Abortion: The Medical and Psychological Evidence*. Second Edition. The deVeber Institute, Toronto, 2003.

¹⁹ Peruvian Constitutional Court. Ruling on the File No. 2868-2004-AA/TC, fundament 14 (freely translated by author).

*choice to wish or assume maternity or not.”*²⁰ It further states, *“Every woman should autonomously determine whether or not she chooses motherhood as part of her "life plans". Hence, the criminalization of abortion in case of rape constitutes a violation of the right to free development of personality and other fundamental rights.”*²¹

We agree that the State or a third party should not interfere with the freedom to set life plans, including maternity. However, such premise does not necessitate the existence of a right to abortion. It is important to distinguish between the situation in which one can freely choose to sexually reproduce, and the situation in which there is already a human life in development.

It is undeniable that the situation of a pregnant woman rape victim is extremely difficult and deserves the widest possible support from the State. However, there is no threat to the woman’s right to the free development of her personality when she is required to respect the right to life of the person that she carries in her womb.

The right to free development of personality calls for a general freedom of development. However, this does not exceed the limits imposed by natural and legal possibilities, including the duty to respect the rights of all other human beings.

Against these propositions, the bill relies once again on a decision of the Peruvian Constitutional Court, which states:

*“(…) the decision of a woman to bring to the world a new human life is one of those options that are protected by the right to free development of personality recognized in paragraph 1 of Article 1 of the Constitution, and shall not be an object of interference by the public authority or by any private party. Consequently, all those measures designed to prevent or to make the exercise of the said vital choice more onerous, are unconstitutional.”*²²

It is quite alarming how the bill distorts the context of this decision. In this decision, the Peruvian Constitutional Court upheld the claim that the separation of a cadet from the

²⁰ Bill No. 3839/2014-IC, Cit., p. 10 (freely translated by author).

²¹ Idem (freely translated by author).

²² Peruvian Constitutional Court. Ruling on the file No. 05527-2008-PHC/TC, fundament 21 (freely translated by author).

police institution in which she was studying, because of her pregnancy, constituted a violation of her rights to equality and non-discrimination, free development of her personality, and education. In this statement, the Constitutional Court protected the rights of the pregnant woman. However, it did not have the sense the Constitutional Court assigns to it. Beneath, we copy the paragraph immediately preceding the cited passage, as well as the entire text to which it belongs:

“20. (...)

*Therefore, any difference in treatment (distinction, exclusion or restriction) in the public or private sphere that is unfavorable to women due to their pregnancy, because it unreasonably prevents them from the enjoyment or exercise of their fundamental rights, constitutes an act of discrimination which is ipso jure null as it contravenes paragraph 2) of Article 2 of the Constitution.*²³

21. In this context, it should be noted that the decision of a woman to bring to the world a new human life is one of those options that are protected by the right to free development of personality recognized in paragraph 1 of Article 1 of the Constitution, which shall not be an object of interference by the public authority or by any private party. Consequently, all those measures designed to prevent or to make the exercise of the said vital choice more onerous, are unconstitutional.”²⁴

Now when the Constitutional Court uses the terms “*the decision of a woman to give birth to a new human life*”, it refers to the decision to intend to become pregnant and be a mother, not to the decision to end an unwanted pregnancy. And when the same Court refers to “*all those measures designed to prevent or to make the exercise of the said vital choice more onerous*”, it means the measures intended to prevent a woman from being a mother, such as discriminating against her within her study center. It does not refer to the measures that forbid the practice of abortion.

Every woman has the right to decide to be a mother. Therefore it is unlawful to discriminate against her for that reason. However, the said right does not mean, *contrario*

²³ Ibidem, fundament 20 (freely translated by author).

²⁴ Ibidem, fundament 21 (freely translated by author).

sensu, that the woman has the right to “decide to stop being pregnant” when there is a human being in gestation inside her womb. The difference between the first and the second of the described situations is radical, because it lies in the existence of a human being and the corresponding obligation to respect the latter’s right to life.

4. The argument that the banning of abortion threatens the women’s right to equality and non-discrimination is untenable

The Explanatory Memorandum of the bill states, “*the criminalization of abortion constitutes an act of discrimination against women. For no other circumstance requires people to provide the use of their bodies without desiring to do so in order to sustain others (...) and the legal binding to do so is condemned as a violation of human rights.*”²⁵

Although we believe that this argument is untenable given the legal obligation to respect life, it is worth mentioning that there is no discrimination when each and every Peruvian citizen is forced to respect the human right to life. For this reason, the crime is punishable not only for the woman who aborts, but also for the doctor that performs the abortion, and to any person who directly or indirectly causes the death of the unborn.

Furthermore, the pregnant woman’s obligation with regard to the unborn is of a special character. It requires of her a greater action than that of any other person who is not carrying the protected human being. However, even in this case, there is no discriminatory conduct. This is due to the fact that the special protection required by the pregnant women is the one required of all mothers, without any distinction based on whether the pregnancy is wanted or not.

It is clear then, that the criminalization of abortion is not an act of discrimination against pregnant women. On the contrary, the perpetration or permission of such practice does constitute a discriminatory act against the unborn human being, whose right to life is denied. The right to life is recognized for all other human beings and is necessary for the enjoyment of all other rights.

²⁵ Bill No. 3839/2014-IC, Cit., p. 10 (freely translated by author).

5. The argument that the banning of abortion threatens the women's right to health is untenable

The bill further argues against the criminalization of abortion based on an alleged violation of the right to health of the pregnant woman. The bill states that “ *forced pregnancy resulting from rape also has serious consequences for the physical, gynecological and mental health of the victims of sexual violence.*”²⁶

We reject this argument on three grounds.

First, it is necessary to distinguish between the consequences for the health of women resulting from the rape and those resulting from the pregnancy. In this regard, it is clear that while a rape can cause serious damages to the physical and mental health of the woman, the pregnancy resulting from it does not *per se* involve an alteration of the mental health of the woman.

Second, the bill claims that the pregnancy resulting from rape can involve a psychological harm to women, because “*it means the permanent reflection of the violent act through the son / daughter*”²⁷. This is true. However, abortion also causes serious damages to the physical or psychological health of women²⁸.

Third, even if the pregnancy negatively affects the mother's health, the bill submitted is not aimed to protect health. This can be deduced from the legal text proposed, which does not mention the existence of a risk to the women's health. According to the text, the fact that the pregnancy is the result of a rape, or a non-consensual artificial insemination, or transfer of eggs, is sufficient for the abortion to be unpunishable.

Moreover, an abortion performed to protect the health of the woman is already decriminalized by Article 119 of the *Peruvian Criminal Code*. Consequently, the argument of the bill based on the health of the mother is inconsistent.

²⁶ Ibidem, p. 5 (freely translated by author).

²⁷ Ibidem, pp. 11-12 (freely translated by author).

²⁸ Cfr. Elizabeth Ring-Cassidy and Ian Gentles. *Women's Health after Abortion: The Medical and Psychological Evidence*. Op. Cit.

6. The argument that the international Human Rights framework forces the Peruvian State to approve the bill is untenable

Finally, the Explanatory Memorandum of the bill relies on certain pronouncements made by the monitoring bodies of the international human rights treaties ratified by Peru. Below, we analyze the information laid out by the bill in order to demonstrate that it does not provide a basis that would require or legitimize the Peruvian State to approve the said bill.

6.1. Inter-American System of Human Rights

The bill cites two cases taken to the Inter-American Commission on Human Rights (IACHR).

6.1.1. *White and Potter vs. United States of America*

The bill refers to a decision issued by the IACHR in the case *White and Potter vs. United States of America*. The bill states that in this case, “*the IACHR interpreted Article 4 of the American Convention which states: ‘Everyone 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.’ [Emphasis added] In this regard, the IACHR noted that the inclusion of the term ‘in general’ was due to a permissive consensus, by States Party to the treaty, to grant the decriminalization of abortion in certain circumstances. Therefore, it considered that the decriminalization of abortion was compatible with the American Convention and, consequently, that the right to life from the moment of conception did not have an absolute nature.*”²⁹

The case under commentary, commonly known as case “*Baby Boy*” refers to a petition filed against the United States. In 1973, a court in Massachusetts declared a physician guilty of homicide that performed the abortion of a child upon the request of the pregnant mother. The child met the age requirements established by the Supreme Court of the United States at that time as an exception to legal abortion. Later, the Massachusetts Supreme Court annulled the first decision, on the grounds that there was insufficient

²⁹ Bill No. 3839/2014-IC, Cit., p. 13 (freely translated by author).

evidence of the recklessness of the physician. The petitioners considered that that decision violated the right to life of the unborn, and under this argument they presented the petition before the IACHR.

First, although the IACHR solved the case in favor of the defendant State, in this case the *American Declaration of the Rights and Duties of Man* was applied, and not the *American Convention*. This is because the latter was not ratified by the United States.

Second, the IACHR did not stop to analyze the question of whether the unborn was considered a person for jurisdictional purposes even though the petition was presented on behalf of the unborn child. It simply assumed that a person was the subject of the alleged violation. Something similar happened in another case brought against the State of Canada³⁰, as well as in the case *Xákmok*, in which the IACHR described children who did not reach birth as “*dead people*”³¹. In order to grant personality to the unborn for jurisdictional purposes, such a being must be previously recognized as a subject of law and as a living human being.³²

Furthermore, the IACHR said, in an *obiter dicta*, that the phrase “*in general, from the moment of conception*” contained in Article 4 of the *American Convention*, did not intend to change the concept of the right to life that prevailed in the adoption of the *American Declaration*. This concept did not specify the initial moment of life. However, this *obiter dicta* is contrary to what was previously held by Commissioner Tom J. Farer and many others when discussing the *Pact of San Jose* at the Congress of the United States in 1979. He said that “*the United States should refuse to accept the categorical preclusion of*

³⁰ Report of the IACHR, Admissibility, James Demers, Canada, No. 85/06, Petition 225-04, 2006, paragraphs 41 y 42. Available in: <<http://www.cidh.org/annualrep/2006sp/canada225.04sp.htm>> (last access: 25/04/2015).

³¹ Petition of the IACHR at the Inter-American Court on Human Rights, case Indigenous community Xákmok Kásek of the Enxet-Lengua people and its members (Case 12.420) against Paraguay, July 3, 2009, paragraph 105. Available in: <<http://www.cidh.oas.org/demandas/12.420%20Xakmok%20Kasek%20Paraguay%203jul09%20ESP.pdf>> (last access: 25/04/2015).

³² Following Fernández Sessarego, “*The law grants people rights and duties. Some of these rights and duties are given even before the person is born and are unalienable.*” (freely translated by author). Original text: “*«Sujeto de derecho» es el ente al cual el ordenamiento jurídico imputa derechos y deberes. En la experiencia jurídica –en la dimensión existencial- este ente o centro de referencia normativo no es otro que el ser humano, antes de nacer o después de haberse producido este evento, ya sea que se le considere individualmente o como organización de personas*”. See: FERNÁNDEZ SESSAREGO, Carlos. *Derecho de las Personas*. Editorial Jurídica Grijley, Lima, 2004, p. 3..

*abortion that Article 4 makes*³³.³⁴ In a similar way, Commissioner Andrés Aguilar seemed to recognize that, under the *American Convention*, the practice of abortion was not allowed. He issued a concurring opinion in which he emphasized that the United States should not be judged in the light of the *Convention*, but only of the *Declaration*, which allowed each State to regulate the protection of life during pregnancy³⁵. Additionally, he affirmed that “*human life begins at the moment of conception and should deserve full protection from this moment, both by domestic and international law*”³⁶.

As the bill mentions,³⁷ the IACHR stated that under the expression “*in general*”, the decriminalization of abortion was compatible with the *American Convention*. Indeed, both the IACHR and the Court have held that the term “*in general*” contained in Article 4 of the *Convention* has a “permissive” nature. However, neither of these bodies has specified the scope of that character.

Additionally, during the preparatory works of the *American Convention*, the representatives of the United States and Brazil proposed to delete all references in the text of Article 4 to conception as the initial moment of life. However, the other countries opposed this proposal, thus supporting life from conception. The Council of the Organization of American States also recommended including a reference to conception³⁸.

In the absence of a clear statement of the IACHR regarding the term “*in general*” of Article 4 of the *Convention*, this term must be applied strictly. Thus, as a general rule, the defense of human life begins from the moment of conception. This interpretation is consistent with both the preparatory works of the *Convention* and with a literal interpretation of the phrase. A literal interpretation must observe the principle of *ut*

³³ AGREGAR UNA NOTA EXPLICANDO LO DEL PACTO Y LO DE EEUU.

³⁴ Cited in ALSTON, “The Unborn”, cit. Note No. 18, pp. 176-177.

³⁵ Case “*Baby Boy*”, concurring opinion of the commissioner Andrés Aguilar M., paragraphs 4, 5 y 7.

³⁶ *Ibidem*, paragraph 8.

³⁷ Bill No. 3839/2014-IC, Cit., p. 13.

³⁸ IACHR. Resolution No. 23/81, Case 2141 United States, March 6, 1981, OAS/Ser.L/VII.54 Doc 9 Rev. 1, October 16, 1981, paragraph 27.

*res magis valeat quam pereat*³⁹, so that the phrase “in general, from the moment of conception” is not made superfluous.

Consequently, if the term “in general” of Article 4 is taken properly, the life of the unborn could only be affected in very restricted circumstances. According to this view,⁴⁰ the termination of a pregnancy is not punishable if it is not directly willed but results from the application of the “principle of double effect”⁴¹, that is, indirect abortions.

Thus, the Explanatory Memorandum of the bill poorly interprets and applies both the *American Declaration and Convention*, and the statement of the IACHR in the case *Baby Boy*.

6.1.2. Case *Paulina vs. Mexico*

The Explanatory Memorandum of the bill refers to another pronouncement of the IACHR, in the decision *Paulina vs. Mexico* on access to abortion in cases of rape. The bill states that in this case “the Inter-American Commission approved a friendly agreement linking access to abortion in cases of rape with the right to a life free of violence and to health.”⁴²

In this decision, a minor who was pregnant as a result of a rape tried to access to the performance of an abortion with the consent of her mother. They argued that this was permitted by the laws of the State of Baja California. However, the girl encountered obstacles in obtaining the abortion and eventually gave birth.

³⁹ This principle applies when a treaty is open to two interpretations and one of these allows the treaty to have appropriate effects while the other does not. The first interpretation should be adopted, in respect to good faith and the object and purpose of the treaty (freely translated by author). Original text: “cuando un tratado da pie a dos interpretaciones, de las cuales una permite que el tratado surta los efectos adecuados y la otra no, la buena fe y el objeto y fin del tratado requieren que se adopte la primera interpretación”. See: NACIONES UNIDAS, *Anuario de la Comisión de Derecho Internacional*. Volumen II. Naciones Unidas, New York, 1967, p. 240.

⁴⁰ See Alvaro P. Diaz, “*Status of the Unborn in the American Convention: An Interpretive Exercise*”, en: *Revista Ius et Praxis*, Year 18, No. 1, 2012, pp. 61-112.

⁴¹ The principle of double effect is a principle of practical reasoning used to determine the legality or illegality of an act which produces or can produce two effects, one of which is good and the other bad. To that end, this principle takes as a basis the distinction between directly and indirectly willing. See, Alejandro Miranda Montesinos. “*El Principio del Doble Efecto y Su Relevancia en el Razonamiento Jurídico*”, in: *Revista Chilena de Derecho*, Vol. 35, No. 3, Santiago, 2008.

⁴² Bill No. 3839/2014-IC, Cit., p. 13 (freely translated by author).

As the bill mentions, the case was resolved with a friendly agreement between the State of Mexico and Paulina Ramirez. In the agreement, Mexico acknowledged its responsibility for not implementing adequate procedures that would allow women to procure a legally authorized abortion. Mexico further committed to implement these procedures and agreed to compensate Paulina Ramirez and her son.

The bill fails to mention, however, that this case was not concerned with the admission of direct abortion under the *American Convention*. Instead, the case relied on the national law of Mexico, which already authorized abortion in certain instances. Therefore, the Commission did not develop doctrine on the status of the unborn, but encouraged Mexico to implement the laws already in place.

6.1.3. The statements of the IACHR are not binding for Peru

The pronouncements of the IACHR cited by the bill do not provide a basis for States Parties to the *American Convention* to neglect the right to life. However, there is an even stronger argument for why they do not bind Peru.

This argument is that no opinion or statement of the IACHR is final, provided that it is the Inter-American Court of Human Rights the one who has the power -in principle- of establishing the final interpretations of the international instruments of the Inter-American System. In the development of its work, this court is not obliged to adhere to the interpretations of the American Convention made by the IACHR. On the contrary, the Court often rejects legal arguments made by the Commission, including among them interpretations of the *Pact of San Jose*⁴³.

According to its own Statute, the Inter-American Commission on Human Rights only has the power to make recommendations, reports, opinions, and conclusions. None of these are mandatory but merely recommendations to the States Parties to the American Convention on Human Rights⁴⁴.

6.2. Universal System of Human Rights

⁴³ Álvaro Díaz P., Cit.

⁴⁴ Article 19 of the *Statute of the Inter-American Commission on Human Rights*.

Finally, the Explanatory Memorandum of the bill refers to some general observations made by the monitoring bodies of the international treaties of the United Nations. In this regard, the bill cites? statements of the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, and the Committee on Economic, Social and Cultural Rights.

It is true that, in recent times, these international bodies have adopted opinions that might promote the decriminalization of abortion in the respective States. However, such statements do not adhere to the international treaties that gave rise to these bodies. None of these treaties denies the right to life of human beings. Furthermore, none of these bodies can issue binding statements for the Peruvian State.

The legal texts that gave rise to these international bodies state that the reports, recommendations or observations issued by the Human Rights Committee⁴⁵, the Committee on the Elimination of Discrimination against Women⁴⁶, the Committee against Torture⁴⁷ or the Committee on Economic, Social and Cultural Rights⁴⁸, are not binding to the States Parties to these instruments.

International treaties ratified by Peru alone bind the Peruvian State, and not the views that the monitoring bodies of these instruments may have. Thus, there is no legal basis that forces, nor legitimizes, a sovereign State like Peru to decriminalize abortion as the bill No. 3839-2014-IC claims

V. Conclusions

⁴⁵ Article 41 of the *International Covenant on Civil and Political Rights*.

⁴⁶ Article 21 of the *Convention on the Elimination of all forms of Discrimination against Women*.

⁴⁷ Articles 19, 20, 21 and 22 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

⁴⁸ Article 21 of the *International Covenant on Economic, Social and Cultural Rights*.

Women who are pregnant as a result of rape are victims of a horrible crime and are placed in a situation that is often difficult. The Peruvian State must take responsive measures to prevent this horrible crime.

Rape violates and affects both the well being of the female victim and of the child conceived. This child will be in a similar vulnerable position as his or her mother. Often the right to life of the unborn child is threatened through the practice of abortion.

The bill No. 3839-2014-IC would decriminalize abortion in cases of pregnancy resulting from rape, artificial insemination, or transfer of eggs without consent. This bill is contrary to Peruvian law, both in its domestic and international spheres. Both expressly protect the right to life from the moment of conception.

Both the international law binding on Peru and Peruvian domestic law recognize the unborn as a human person. Thus, they explicitly recognize this being as a subject of law.

Both legal spheres uphold the right to equality and non-discrimination of all human beings. Therefore, they outlaw any differences in the legal protection provided to the born and unborn human beings.

Requiring a pregnant woman to respect the right to life of the unborn, even under circumstances which may involve difficulties, does not threaten her dignity or her rights to the free development of her personality, to equality and non-discrimination, to health, or any others. On the contrary, allowing the woman to have an abortion places her in a

situation of even greater vulnerability, since she will have to bear the psychological trauma and physical consequences of both rape and abortion.

The reports, opinions, observations, and other pronouncements of the Inter-American Court of Human Rights, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, and the Committee on Economic, Social and Cultural Rights of the United Nations, do not bind the Peruvian State. Even if those bodies issue opinions that are contrary to the protection of the right to life, these statements do not force, nor legitimize, the Peruvian State to decrease the legal protection afforded to human life. In fact, they are in violation of the international treaties which created these international committees.

There is no legal basis that forces, nor legitimizes, the Peruvian State to approve the bill No. 3839-2014-IC.