

CONTROVERSIAL CONCEPTIONS: THE UNBORN AND THE AMERICAN CONVENTION ON HUMAN RIGHTS

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Abstract

This study interprets the ambiguous Article 4(1) of the American Convention on Human Rights, which establishes that life shall be protected “in general, from the moment of conception.” When doing so, it pays attention to different interpretive systems, and takes into account what is recorded in the *travaux préparatoires* of the Convention. Likewise, this study analyzes what the Inter-American Commission has determined on this issue, and assesses the value of these decisions. This article concludes that, even though one of the possible interpretations of the American Convention affirms that it would tolerate domestic legislations providing for abortion in exceptional circumstances, it declares the unborn’s personhood.

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I. Introduction

Forced disappearances, extrajudicial executions, and torture were formerly the main issues around which the Inter-American Court of Human Rights (IACtHR) would develop its case law. Today, this court is faced with less flagrant violations – cases where the issues involved are more subtle and difficult to decide. These issues include such matters as the right to participate in government, telephone tapping, and illegal immigration. Until now, the IACtHR has issued around one hundred and fifty judgments dealing with an extensive range of matters. The IACtHR has been very innovative when dealing with many topics, such as the property rights of indigenous communities.

Xákmok Kásek Indigenous Community v. Paraguay (the *Xákmok case*)¹ was one of the recent cases dealing with property rights of indigenous communities. The claim in this case involved an issue which had not yet been addressed by the IACtHR—unborn children—giving this court the chance to apply its innovative outlook.² Unfortunately, the regional court made no use of this opportunity to develop its case law regarding the unborn. This topic is of particular interest to the Inter-American system, because the American Convention on Human Rights (ACHR)³ makes an explicit reference to the protection of life before birth. Indeed, Article 4(1) of this treaty provides, “[e]very 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.”⁴

In the *Xákmok case* the IACtHR decided not to define whether the unborn had a right to life. The lack of a decision on this matter motivated the writing of this article. It is therefore relevant to briefly describe the case. The applicants of this case argued that they had been claiming part of their ancestral property in accordance to the domestic laws of Paraguay since 1990, with no results.⁵ The members of the *Xákmok Kásek* indigenous community also claimed that, as a consequence of the lack of recognition of their ancestral land, they were obliged to live in a place without the necessary means for their subsistence (e.g. it lacked necessary water supplies). They argued that this left them in a state of social vulnerability that affected their general condition, especially their health, whereby many members of the Community died.⁶ Among the deceased were

¹ *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010) [hereinafter *Xákmok case*]. The case law of the Inter-American Court [hereinafter “IACtHR”] is available at www.corteidh.or.cr (in the “jurisprudence” section of the English version) (last visited June 18, 2011).

² This paper will mostly use the word “unborn,” since this term as a concept includes both embryos and fetuses. For simplicity purposes, this work will mostly use the word “unborn” as a noun referring to both unborn child and unborn children.

³ OAS, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter “ACHR”].

⁴ The Spanish and English versions of this norm are equivalent.

⁵ *Xákmok case*, *supra* note 1, ¶ 2.

⁶ *Id.* ¶¶ 184, 223-26.

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two unborn children, (NN) Corrientes Domínguez and (NN) Dermott Ruiz.⁷ To include these fetuses among the Community's claim was not particularly audacious, because—besides Article 4(1)'s reference to conception—the IACtHR had in previous cases referred to the unborn as a “baby,”⁸ and some judges had issued individual opinions that seemed favorable to such an interpretation of the right to life.⁹

When deciding the case, the IACtHR affirmed that the State had indeed breached its obligation regarding the property rights of the Indigenous Community. Also, after proving the State's knowledge of the indigenous people's situation, and the governmental authorities' lack of an appropriate response, the Court found Paraguay responsible for some of the deaths claimed by the applicants. The Court held that the right to life involves not only negative obligations, such as not taking another person's life arbitrarily, but also positive obligations aimed at protecting and preserving life.¹⁰

Regarding Paraguay's responsibility for the death of the members of the Community, the ACHR made a distinction, considering the State to be liable in some instances but not in others. Most of the instances in which the Court found against the State involved its failure to prevent or adequately respond to easily preventable diseases.¹¹ When confronted with the situation of the unborn, the IACtHR stated that the claimants presented no arguments “regarding the alleged violation of the right to life of the ‘unborn.’”¹² Then, it asserted: “[w]ithout a foundational basis, the Court lacks the legal elements for determining the State's responsibility in these cases.”¹³

This assertion by the IACtHR addresses a lack of juridical arguments rather than factual uncertainty. Indeed, the Court did not base its non-decision on insufficient evidence, since it was proven that the unborn were dead, and that the reason for their passing was the precarious living conditions of the Community.

⁷ The Commission used the expression “NN” for saying that the unborn children had no names. *Id.* ¶ 228.

⁸ Gómez-Paquiyaui Brothers v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 67(x) (July 8, 2004).

⁹ See e.g., Judge Ventura says incidentally that “[p]ersonal identity starts from the moment of conception and its construction continues throughout the life of the individual,” and Judge Cançado Trindade refers to the possible consequences of violence exercised on pregnant women in the mind of children “even before their birth.” Dissenting Opinion of Judge Manuel E. Ventura Robles on the Third Operative Paragraph in Serrano-Cruz Sisters v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 132 (*n.b.*: there is a mistake in the official numbering, since it is actually ¶ 14) (Mar. 1, 2005) (the majority decision does not extend to the issue of when personhood begins); Concurring Opinion of Judge Cançado Trindade in Miguel Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 61 (Nov. 25, 2006).

¹⁰ *Xákmok case*, *supra* note 1, ¶ 187.

¹¹ *Id.* ¶¶ 231-34. At ¶ 231 the IACtHR stresses that many of the victims were children, whose rights should be especially protected by the State. *Id.* In ¶ 233 the IACtHR makes especial reference to necessary pre-natal care, but it focuses its concern mainly on the pregnant mother rather than on the unborn child. *Id.*

¹² *Id.* ¶ 228.

¹³ *Id.* ¶ 228. The original version of the phrase “[w]ithout a foundational basis” is “ante la falta de fundamentación,” which should be understood as making reference to a lack of argumentation.

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The IACtHR's argument that it lacked juridical elements to judge an issue of law is in direct contrast to this court's frequent use of the *iura novit curia* principle,¹⁴ whereby it does not need the parties to invoke the law or explain it, because a court is supposed to know, apply, and interpret the law, even if the parties give no further explanations for their claims. This departure from the *iura novit curia* principle is particularly puzzling in the case of the IACtHR because this court not only adopts this principle, but also formulates its own legal theories on it,¹⁵ thereby broadening its scope in order to support the Court's practice of determining the violation of rights that have not been pleaded by the claimant.¹⁶

According to the foregoing, the request of the *Xákmok* community was clear, the ACHR makes an explicit reference to the moment of conception when declaring the right to life, and the Court usually applies the *iura novit curia* principle. Taking these three elements into consideration, the IACtHR should have declared whether unborn children are considered to be persons according to the ACHR, and therefore, whether the State was responsible for the two pre-natal deaths reported in the *Xákmok case* and liable towards their next of kin.

Before addressing the main issue of this paper—the treatment of the unborn under the ACHR—it is necessary to outline the Inter-American regional system of human rights,¹⁷ which was created within the context of the Organization of American States (OAS).¹⁸ The main human rights instruments of this system are the 1948 American Declaration of the Rights and Duties of Man (American Declaration),¹⁹ and the 1969 ACHR or Pact of San José de Costa Rica.²⁰ The struc-

¹⁴ A principle meaning that *the court knows the law*.

¹⁵ Gerald L. Neuman, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 104 (2008). Indeed, "[t]he Court also exercises the authority to find different violations from those the Commission has alleged on the same facts. . . . The Court has been willing to find multiple violations in the same case, apparently in order to make optimal use of the opportunity to develop its jurisprudence despite its small case load." *Id.*

¹⁶ See e.g., *Usón Ramírez v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 207, ¶ 53 (Nov. 20, 2009). What makes even more bewildering this refusal to decide on an issue pertaining to the core of the right to life (the right not to be deprived of it) is that the IACtHR is at a stage in which it refers to advanced developments gleaned from the right to life such as "dignified existence." See *Xákmok case*, *supra* note 1, ¶¶ 194-217.

¹⁷ See generally HÉCTOR FAÚNDEZ LEDESMA, *THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: INSTITUTIONAL AND PROCEDURAL ASPECTS* (Charles Moyer trans., 2008), available at http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_125911109/interamerican_protection_hr.pdf (last visited Feb. 25, 2011); *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (David J. Harris & Stephen Livingstone eds., 1998); J. SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (1997). All these sources describe the Inter-American system.

¹⁸ All thirty-five independent States of the Americas are members of the OAS, namely: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (Commonwealth of), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas (Commonwealth of), Trinidad and Tobago, United States of America, Uruguay and Venezuela (Bolivarian Republic of). REP. INTER-AM. CT. H.R. 2009, 93 (2010). However, currently Cuba and Honduras are not active members. *Id.*

¹⁹ American Declaration of the Rights and Duties of Man, (1948), reprinted in INTER-AMERICAN COURT OF HUMAN RIGHTS, *BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM* 19 (2003), available at <http://www.corteidh.or.cr/docs/libros/Basing101.pdf> (last visited Feb. 7, 2011) [hereinafter American Declaration].

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ture of the Inter-American system to some extent resembles the European human rights system in its early years of existence, primarily through the joint operation of a Commission and a Court of Human Rights.²¹

According to the Charter of the OAS, the Commission is a supervisory body for protecting the rights set forth in the American Declaration, and its “principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the [OAS] in these matters.”²² The Commission also has an important role under the ACHR, which gives quasi-judicial powers to this pre-existing body.²³ On the other hand, the IACtHR was established by the ACHR as the competent organ for the protection of this treaty’s wide catalogue of human rights. Since members of the OAS are under no obligation to sign the ACHR or to grant compulsory jurisdiction to the Court²⁴—contrary to what is required to the members of the Council of Europe—some States in the Americas are subject to the jurisdiction of both the Court and the Commission, while others are subject solely to the latter. The Court has both advisory and adjudicatory jurisdiction, and may also order provisional measures²⁵ and track State’s compliance with its judgments.²⁶ There is no direct access for individuals to the IACtHR.²⁷

²⁰ There are also other OAS documents and treaties that refer to human rights, such as the Inter-American Convention to Prevent and Punish Torture (1985), the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (1988), the Protocol to the ACHR to Abolish the Death Penalty (1990) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994). *See id.* at 97, 79, 93 & 117.

²¹ The Inter-American Commission on Human Rights [hereinafter “Commission”] is located in Washington D.C., and the IACtHR in San José de Costa Rica.

²² Charter of the Organization of American States, Article 106(1), Apr. 30, 1948, 119 U.N.T.S. 3, *amended by*, “Protocol of Buenos Aires”, Feb. 27, 1967, O.A.S.T.S. No. 1-A, 721 U.N.T.S. 324, *amended by*, Protocol of Cartagena de Indias, Dec. 5, 1985, O.A.S.T.S. No. 66, 25 I.L.M. 527, *amended by* Protocol of Washington, Dec. 14, 1992, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *amended by* Protocol of Managua, June. 10, 1993, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *reprinted in* INTER-AMERICAN COURT OF HUMAN RIGHTS, *supra* note 19, at 233.

²³ *See* ACHR, *supra* note 3, arts. 41-51.

²⁴ “Twenty-one States Parties have accepted the compulsory jurisdiction of the Court. They are: Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Suriname, Panama, Chile, Nicaragua, Paraguay, Bolivia, El Salvador, Haiti, Brazil, Mexico, the Dominican Republic and Barbados.” REP. INTER-AM. CT. H.R. 2009, 2 (2010).

²⁵ This power may be exercised even before an issue is submitted as a contentious case. Interim measures are established in article 63(2) of the ACHR, and their practical details are regulated in the rules of procedure. Inter-Am. Ct. H.R., *Rules of Procedure of the Inter-American Court of Human Rights* (San José, Costa Rica, approved Nov. 24, 2009, entered into force Jan. 1, 2010), *available at* <http://www.corteidh.or.cr/reglamento.cfm> (last visited Feb. 25, 2011); *see* Jo M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 291 (2003) (detailing provisional measures).

²⁶ “The ACHR does not assign to a political body of the OAS the duty to ensure compliance with the Court’s orders, and the Court has attempted to oversee compliance itself.” Gerald L. Neuman, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 105 (2008). He considers that this “[l]ack of support from the OAS on enforcement mirrors chronic underfunding of the Court.” *Id.* (footnotes omitted).

²⁷ ACHR, *supra* note 3, art. 44.

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This paper will endeavor to elucidate the ACHR's ambiguous norm regarding the unborn, taking into account different systems of interpretation. It will also consider what the Inter-American Commission has stated regarding the issue, assessing the value of these interpretations. The paper will conclude that, although one of the possible interpretations of the ACHR would indicate tolerance of certain domestic legislations providing for abortion in exceptional circumstances, it grants to the *nasciturus*²⁸ the status of a person. Therefore, the Court should have granted the relevant compensation sought in the *Xákmok case*.

II. Interpreting Article 4(1) in Relation to the Unborn Child

The IACtHR has referred many times to the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT) as guiding its interpretation of the ACHR.²⁹ The VCLT sets out not only the criteria by which a norm must be interpreted, but also the precedence that must be given to each of them. Some interpretations of Article 4(1), however, have had "major problems ari[sing] largely as a result of . . . ignoring the existence of the canons of interpretation codified by the Vienna Convention of the Law of Treaties."³⁰ Thus, this paper will follow the principles established in this source of international law, which require interpretations to be carried out in good faith and by analyzing "the terms of the treaty in their context and in the light of its object and purpose."³¹ This study will also make reference to a possible evolutive and *pro homine* or pro person interpretation.³²

A. Primary Method of Interpretation According to the Rules of the VCLT

This section does not intend to offer an evaluative judgment of Article 4(1) of the ACHR, but merely to clarify its meaning. This paper will interpret the text of the relevant norms of the ACHR, taking into account this treaty's context, object and purpose.³³ It will begin by thoroughly analyzing Article 4(1), which is composed of three sentences:

(1): "Every person has the right to have his life respected;"

²⁸ This study will use the Latin word *nasciturus* as a synonym of "unborn."

²⁹ This system has been used since the IACtHR's early days. See Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 48 (Sept. 24, 1982); see also Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶ 23 (Sept. 29, 2009). The relevant rules of the Vienna Convention are established in arts. 31-33. Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 20, 1980) [hereinafter "VCLT"].

³⁰ Dinah Shelton, *Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy"*, 2 HUM. RTS. L. J. 309, 313 (1981).

³¹ VCLT, *supra* note 29, art. 31(1).

³² The Latin concept *pro homine* could be translated as "in favor of man" or "in favor of the person."

³³ Originally the IACtHR asserted "the principle of the primacy of the text." Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 50. But now it tends to stress the importance of analyzing the ACHR as a whole. See *Advisory Opinion OC-20/09*, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶¶ 23-26.

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(2): "This right shall be protected by law and, in general, from the moment of conception;" and

(3): "No one shall be arbitrarily deprived of his life."³⁴

The first of these sentences declares the existence of a right to life. The second refers to the right declared in the previous sentence and establishes an obligation of the State. The third could be read as establishing a new right or as making explicit a consequence of the right established in the first sentence; the latter interpretation seems more reasonable.

The second sentence alludes to conception, posing the challenge of determining whether this means that a human organism has rights from this time.³⁵ This sentence, the most important for this study's textual analysis, is qualified by the "in general" phrase. Without this idiom it would read as follows: *This right shall be protected by law and from the moment of conception.*³⁶ In order to avoid the complexities added by the phrase "in general," this study will be divided in two parts, one analyzing the second sentence of Article 4(1) without this phrase, in order to understand the idea subject to this proviso, and the other with it.

1. Textual Interpretation of Article 4(1)

The subject of the sentence "*this right shall be protected by law and from the moment of conception*" is "this right." The word "this" refers to the right mentioned in the first sentence, which is the right to life. This second sentence is constructed in the passive voice,³⁷ so there is an action performed on the subject "this right," which is "protection." This sentence does not expand or restrict the right to life; it only establishes an obligation regarding its protection. The expressions "by law" and "from the moment of conception" are qualifying the action of protection by providing that the safeguard given to the right to life shall have at least these qualities. Thus, the State is not absolutely free to determine

³⁴ ACHR, *supra* note 3, art. 4(1).

³⁵ This paper will use the words conception and fertilization alternatively. Works of legal scholarship do not usually define conception, but seemingly the majority of authors consider it as a synonym of fertilization. See e.g., Rudy J. Gerber, *Abortion: Two Opposing Legal Philosophies*, 15 AM. J. JURIS. 1, 7 (1970); Eithne Mills & James McConville, *The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience*, 4 EUR. J.L. REFORM 481, 488 (2002) (Neth.); Marco Gerardo Monroy Cabra, *Derechos y Deberes Consagrados en la Convención Americana sobre Derechos Humanos "Pacto de San José de Costa Rica"*, in LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS 33, 36 (Comisión Interamericana de Derechos Humanos ed., 1980); Ángela Vivanco Martínez, *La Píldora del Día Después*, 35 REVISTA CHILENA DE DERECHO [R. CH. D.] 543, 544 (2008) (Chile). More recently, many legal scholars asserted in the first footnote to the *San José Articles* that conception or fertilization "is the union of an oocyte and sperm cell." SAN JOSE ARTICLES, http://www.sanjosearticles.com/?page_id=88 (last visited Feb. 8, 2012) There are, however, exceptions to this understanding. See e.g., Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 173 (1990) (identifying conception with implantation).

³⁶ This provision can be compared with the second sentence of Article 6(1) of the International Covenant on Civil and Political Rights, which states, "This right shall be protected by law." International Covenant on Civil and Political Rights, G.A. Res. 2200 A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

³⁷ An active voice construction of this sentence would read as follows: The law shall protect this right from the moment of conception.

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how to protect life,³⁸ since it is compelled to defend it by law. Similarly, the legislator cannot choose to provide this protection from a particular stage of human development,³⁹ since it is obliged to grant it from the moment of conception (at least as a general rule).

This mandate to protect life from the moment of conception is based on the understanding that the right to life exists from fertilization onwards. Otherwise, there would be no life to protect at that stage.⁴⁰ Furthermore, it must be noted that the second sentence of Article 4(1) draws its understanding of the unborn's right to life from the first sentence, which declares that every *person* has this right. Thus, the ACHR not only declares that unborn children have a right to life, but also that they are persons. In this regard, Article 4(1) allows no other interpretation, since its first sentence refers to the right of every *person* to have his or her life respected and the second prescribes an obligation to protect *this right*, in general, from the moment of conception. Any attempt to restrict the scope of the concept of *person* to some later starting point—whether before, at the moment, or after birth—is excluded by the clear language of Article 4(1).

The foregoing assertions can be buttressed by other norms in the ACHR, which exhibit a general trend in this regard. For instance, Article 1(2) establishes that “[f]or the purposes of this Convention, ‘person’ means every human being.”⁴¹ This norm, which has no counterpart in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or in the International Covenant on Civil and Political Rights (ICCPR), reinforces the unborn child's personhood, since it is very difficult to contest the fact that embryos and fetuses belong to the human species.⁴² Another norm is Article 4(5), which forbids the application of capital punishment to pregnant women, since this rule was not established in favor of the mother (whose basic rights are put to an end with

³⁸ It cannot decide to protect it only via administrative actions.

³⁹ See generally HELGA KUHSE & PETER SINGER, SHOULD THE BABY LIVE? THE PROBLEM OF HANDICAPPED INFANTS (1985). These authors “do not think new-born infants have an inherent right to life.” *Id.* at 192. They further affirm that States should allow the killing of undesired disabled babies until the 28th day after birth. *Id.* at 189-97. Kuhse & Singer quote other authors who advocate the establishment of “such a period before full acceptance of the infant.” *Id.* at 195.

⁴⁰ Some might argue that, *a contrario sensu*, this would give States the freedom to determine the moment until which life is protected by law (e.g. as long as a person maintains his or her mental capacities), but this interpretation would not accord with the spirit of the ACHR. This provision of the ACHR only seeks to strengthen the protection of the unborn. It does so following the trend of international treaties, which often show an explicit concern for groups of people whose rights have been repeatedly violated in the past, or when there is a real threat of these rights being violated in the future,

⁴¹ ACHR, *supra* note 3, art. 1(2).

⁴² It cannot be said that this rule wishes to clarify that women are protected by the ACHR, since there has never been any doubt in this regard, and because the American Treaty does not use the word *men* when referring to persons. An author who contests the unborn's quality of being a human is Philip Alston. He considers that in international law “there is no precedent for interpreting either that term [child], or others such as ‘human being’ of ‘human person,’ as including a fetus.” He, nevertheless, considers that Article 4(1) of the ACHR specifies its intention of considering the unborn as a human being. Alston, *supra* note 34, at n.68. On the contrary, Rita Joseph affirms that the unborn is clearly a human being according to international law. See generally RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD (2009).

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capital punishment), but rather in favor of the developing child.⁴³ Moreover, the ACHR is not the only human rights treaty to make explicit declarations regarding the unborn. The ninth paragraph of the Preamble of the Convention on the Rights of the Child also does so when quoting the Declaration of the Rights of the Child. It states: “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”⁴⁴

It has been suggested that incapacity of the unborn to enjoy every right established in the ACHR is proof of their non-personality.⁴⁵ This argument is not well grounded because there are rights in the ACHR that cannot be exercised even by adults in certain circumstances, for example, when they are in a vegetative state. In addition, there are many rights that cannot be fully exercised by born children, mostly during their early years. Likewise, several rights in the ACHR were established for the sole benefit of certain categories of people, such as the rights of citizens and minors.⁴⁶ Therefore, the impossibility of exercising certain rights declared in a human rights treaty does not prevent someone from exercising the rest of them and, *a fortiori*, does not make him or her lose the status as a person.

The previous analysis does not include the phrase “in general,” which requires interpretation. Its literal meaning in this context is simply that the rule on the protection of the right to life from the moment of conception may have some exceptions. In other words, the ACHR understands that there may be some obstacles in protecting life from the moment of fertilization. As such, though these hurdles may impede the protection of unborn children, they do not deprive them of their personhood. This is unquestionable, because the phrase “in general” was placed in the sentence related to the protection of the right to life, not in the sentence establishing the right itself.⁴⁷ Since the extent of the “in general” pro-

⁴³ This is similar to the right established in ICCPR art. 6(5). According to the *travaux préparatoires* of this latter convention, “[t]he Principal reason for providing [. . .] that the death sentence should not be carried out on pregnant women was to save the life of an innocent unborn child.” A/3764 ¶ 118, *reprinted in THE RIGHT TO LIFE IN INTERNATIONAL LAW* 53 (B. G. RAMCHARAN ed., 1985) (on file with author).

⁴⁴ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, pmb. (Nov. 20, 1959); Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 176, U.N. Doc. A/44/49 (Nov. 20, 1989). It is important to consider that in some editions of the Oxford English Dictionary the first meaning for the word child includes the unborn. See SHORTER OXFORD ENGLISH DICTIONARY 397 (Vol. I, 6th ed. 2007); THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 396 (Vol. I, 1971). There are two approaches to whether the Convention on the Rights of the Child is applicable to the unborn. Philip Alston considers that it is not. Alston, *supra* note 35, at 177-78. Bruce Abramson, on the other hand, considers that the rights are applicable to the unborn. BRUCE ABRAMSON, VIOLENCE AGAINST BABIES: PROTECTION OF PRE- AND POST-NATAL CHILDREN UNDER THE FRAMEWORK OF THE CONVENTION ON THE RIGHTS OF THE CHILD 56-103, 195-211 (Revised ed. 2006), available at <http://www.law2.byu.edu/wfpc/policy%20issues/VIOLENCE%20AGAINST%20BABIES.pdf>.

⁴⁵ CECILIA MEDINA QUIROGA, LA CONVENCION AMERICANA: VIDA, INTEGRIDAD PERSONAL, LIBERTAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL 75 (2003) (on file with author).

⁴⁶ ACHR, *supra* note 3, arts. 19, 23.

⁴⁷ There are a few authors who consider that it is *life*, not *protection*, what may have exceptions to its commencement from the moment of conception. This stance not only disregards the sentence to which the “in general” proviso is made (that referring to protection), but also forgets that biological processes—an example of which is the beginning of life—are common to all humankind. Therefore, even though diverse legal systems may consider different moments as the beginning of life for juridical purposes, this

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viso is not defined in the ACHR, it will be analyzed later in this paper, after referring to the other interpretative tools and the Commission's reading of Article 4(1).

2. *Other Considerations for a Textual Interpretation of Article 4(1)*

The VCLT requires that textual interpretations must be in accord with the context, object and purpose of a treaty. The VCLT also states which instruments, practices or rules comprise the context of a treaty, none of which exist in the Inter-American system regarding the matter of personhood.⁴⁸ Hence, this section will focus upon the object and purpose of the ACHR, which according to the Court is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States."⁴⁹ This object and purpose is compatible with the previously described interpretation of Article 4(1) because it is not unreasonable for a human rights convention to seek to protect human life *per se*, regardless of its stage of development.

Some might argue that the aforementioned interpretation, which could restrict abortions significantly, would be at odds with granting protection to other rights usually referred to when dealing with abortion, such as privacy and physical integrity.⁵⁰ Part of this issue will be addressed when analyzing the possibility of

moment should be the same for everyone under a particular jurisdiction. Among these authors are Pasqualucci and Cançado Trindade. See, PASQUALUCCI, *supra* note 25, at 341; see also Lauri R. Tanner, *Interview with Judge Antônio A. Cançado Trindade, Inter-American Court of Human Rights*, XVI ANN. SURV. INT'L & COMP. L. 165, 177 (2010). Judge A. Cançado Trindade also states that domestic laws admitting abortion would be one of the reasons why some States have not ratified the ACHR. *Id.* at 177.

⁴⁸ VCLT, *supra* note 29, arts. 31(2), 31(3). Indeed, there are no other agreements or instruments made between all of the parties—or accepted by them—in connection with the conclusion of the treaty, nor agreements between the parties regarding the interpretation or application of this particular provision, nor any other relevant rules of international law applicable in this particular regard. *Id.* Both the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (1988) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) contain some rules about the protection of families and women. See INTER-AMERICAN COURT OF HUMAN RIGHTS, *supra* note 19, at 79, 117. But they do not refer to the issue of the unborn, they are not strictly aimed at interpreting the ACHR, and they do not establish international rules in the matter of the right to life, so they cannot be appropriately considered as context for analyzing whether the unborn is deemed a person according to the ACHR.

⁴⁹ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 65 (Sept. 24, 1982). More recently the IACtHR seems to have broadened the scope of this object, by not stating from whom is this protection granted. Indeed, in the *Boyce* case, the IACtHR defined its object simply as the "protection of the basic rights of individual human beings." *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 15 (Nov. 20, 2007). It seems more accurate to state that the object of the ACHR is the creation of legally binding regional standards for the protection of human rights and the establishment of a system to supervise their fulfilment. It has been argued that a treaty may have several objects and purposes, and that different norms may have different objects and purposes as well. However, it is also asserted that this latter approach would deprive the object and purpose of much of its interpretative value. See Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 LAW & PRAC. INT'L CTS. & TRIBUNALS 443, 474 (2010) (Neth.).

⁵⁰ See e.g., *Roe v. Wade*, 410 U.S. 113 (1973). In this case, the United State's Supreme Court determined that freedom to perform an abortion was included in the right to privacy (under certain requirements of the trimester rule).

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reading the ACHR in an evolutive fashion. It should be noted, however, that the legal extent of these other rights varies according to the instrument in which they are established. Therefore, even though privacy and physical integrity have been considered in other jurisdictions as rights related to the procurement of abortions, this may not be so in the ACHR. In this regard, the text of this treaty has no explicit provision—besides the “in general” phrase—which could be clearly related to the issue of abortion. This is in contrast to the ACHR’s explicit declaration of the unborn’s personhood. Furthermore, even the idiom “in general” could be interpreted as reflecting the ACHR’s stance in a possible clash between right to life and other rights such as privacy and physical integrity because this phrase implies that the ACHR allows certain interferences with the right to life but that such interferences may only occur exceptionally.

The ACHR’s approach to the right to life could be considered as a guiding value of this regional system because it reflects the special importance which domestic legislation grants to the unborn in the context of the Americas. Indeed, many political constitutions—some of which were promulgated as recently as 2008 and 2010—protect life from the moment of conception.⁵¹ This concern is also enshrined in the legislation of countries whose constitutions make no explicit reference to conception, but whose legal system bans every type of direct abortion, as in the case of Chile, Nicaragua, and Honduras.⁵² El Salvador and the Dominican Republic—whose Constitutions protect life from the moment of con-

⁵¹ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, 2008, art. 45; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA, 2010, art. 37 (this disposition did not exist in previous Dominican Constitutions); CONSTITUCIÓN, 1992, art. 1(2) (El Sal.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, 1985, art. 3 (all of the foregoing refer to the moment of conception without any phrase analogous to the ACHR’s “in general”); CONSTITUCIÓN NACIONAL DE LA REPÚBLICA DEL PARAGUAY, 1992, art. 4 (has the same wording as the ACHR); CONSTITUCIÓN POLÍTICA DEL PERÚ, 1993, art. 2 No. 1 (establishing the rule *infans conceptus pro nato habetur, quoties de commodis ejus agitur*). Besides these member State constitutions, there are also many constitutions of federal states that acknowledge the existence of life from the moment of conception, with or without explicit exceptions. For instance, the majority of Mexican states approved amendments to their constitutions during the years 2008 and 2009 in order to recognize life from the moment of conception, including: Chihuahua (CONSTITUCIÓN POLÍTICA DEL ESTADO LIBRE Y SOBERANO DE [hereinafter CONST. P.E.L.S.] CHIHUAHUA, 1950, art. 5), Sonora (CONST. P.E.L.S. SONORA, 1917, art. 1), Baja California (CONST. P.E.L.S. BAJA CALIFORNIA, 1953, art. 7), Morelos (CONST. P.E.L.S. MORELOS, 1930, art. 2), Colima (CONST. P.E.L.S. COLIMA, 1917, art. 1 (I)), Puebla (CONST. P.E.L.S. PUEBLA, 1917, art. 26 (IV)), Jalisco (CONST. P.E.L.S. JALISCO, 1917, art. 4), Durango (CONST. P.E.L.S. DURANGO, 1917, art. 1), Nayarit (CONST. P.E.L.S. NAYARIT, 1917, art. 7 (XI) (1)), Guanajuato (CONST. P.E.L.S. GUANAJUATO, 1917, art. 1), and several others (this happened as a reaction to Mexico City’s recent liberalization of abortion). This is also the case in many Argentinean state’s constitutions, including: Provinces of Córdoba (CONSTITUCIÓN DE LA PROVINCIA DE [hereinafter CONST. P.] CÓRDOBA, 1987, art. 4), Tucumán (CONST. P. TUCUMÁN, 2006, art. 40), Tierra del Fuego (CONST. P. TIERRA DEL FUEGO, ANTÁRTIDA E ISLAS DEL ATLÁNTICO SUR, 1991, art. 14) and Salta (CONST. P. SALTA, 1986, art. 10). Also in the case of Argentina, when ratifying the Convention on the Rights of the Child this State declared that: “child means every human being from the moment of conception up to the age of eighteen.” CONVENTION ON THE RIGHTS OF THE CHILD, DECLARATIONS AND RESERVATIONS, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-11&chapter=4&lang=en#EndDec (last visited April 3, 2012).

⁵² See CÓDIGO PENAL [CÓD. PEN.] arts. 342-45 (Chile); LEY DE CÓD. PEN. arts. 143-45 (Nicar.); and CÓD. PEN. arts. 126-29 (Hond.). All these countries used to have exceptions to the prohibition of abortion. Usually Honduras is not considered among the countries banning abortion in every situation, but no exceptions to the prohibition of abortion can be found in its Penal Code or in the Code of Medical Ethics of the Medical Council. Código de Ética del Colegio Médico de Honduras, available at http://www.colegiomedico.hn/doc/leyes/27_reglamento_codigo_etica.pdf.

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ception—also forbid every kind of direct abortion.⁵³ Another interesting case is Costa Rica, whose constitutional jurisprudence forbids in vitro fertilization in its current stage of development, arguing that it involves a high mortality rate for embryos.⁵⁴ Moreover, if the importance given to the life of the unborn is understood as a guiding value of the Inter-American regional system, it would not seem to be a coincidence that all of the previously referred countries are signatories to the ACHR, while the majority of States with liberal abortion laws are not (e.g. United States, Canada, Guyana and Cuba, the latter not being an active member to the OAS).

Furthermore, legal scholarship is aware that Article 4(1) of the ACHR protects the life of the unborn, even though there are exceptions to this understanding.⁵⁵ Thus, in the early years of the ACHR, the former President of the Inter-American Commission, Marco Monroy Cabra, wrote when he was a delegate of that organization, “[i]t is obvious that the Pact of San José is more developed [than the ICCPR] since it protects life ‘from the moment of conception.’ This may involve some difficulties for the States which allow abortion in certain circumstances.”⁵⁶ Monroy goes even further by saying that “[t]he right to be born is a particular manifestation of the right to life, whereby the great majority of States define abortion as a crime.”⁵⁷

Today, the understanding that the ACHR protects the life of the unborn is apparent in the opinion of international human rights scholars, including Cançado Trindade,⁵⁸ Rodríguez Rescia,⁵⁹ Joseph,⁶⁰ Pasqualucci,⁶¹ etc.⁶² In addition to

⁵³ Cód. PEN. (El Sal.) arts. 133-37, and Cód. PEN. (Dom. Rep.) art. 317. El Salvador used to have exceptions to the prohibition of abortion. Regarding the Dominican Republic’s use of the state of necessity for leaving some abortions unpunished. See ABORTION POLICIES, *infra* note 189, at 130.

⁵⁴ Corte Suprema [C.S.], Sala Constitucional [Supreme Court, Constitutional Chamber], Mar. 15, 2000, Sentencia: 02306, Expediente: 95-001734-0007-CO, Considerando IX, available in Spanish at http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=128218&strTipM=T&IResultado=&pgn=&pgrt=&param2=1&nTermino=&nTesoro=&tem1=&tem4=&strLib=&spe=&strTem=&strDirTe= (last visited Feb. 28, 2012). However, this decision would allow the application of in vitro fertilizations once this technique’s mortality rate of embryos is diminished. This article will address a case before the Commission regarding this issue.

⁵⁵ See e.g., Quiroga, *supra* note 45, at 66. Cecilia Medina Quiroga asserts that the ACHR is compatible, or even requires, liberal legislation in the issue of abortion. Scott Davidson has a more nuanced stance and asserts that “the questions of whether a foetus is a human being and when a human being ceases to exist are not answered by the instruments themselves [the American Declaration and the ACHR].” Scott Davidson, *The Civil and Political Rights Protected in the Inter-American Human Rights System*, THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 213, 216 (1998).

⁵⁶ Cabra, *supra* note 35, at 26-27 (translated by author).

⁵⁷ *Id.*

⁵⁸ Tanner, *supra* note 45, at 177.

⁵⁹ VÍCTOR RODRÍGUEZ RESCIA, LAS SENTENCIAS DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: GUÍA MODELO PARA SU LECTURA Y ANÁLISIS 11 (San Jose, Instituto Interamericano de Derechos Humanos 2009).

⁶⁰ JOSEPH, *supra* note 41, at 213.

⁶¹ PASQUALUCCI, *supra* note 25, at 341.

⁶² Other examples include: RICARDO BACH DE CHAZAL, EL ABORTO EN EL DERECHO POSITIVO ARGENTINO 199 (2009) (Arg.) quoted by Piero A. Tozzi et al. in *El Aborto en el Derecho Internacional y en la Jurisprudencia Panamericana*, EL DERECHO 1, 4 (Aug. 2011) (Arg.); Ligia M. de Jesus, *Revisiting*

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these authors, some State officials have also endorsed this interpretation. For instance, during 2008 the then president of Uruguay, Tabaré Vázquez Rosas, invoked Article 4(1) of the ACHR when he vetoed a bill purporting to introduce abortion until the twelfth week,⁶³ and in 2003 the Canadian Standing Senate Committee on Human Rights stated that Article 4(1) raised “concerns related to the preservation of the status quo, in Canadian law, with respect to abortion.”⁶⁴

If the ACHR did not purport to declare and protect the right to life from the moment of fertilization, the reference to conception in Article 4(1) would be rendered useless. This would be at odds with the basic principle of interpretation stating that norms should be read in a way in which they are not rendered meaningless.⁶⁵ Therefore, it should be understood that the text of the ACHR, in light of its context, object, and purpose, considers the unborn as entitled to the right to

Baby Boy v. United States: Why the IACHR Resolution did not Effectively Undermine the Inter-American System on Human Rights’ Protection of the Right to Life from Conception, 23 FLA. J. INT’L L. 221 (2011); José Alfredo de Oliveira Baracho, *A Prática Jurídica no Domínio da Proteção Internacional dos Direitos do Homem (A Convenção Europeia dos Direitos do Homem)*, LIBER AMICORUM HÉCTOR FIX-ZAMUDIO 375, 398 available at <http://www.corteidh.or.cr/docs/libros/FixVol1.pdf> (last visited Feb. 15, 2011); RODOLFO BARRA, *LA PROTECCIÓN CONSTITUCIONAL DEL DERECHO A LA VIDA* 60 (1996), quoted by HERNÁN CORRAL TALCIANI, *DERECHO CIVIL Y PERSONA HUMANA: CUESTIONES DEBATIDAS* 86 (2007) (who shares his opinion); HÉCTOR GROS ESPIELL, *LA CONVENCION AMERICANA Y LA CONVENCION EUROPEA DE DERECHOS: ANALISIS COMPARATIVO* 82 (1991); NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW* 248 (U. K., Univ. Press 2002); and Patricia Palacios Zuloaga, *La Aplicabilidad del Derecho a la Vida al Embrión o Feto en la Jurisprudencia Internacional*, 1 ANUARIO DE DERECHOS HUMANOS 75, 79 (2005) (Chile). Among those adopting this position there are also people who think that the ACHR is compatible with rather liberal approaches to abortion, such as William Schabas, who considers “that Article 4(1) does not impose an obligation to prohibit abortion, in general, although it may require States to regulate the practice and to prohibit it in certain cases, such as after a certain number of weeks of pregnancy.” William A. Schabas, *Canadian Ratification of the American Convention on Human Rights*, 16 NETH. Q. HUM. RTS. 315, 328 (1998).

⁶³ Letter from the Presidencia de la República Oriental del Uruguay [Presidency of the Oriental Republic of Uruguay] to the Presidente de la Asamblea General [President of the General Assembly] (Nov. 14, 2008), available at http://www.presidencia.gub.uy/_Web/proyectos/2008/11/s511_00001.PDF (last visited Feb. 5, 2011). President Vázquez’s left wing political affiliation is an expression that in Latin America the debate regarding abortion cannot simply be presented as a conservative-versus-liberal one. Other examples of this are that the new Nicaraguan law against abortion was supported by the extreme left Sandinistas (F.S.L.N.); that the new Ecuadorian Constitution protecting life from the moment of conception was discussed and enacted during Rafael Correa’s government; and that the constitutional amendments protecting the unborn in several Mexican states were in many cases supported by members of the Partido Revolucionario Institucional (P.R.I.). See *supra* text accompanying note 51. Similarly, the fact that President Tabaré Vázquez is an agnostic, and that Nicaragua is among the Central and South American countries with a lesser proportion of Catholics (58%, with 16% who declare themselves of no religion) shows that the Latin American stance towards abortion cannot be explained only by the position of Catholics on this issue. CARLOS LISCANO, *CONVERSACIONES CON TABARÉ VÁZQUEZ* 33-34 (Buenos Aires, Colihue 2004); El Instituto Nacional de Estadísticas y Censos, *2005 Población Características Generales*, VIII CENSO DE POBLACIÓN Y IV DE VIVIENDA, 195 (2006), available at <http://www.inide.gob.ni/censos2005/VolPoblacion/Volumen%20Poblacion%201-4/Vol.I%20Poblacion-Characteristicas%20Generales.pdf> (last visited Feb. 4, 2011). This is also understood by Mala Htun, who considers that “[t]he intensity of religious belief does not correspond to the course of gender rights reform.” MALA HTUN, *SEX AND THE STATE: ABORTION, DIVORCE, AND THE FAMILY UNDER LATIN AMERICAN DICTATORSHIPS AND DEMOCRACIES* 27 (Cambridge Univ. Press 2003).

⁶⁴ REPORT OF THE STANDING SENATE COMMITTEE ON HUMAN RIGHTS, ENHANCING CANADA’S ROLE IN THE OAS: CANADIAN ADHERENCE TO THE AMERICAN CONVENTION ON HUMAN RIGHTS 61 (2003) (Can.), available at <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.pdf> (last visited Feb. 26, 2011).

⁶⁵ *Ut res magis valeat quam pereat*.

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life, even though there will be some exceptions to this right's protection, the extent of which will be addressed later in this paper. The following section, despite the principle of *in claris non fit interpretatio*, will deal with other interpretative procedures, such as recourse to the *travaux préparatoires* of the ACHR.

B. Supplementary Method of Interpretation: Travaux Préparatoires

The *travaux préparatoires* are only a subsidiary means of interpretation according to the VCLT.⁶⁶ They should “be used either to confirm the meaning of the treaty or as an aid to interpretation where . . . the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.”⁶⁷ Despite this, several elucidations of Article 4(1) of the ACHR have relied primarily on the *travaux préparatoires*.⁶⁸ However, even this subsidiary means of interpretation supports the fact that the unborn is considered a person in the Inter-American system.

The three original drafts of the ACHR proposed to approve the following sentence: “This right shall be protected by law and from the moment of conception.”⁶⁹ However, when the Commission received these drafts and made its own proposal, it “sought to make the principle stated in the Draft less strict and therefore proposed inserting the words ‘in general.’”⁷⁰ Nevertheless, the Commission considered that “for *reasons of principle* it was *fundamental*” to maintain the provision’s reference to conception.⁷¹ This wording did not follow the *Rapporteur*’s recommendation, which was to leave the question of the protection of the right to life from conception “open”—suppressing the reference to conception—in order to avoid the possibility of conflicting with the United Nations’ ICCPR.⁷²

During the drafting of the ACHR, the relevant norm was understood as recognizing personhood in the unborn, which is why Brazil proposed to suppress the phrase “and, in general, from the moment of conception.” Brazil argued that, even though the Brazilian Civil Code protected the rights of the unborn from the

⁶⁶ VCLT, *supra* note 29, art. 32.

⁶⁷ Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in *INTERNATIONAL LAW* 187, 201 (2d ed. Oxford Univ. Press 2006).

⁶⁸ Shelton, *supra* note 30, at 313.

⁶⁹ See e.g., Draft Convention on Human Rights approved by the Fourth Meeting of the Inter-American Council of Jurists, Sept., 1959, Doc. CIJ-43 (Chile) (on file with author); *Proyecto de Convención sobre Derechos Humanos*, presented by the Government of Chile to the Second Extraordinary Inter-American Conference, Río de Janeiro, 1965, Doc. 35 (on file with author); *Proyecto de Convención sobre Derechos Humanos*, presented by the Government of Uruguay to the Second Extraordinary Inter-American Conference, Río de Janeiro, 1965, Doc. 49 (on file with author). All are reprinted in ANUARIO INTERAMERICANO DE DERECHOS HUMANOS [INTER-AM. YRBK. ON HUM. RTS.] at 237, 280, 298, respectively (1973). The two latter ones are only available in Spanish.

⁷⁰ Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights (OEA/Ser.L/V/IL 19 Doc. 18), reprinted in ANUARIO INTERAMERICANO DE DERECHOS HUMANOS [INTER-AM. YRBK. ON HUM. RTS.], *supra* note 69, at 193.

⁷¹ *Id.* at 97 (emphasis added).

⁷² *Id.* at 193. The *Rapporteur* was the Brazilian Carlos Dunshee de Abranches.

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moment of conception, its Penal Code allowed abortions to be practiced when pregnancy threatened the life of the woman or when the pregnancy was the consequence of rape.⁷³ Brazil also argued that the expression “in general, from the moment of conception” was vague, so it would not be effective in preventing States from legalizing abortion, and should therefore be eliminated, allowing American countries to regulate the termination of pregnancies.⁷⁴ The Brazilian proposal was supported by the United States.⁷⁵

The Brazilian proposition was strongly opposed by Venezuela, who argued that domestic laws could not be used for determining international civil and political rights, and that the ACHR could make no concessions regarding the existence of the right to life from the moment of conception, as it would be unacceptable for the ACHR not to establish such a principle.⁷⁶ The Dominican Republic proposed to copy the ICCPR’s statement on the right to life, which does not make any reference to conception, so it would have had the practical effect of suppressing the sentence “from the moment of conception.”⁷⁷ According to the Dominican Republic, its rationale for proposing this construction was to strengthen “universal concepts.”⁷⁸ Ecuador took the contrary position, purporting to eliminate the phrase “in general,” thus protecting life from conception in every situation.⁷⁹

Finally, a majority of American States approved the current wording of the ACHR.⁸⁰ The result of Article 4(1) is not the rule proposed by the original drafts

⁷³ SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, CONFERENCIA ESPECIALIZADA INTERAMERICANA SOBRE DERECHOS HUMANOS: ACTAS Y DOCUMENTOS, OEA/SER.K/XVII/1.2, 7-22 DE NOVIEMBRE DE 1969, 121 (1973) (Costa Rica), *available at* <http://www.corteidh.or.cr/tablas/15388.pdf> [hereinafter SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS]. According to the text of the *travaux préparatoires* Brazil used the Spanish word *estupro*, which means sexual intercourse with a minor who is able to give consent, when this carnal relation has been obtained by deceit or the abuse of the superiority of the offender, but the Brazilian Criminal Code uses the Portuguese word *estupro* meaning rape. See *Diccionario de la Real Academia Española* [Dictionary of the Spanish Royal Academy], *available at* www.rae.es; CÓDIGO PENAL BRASILEIRO [BRAZILIAN CRIMINAL CODE], arts. 128, 213.

⁷⁴ SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 73, at 121, 159.

⁷⁵ The U.S. delegate was much more influential in the matter of incitement to hatred and freedom of speech, since his proposition was accepted by the States of the OAS. Probably this happened because the delegate argued “that this amendment was very important to his delegation because it made the text consistent with the constitutional guarantee of free speech in his country.” *Id.* at 444. The U.S. delegate could not adduce such an important political argument in the issue of abortion, since the *Roe v. Wade* decision was rendered only in 1973. 410 U.S. 113 (1973).

⁷⁶ SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 73, at 159-60.

⁷⁷ *Id.* at 57.

⁷⁸ *Id.* That the Dominican Republic did not have the same intentions as Brazil and the United States is also supported by the fact that it did not sign these two countries’ interpretative declaration regarding the unborn. It must be noted that the current Constitution of the Dominican Republic asserts the inviolability of life from the moment of conception. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA, art. 37 (2010) (Dom. Rep.).

⁷⁹ SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 73, at 160.

⁸⁰ *Id.* Unfortunately, the *travaux préparatoires* give no details about the way in which each State delegate voted. *Id.*

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or by Ecuador, so it allows exceptions to the protection of the right to life, which will be analyzed in the final section of this paper. The current text, however, was considered by Venezuela as one which *made no concessions* to the existence of the right to life from the moment of conception.⁸¹ This is why, despite Article 4(1)'s use of the phrase "in general," the *travaux préparatoires* enables the interpreter to affirm that the current wording of the ACHR is more a *principled* than a *compromised* solution between the countries of the Americas.

C. Evolutive and Pro Homine Interpretations⁸²

In the light of the above, it is clear that the ACHR's text considers embryos and fetuses as persons and grants them the right to life. However, it could be speculated as to whether an evolutive or a *pro homine*—or pro person—interpretation may change this textual reading, making the right to life and its protection more restrictive, especially because the Court has, in many cases, supported the use of these interpretative tools.⁸³ This paper will take no stance on the contested issue of the adequacy and extent of evolutive interpretation, but it will refer to the main features of this system of elucidation in order to analyze whether it is applicable to a reading of Article 4(1).⁸⁴

Evolutive interpretation is itself a developing concept "whose contours are as yet quite unclear."⁸⁵ However, there seems to be a consensus in international practice that a treaty may evolve if it utilizes "evolutive terms."⁸⁶ This happens when international treaties utilize open-ended concepts to determine the content

⁸¹ *Id.*

⁸² The *pro homine* principle is a hermeneutical tool used in several jurisdictions, whereby norms are interpreted in the way most favorable to the human being, as long as this elucidation is consistent with the provision being interpreted.

⁸³ The IACtHR asserts that evolutive interpretations are compatible with the rules of the VCLT. Compare The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114-15 (Oct. 1, 1999), with Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 37 (July 14, 1989). Before interpreting a treaty in an evolutive fashion it is necessary to determine whether it was framed as one suitable for evolutive interpretation. In doing so, the intention of the parties and the wording of the treaty should be analyzed. Arato, *supra* note 49, at 444. However, since the IACtHR has already stated that the ACHR is suitable for an evolutive interpretation, this paper will not dwell on this issue.

⁸⁴ There is no consensus within legal scholarship on the appropriateness of evolutive interpretations. For an opinion justifying originalist interpretations of International Law on the grounds of its creation via particular agreements, see generally ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008).

⁸⁵ Arato, *supra* note 49, at 444 n. 5, referring to an argument of Malgosia Fitzmaurice.

⁸⁶ *Id.* at 468. Arato also refers to a more contested rationale for evolution, one based in the object and purpose of a treaty. He considers that an evolution based on this rationale could only be used when it is *necessary* for giving effect to its object and purpose, and that "mere convenience" would be an insufficient rationale, since it could lead not only to a "superfluous application of evolutive interpretation", but also could "seriously undermine certainty in the law of treaties, since anything could be judged to be evolutive." *Id.* at 476. However, even evolution based on the object and purpose of a treaty cannot go against the explicit wording of a treaty.

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of a particular right.⁸⁷ This method of interpretation may be used for extending the content of a right in a way which was not foreseen by the framers of a treaty, or for departing from previous precedents. However, evolutive interpretations cannot derive from international treaties “a right that was not included therein at the outset,” especially when its “omission was deliberate.”⁸⁸ *A fortiori*, they should not contravene the express wording of a treaty. Indeed, “[t]he only matter which can be evolutively interpreted—and perhaps thereby expanded into unforeseen fields of application—is a matter which is already explicit or implicit in the wording of the text.”⁸⁹ This is why the ACHR’s explicit declaration of the right to life of the unborn could not be interpreted in a fashion that deprives embryos or fetuses of their personhood.

Even though the previous argument is conclusive, it should be noted that evolutive interpretations of human rights treaties are always used to enlarge the application of rights established in international documents, never to reduce them.⁹⁰ For instance, an evolutive interpretation of the ACHR may allow the Court to enlarge the list of procedural requirements that benefit a person who is under arrest, e.g., by including “the rights not to incriminate oneself and to have an attorney present when one speaks,” but not to diminish them.⁹¹ “Evolution downwards” is not accepted by those who favor progressive interpretations.⁹² This is especially true when it comes to Article 4(1), since “[o]wing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible.”⁹³ Therefore, developing interpretations of the ACHR could only make the right to life more demanding.⁹⁴

Nevertheless, following what has been done in some domestic and international forums, it could be argued that interpreting the ACHR as allowing abortion should not be understood as a restriction of the right to life, but as an enhancement of other guaranties, such as the respect of privacy and physical, mental, and moral integrity.⁹⁵ Indeed, some domestic courts have asserted that abortion falls

⁸⁷ This can be due to a lack of agreement. Philip Alston, *The Historical Origins of the Concept of “General Comments”* in LIBER AMICORUM GEORGES ABI-SAAB, *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY* [L’ORDRE JURIDIQUE INTERNATIONAL, UN SYSTÈME EN QUÊTE D’ÉQUITÉ ET D’UNIVERSALITÉ] 763, 776 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds. 2001).

⁸⁸ Johnston et.al. v. Ireland, 112 Eur. Ct. H.R. (ser. A) at ¶53 (1986).

⁸⁹ Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 66 (1990).

⁹⁰ See Arato, *supra* note 49, at 466.

⁹¹ The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶117 (Oct. 1, 1999).

⁹² Mahoney, *supra* note 89, at 66–67.

⁹³ Villagrán-Morales et al. (Street Children Case) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144 (Nov. 19, 1999). In this case the IACtHR also stated that the right to life is a fundamental right whose exercise “is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning.” *Id.*

⁹⁴ This is true not only in regards to living conditions, as the IACtHR has already stated, but also in regards to the very core of its meaning: the right to stay alive.

⁹⁵ Established in ACHR *supra* note 3, arts. 5(1), 11.

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within the area free from the State's intervention created by the right to privacy.⁹⁶ However, in these forums, the status of the unborn has not been as clearly stated as in the ACHR, which explicitly declares personhood from the moment of conception.⁹⁷ According to the ACHR, the right to life is not a private matter, but something that a State's legislation must ensure. This provides for no doubt as to the extension of the right to privacy in relation to abortion.

In addition, evolutive or progressive interpretations do not rely exclusively on the open-endedness of the wording of a treaty. They also require an additional rationale, such as a change in circumstances due to new technological means, or international consensus on the obligations stemming from a particular right. In regard to the issue of the unborn, if the former rationale is taken into account, it could be used precisely for stating that technological advancements, such as the improved knowledge of the DNA of the embryo, and the ever increasing reduction of the hazards involved in carrying a pregnancy to term could justify an evolving interpretation enhancing the right to life. This would narrow the exceptions accepted by the "in general" proviso. Similarly, the rationale of international consensus cannot be used for restricting the right to life either, since international trends do not necessarily coincide with those of Western Europe and North America.⁹⁸ Abortion laws have no clear direction in the member States of the OAS, since some abortion laws have become more liberal, as in the case of Mexico's Federal District or Colombia,⁹⁹ while others have become stricter, like those of Nicaragua, El Salvador, and Chile.¹⁰⁰ As such, these argu-

⁹⁶ See e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973).

⁹⁷ If it would have been so, the decisions of these domestic and international courts would be different. For example, in *Roe v. Wade*, the Supreme Court asserted that if the Fourteenth Amendment would have suggested that the unborn had personhood, "the appellants case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." *Id.* at 156-57. However, the Court continued by saying that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

⁹⁸ However, even in the United States there is no clear trend in the issue of abortion, since the precedent of *Roe v. Wade*, has been "clarified." E.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874, 881-83 (1992) and *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007).

⁹⁹ See generally Allison Ford, *Mexico City Legalizes Abortion*, 16 LAW & BUS. REV. AM. 119 (2010) and Corte Constitucional [C.C.] [Constitutional Court], May 10, 2006, Sentencia C-355/06 (Colom.), available at <http://english.corteconstitucional.gov.co/sentences/C-355-2006.php> (in Spanish with English abstract) (last visited Feb. 15, 2011) [hereinafter *Colombian Constitutional Court's abortion decision*].

¹⁰⁰ In the case of Nicaragua, the total ban on abortion was established only in 2006 by a law derogating art. 165 of its former Penal Code. Ley No. 603, 26 Oct 2006, Ley de Derogación al Artículo 165 del Código Penal Vigente, La Gaceta, Diario Oficial [L.G.], 17 Nov. 2006 (Nicar.). (on file with author). This ban was maintained in Nicaragua's new 2007 Penal Code. Cód. Pen. art. 143-45 (Nicar.). El Salvador's 1997 Penal Code abolished the legal exclusions to the penalization of abortion in the 1974 Penal Code. I Francisco Moreno Carrasco & Luis Rueda García, *Código Penal de El Salvador Comentado* 531 (El Sal.), available at http://www.cnj.gob.sv/index.php?view=article&catid=42:publicaciones&id=116:codigo-penal-de-el-salvador-comentado-&option=com_content&Itemid=12 (last visited Feb. 15, 2011). Chile modified its Health Code in 1989 in order to abolish the permission to undertake an abortion when the life of the mother was threatened by pregnancy. Código Sanitario [Health Code] art. 119 (1931) (Chile), available at <http://www.leychile.cl/Navegar?idNorma=5595> (last visited Feb. 15, 2011). Both the legal permission of abortion in this circumstance in 1931, and the reintroduction of its prohibition in 1989, were not approved by a Parliament elected by the people, since in 1931 the Sanitary Code was approved by the so-called Congreso Termal, during what is referred as the dictatorship of President General Carlos Ibáñez del Campo, and in the year 1989 there was simply no Parliament. Also in Chile, a

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ments complement the reasons described in previous paragraphs about why an evolutive interpretation against the unborn would not be appropriate.

On the other hand, something similar happens with the *pro homine* principle, which can never be used against the text of the ACHR. The IACtHR has stated that the ACHR must be interpreted “in favor of the individual, who is the object of international protection, *as long as such an interpretation does not result in a modification of the system.*”¹⁰¹ Furthermore, this principle could be used to enlarge a right, but not to diminish it. For instance, it could support that the right to be free from ex post facto criminal laws applies also to administrative laws establishing sanctions,¹⁰² but the principle could not be used to restrict the right to only certain types of penal laws.

Notwithstanding the foregoing, some might wish to use the *pro homine* argument in order to affirm that the pregnant woman should take precedence over the unborn. However, this is a double-edged sword because it could also be argued that the Inter-American system allows no kind of abuse against a *person*, a term which includes the unborn in the ACHR. Therefore, it could end up forbidding every form of abortion. An example of this approach is given by the Chilean Constitutional Court, which quoted the IACtHR’s use of the *pro homine* principle when determining that the “morning after pill” could not be legally distributed in public medical centers. This court’s reasoning began by noting that there was a reasonable doubt in the scientific community about whether life began at conception or at implantation, and thus, about whether one of the effects of the “morning after pill” would be to put an end to the life of a human being. Then, the Constitutional Court considered that the *pro homine* principle required the adjudicator to take a position that would not jeopardize the life of what could be a

law enshrining the protection of life from the moment of conception was recently promulgated. Law No. 20.120, Sept. 7, 2006, Diario Oficial [D.O.] (Chile). The enactment of a law authorizing the distribution in Chile of the so called morning after pill was based on the understanding—so says the law—that this method does not cause abortions. Law No. 20.418, Jan. 18, 2010, Diario Oficial [D.O.] (Chile). The Honduran Criminal Code was modified in 1983 to allow certain exceptions to the criminalization of abortion, but this modification was repealed in 1985, before these new provisions came into force. U.N. Dep’t of Econ. & Soc. Affairs, Abortion Policies: A Global Review, Volume 2: Gabon to Norway, at 49, U.N. Doc. ST/ESA/SER.A/129/Add. 1, U.N. Sales No. E.94.XIII.2 (2001). Regarding the modification of the constitution of many Mexican states, see *supra* note 27. In many cases, the admissibility of abortion has not been approved by legislators, but by judges, as in the case of the Colombian Constitutional Court’s abortion decision, *supra* note 99.

¹⁰¹ In the matter of Viviana Gallardo et al., Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. G 101/81, ¶ 16 (Nov. 13, 1981) (emphasis added).

¹⁰² As the IACtHR did in Baena Ricardo et al. v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶¶ 106-07 (Feb. 2, 2001), even though it made no explicit reference to a *pro homine* interpretation.

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person.¹⁰³ A similar reasoning, but based on the *principle of precaution*, can be seen in a case decision of the Peruvian Constitutional Court of 2009.¹⁰⁴

D. Interpretative Declarations

When voting on Article 4(1), Brazil and the United States agreed to introduce the following declaration, originally written in English: “The United States and Brazil interpret the language of paragraph 1 of Article 4 as preserving to State Parties [sic] discretion with respect to the content of legislation in the light of their own social development, experience and similar factors.”¹⁰⁵ This declaration expresses that both countries should have the freedom to interpret the right to life in the way they consider most appropriate. Because it refers broadly to Article 4(1), it would extend not only to the beginning of personhood from the moment of conception, but to several other important issues regarding the most basic of all rights.¹⁰⁶ According to the wide framing of the declaration of Brazil and the United States, it would be permissible for a State to consider, in light of its own “social development,” that not every person—either born or unborn—has the right to have his or her life respected. The *travaux préparatoires* do not record how other States responded to this declaration. However, the relevance of this declaration is very limited because the United States is not a party to the ACHR and Brazil did not ratify its statement when it became a member State.¹⁰⁷ Thus, this declaration lacks importance for this article’s interpretative purposes.

Almost thirty years later, Mexico ratified the ACHR with the following interpretative declaration: “With respect to Article 4, paragraph 1, the Government of Mexico considers that the expression ‘in general’ does not constitute an obligation to adopt or keep in force legislation to protect life ‘from the moment of conception’, since this matter falls within the domain reserved to the States.”¹⁰⁸ The text of this declaration does not set birth as a time limit for this country’s

¹⁰³ Tribunal Constitucional [T.C.] [Constitutional Court], Apr. 18, 2008, Rol de la causa: 740-07-CDS, 118-19, 140-42 (Chile), available at <http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/914> (in Spanish) (last visited Aug. 12, 2011) (the referred page numbers are taken from the document in PDF available in this court’s website). After this decision, the law was modified in order to allow the distribution of the *morning after pill*. This legal permission was given in the understanding that this method was not abortive (the law explicitly states the illegality of any method intending to produce an abortion). Law No. 20.418, Enero 18, 2010, DIARIO OFICIAL [D.O.] (Chile).

¹⁰⁴ Tribunal Consitucional [T.C.] [Constitutional Court], Exp. No. 02005-2009-PA/TC, ¶¶ 48-52, Oct. 16, 2009 (Peru), available at <http://www.tc.gob.pe/jurisprudencia/2009/02005-2009-AA.html> (in Spanish) (last visited Oct. 24, 11).

¹⁰⁵ SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 73, at 441.

¹⁰⁶ It would extend to the protection of life by law; to the moment when life begins; and to the arbitrary deprivation of life.

¹⁰⁷ When becoming a member of the ACHR, Brazil made an interpretative declaration that does not refer to art. 4(1). INTER-AMERICAN COURT OF HUMAN RIGHTS, *supra* note 19, at 75. The legal status of Brazil’s former declaration is a theme, which goes beyond the scope of this work. However, it is important to consider that “[i]f formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty.” VCLT. art. 23, ¶ 2, *supra* note 29.

¹⁰⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS, *supra* note 19, at 69.

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freedom to “adopt or keep in force legislation to protect life.”¹⁰⁹ However, Mexico’s intention when issuing this declaration was only to assert its freedom to legislate on abortion, and not to be excluded from the obligation to protect the life of born people.¹¹⁰ Therefore, this declaration should be interpreted as concerning only the issue of terminations of pregnancies, and not matters such as infanticide.

This article has shown that the intention of Article 4(1) is to grant personhood from the moment of conception and to require States to protect the life of the *nasciturus* by law as a general rule. In spite of this, Mexico uses its declaration to try to avoid reforming its legal system on the issue of the unborn. Thus, this declaration intends to change the scope of the obligation stemming out of Article 4(1). When interpretative declarations are aimed at doing so, “they cease to be declarations and become reservations.”¹¹¹ Therefore, Mexico’s nominal “declaration” is in fact a reservation, which should undergo scrutiny of its contents if a relevant case is brought to the Court.¹¹² Something of this nature occurred in the European Court of Human Rights, another regional international body with an “institutionalized procedure to decide upon the permissibility of reservations.”¹¹³ In *Belilos v. Switzerland* and in *Loizidou v. Turkey*, the European Court of Human Rights had to decide upon the validity of the relevant part of these two defendant States’ declarations.¹¹⁴

“The purpose of the Convention imposes real limits on the effect that reservations attached to it can have,”¹¹⁵ while reservations to the ACHR “have to be interpreted in a manner that is most consistent with [the Convention’s] object and purpose.”¹¹⁶ Therefore, if the IACtHR is faced with the application of this declaration, it should analyze the broadness of the reservation, and whether it is compatible with the object and purpose of the ACHR, in accordance with the leeway that it has or has not given to States in previous instances.¹¹⁷ The Court should

¹⁰⁹ *Id.*

¹¹⁰ No author seems to have ever argued that the ACHR could allow the endorsing of theories such as those of Kuhse and Singer, previously referred to. See *supra* note 39.

¹¹¹ Fitzmaurice, *supra* note 67, at 208. Regarding reservations to the ACHR, see generally Andrés E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT’L L. REV. 269 (2001).

¹¹² Article 75 of the ACHR establishes that it “shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.” ACHR, *supra* note 3, art. 75. In relation to Article 20 of the VCLT (entitled “Acceptance of and Objection to Reservations”), the IACtHR has stated that only the first paragraph is applicable. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶¶ 27-35 (Sept. 24, 1982).

¹¹³ Fitzmaurice, *supra* note 67, at 207.

¹¹⁴ The European Court considered these declarations to be invalid. *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) at ¶¶ 51-60 (1988); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at ¶¶ 15, 27, 89-90, 95-98 (1995).

¹¹⁵ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 65 (Sept. 8, 1983).

¹¹⁶ *Id.*

¹¹⁷ In a case involving a broad reservation concerning the death penalty, the IACtHR “examined and dismissed—in part—the effectiveness of the reservation or limiting declaration formulated by Trinidad

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consider that Mexico's declaration to Article 4(1) refers to what this very State has called the "most fundamental of human rights."¹¹⁸ In any case, this declaration could have effect only with respect to Mexico. It cannot be used as a tool for interpreting the ACHR itself.

III. Interpretation Given by the Commission

Until now, the Court has not directly addressed the issue of the unborn, but the Commission has done so when deciding on particular petitions and when issuing some general or country-oriented recommendations. In the latter, the Commission has adopted a position contrary to laws banning abortion in every situation,¹¹⁹ which has probably influenced the domestic legislation of some OAS

and Tobago, finding that due to its excessively general character it runs contrary to the object and purpose of the Convention, and broadly subordinates the jurisdictional function of the Court to domestic norms and to the decisions of national organs, thereby contravening principles of international law." Concurring separate opinion of Judge Sergio García Ramírez in Hilaire, Constantine and Benjamin et. al. v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 2 (June 21, 2002) (footnotes omitted). Some judges are contrary to reservations made regarding non-derogable norms of the ACHR, such as Judge Cançado Trindade, who in the *Caesar v. Trinidad and Tobago* case strongly rejected any reservation in the matter of the right to life. See Separate opinion of Judge A.A. Cançado Trindade in *Caesar v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 23 (Mar. 11, 2005). The United Nations Human Rights Committee [UNHRC] has a similar opinion regarding reservations. UNITED NATIONS HUMAN RIGHTS COMM., GENERAL COMMENT NO. 24: ISSUES RELATING TO RESERVATIONS MADE UPON RATIFICATION OR ACCESSION TO THE COVENANT OR THE OPTIONAL PROTOCOLS THERETO, OR IN RELATION TO DECLARATIONS UNDER ARTICLE 41 OF THE COVENANT ¶¶ 6-12 (1994), available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/69c55b086f72957ec12563ed004ecf7a?Opendocument> (last visited Mar. 4, 2011). Montalvo considers the Mexican declaration as compatible with the ACHR. Montalvo, *supra* note 111, at 293, 295.

¹¹⁸ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 26 (Oct. 1, 1999).

¹¹⁹ See INTER-AM. COMM'N. H.R., THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA, OEA/Ser.L/V/II.102, Doc. 9, rev. 1 ch. XII, ¶¶ 49-51 (1999), available at <http://www.cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm> (last visited Feb. 7, 2011). In INTER-AM. COMM'N. H.R., FIFTH REPORT ON THE SITUATION OF HUM. RIGHTS IN GUATEMALA, OEA/Ser.L/V/II.111, Doc. 21 rev. ch. XIII ¶ 39 (2001), available at <http://www.cidh.org/countryrep/guate01eng/TOC.htm> (last visited May 14, 2011), the Commission seems to have a negative view of Guatemala's prohibition of abortion, which only admits termination of pregnancies when they are indispensable to save the mother's life. In INTER-AM. COMM'N. H.R., ACCESS TO JUSTICE FOR WOMEN VICTIMS OF SEXUAL VIOLENCE IN MESOAMERICA, OEA/Ser.L/V/II., Doc. 63 ¶ 242 (2011), available at <http://www.oas.org/en/iachr/women/docs/pdf/WOMEN%20MESOAMERICA%20ENG.pdf> (last visited Feb. 9, 2012), the Commission includes El Salvador and Nicaragua's total ban on abortion within the title "[l]ack of articulation between the health and justice sectors," and complains about the unavailability of the morning after pill in Honduras. The Commission's stance towards abortion may also be drawn out from documents which have no explicit negative consideration of restrictions to the termination of pregnancies, but in which this body refers to abortion amongst other women's rights, e.g., INTER-AM. COMM'N. H.R., ACCESS TO MATERNAL HEALTH SERVICES FROM A HUMAN RIGHTS PERSPECTIVE, OEA/Ser.L/V/II., Doc. 69 ¶ 42 (2010), available at <http://www.cidh.org/women/saludmaterna10eng/MaternalHealth2010.pdf> (last visited Feb. 11, 2011) (referring to abortion "in terms of women's human rights to integrity and privacy"); INTER-AM. COMM'N. H.R., OBSERVATIONS OF THE INTER-AM. COMM'N. ON H.R. UPON CONCLUSION OF ITS 2007 VISIT TO HAITI, OEA/Ser.L/V/II.131, Doc. 36 ¶ 53 (2008), available at <http://cidh.org/pdf%20files/April%202007%20Haiti%20Observations%20ENG.pdf> (last visited Feb. 7, 2011) (when referring to Haiti's intention to consider the approval of an abortion law); INTER-AM. COMM'N. H.R., ANNUAL REPORT OF THE INTER-AM. COMM'N. H.R. 2006, OEA/Ser.L/V/II.127, Doc. 4 rev. 1 ¶ 126 (2007), available at <http://www.cidh.org/annualrep/2006eng/chap.4d.htm> (last visited Mar. 3, 2011) (referring to the possible submission of a Haitian abortion bill); INTER-AM. COMM'N. H.R., ACCESS TO JUSTICE FOR WOMEN VICTIMS OF VIOLENCE

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member States.¹²⁰ However, these general recommendations give no details about how the Commission reaches its conclusions or what role is played by Article 4(1) in this body's decision. Therefore, this paper will mainly deal with what the Commission has said in its particular cases because it is there where this body explains its assertions in more detail.

A. The "Baby Boy" Case

The "*Baby Boy*" case refers to a petition filed against the United States before the Inter-American Commission.¹²¹ The United States is not subject to the jurisdiction of the regional court of the Americas, but during the time when the "*Baby Boy*" case was being analyzed, the United States considered the possibility of ratifying the ACHR.¹²² Nevertheless, because the United States is a member of the OAS, a system in which the Commission ought "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization" in these matters, this body was able to decide this case.¹²³ In "*Baby Boy*"

IN THE AMERICAS, OEA/Ser.L/V/II., Doc. 68 ¶¶ 254-255 (2007), available at <http://www.cidh.org/women/access07/Report%20Access%20to%20Justice%20Report%20English%20020507.pdf> (last visited Feb. 7, 2011) (referring to the *Colombian Constitutional Court's abortion decision*, *supra* note 99—which ended a blanket prohibition on abortion—as a ruling "aimed at protecting the rights of women"); INTER-AM. COMM'N. H.R., ANNUAL REPORT OF THE INTER-AM. COMM'N. H.R. 1992-1993, OEA/Ser.L/V/II.83, Doc. 14 corr. 1 ch. V pt. V, *Situation of human rights of women in the hemisphere*, under the heading *Costa Rica* (1993) available at <http://www.cidh.org/annualrep/92eng/TOC.htm> (last visited Mar. 3, 2011) (where it includes a bill allowing abortion in the case of rape among steps for enhancing women's rights). In INTER-AM. COMM'N. H.R., ACCESS TO INFORMATION ON REPRODUCTIVE HEALTH FROM A HUMAN RIGHTS PERSPECTIVE, OEA/Ser.L/V/II., Doc. 61 ¶ 84 (2011), available at <http://www.oas.org/en/iachr/women/docs/pdf/womenaccessinformationreproductivehealth.pdf> (last visited Feb. 9, 2012), the Commission states that in some countries "medical services have been completely criminalized," what considers abortion to be a medical service. It is also interesting to note that the rules on abortion are considered as indicators for assessing equality in the right to health. INTER-AM. COMM'N. H.R., GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, OEA/Ser.L/V/II.132, Doc. 14 table beneath ¶ 93 (2008), available at <http://www.cidh.oas.org/pdf%20files/Guidelines%20final.pdf> (last visited Feb. 7, 2011).

¹²⁰ *E.g.*, THE THIRD REP. ON THE HUM. RTS. SITUATION IN COLOMBIA, *supra* note 119, was referred to when this country's Constitutional Court was called to decide whether to put an end to Colombia's blanket legal prohibition on abortion. In this case, the Commission's report is referred to in the arguments of the General Attorney, who asked the Court to uphold the ban on abortion, while allowing certain exceptions (the decision mistakenly refers to the Inter-American Committee on Human Rights) *Colombian Constitutional Court's abortion decision*, *supra* note 99, at 177, 178 (in Spanish)(the page numbers cited in this article are those of the document uploaded to the website of the Constitutional Court). It is also mentioned in the opinions—either concurring or dissenting—of judges Monroy and Escobar (the former is the same who issued a dissenting opinion in the "*Baby Boy*" case, a case which will be analyzed later in the brief), Cepeda and Tafur. *Id.* at 562, 395 655. The Constitutional Court's majority position put an end to Colombia's blanket prohibition on abortion.

¹²¹ United States, Case 2141, Inter-Am. Comm'n. H.R., Res. No. 23/81, OAS/Ser.L/V/II.52, doc. 48 (1981), available at <http://www.cidh.org/annualrep/80.81eng/usa2141.htm> [hereinafter "*Baby Boy*" case]. For a detailed account of this case see De Jesus, *supra* note 62.

¹²² See Alston, *supra* note 35 at 176; see also "*Baby Boy*" case, *supra* note 121, ¶ 1.

¹²³ Charter of the Organization of the American States, art. 106, Feb. 27 1967, 2 U.S.T. 2394, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27 U.S.T. 607, T.I.A.S. No. 6847. One of the Inter-Am. Cmm'n. H.R.'s powers is "to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights." Organization of American States, Statute of the Inter-Am. Cmm'n. H.R., OAS/Ser.L/V/I.4 rev.8 (Oct. 1979), reprinted in INTER-AMERICAN COURT OF HUMAN RIGHTS, *supra* note 19, at 137.

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the Commission asserted its jurisdiction to apply the American Declaration as substantive law to all member States of the OAS.¹²⁴

In this 1973 case, a Massachusetts court found a physician guilty of manslaughter for performing the duly requested abortion of a “child [who] was such as to fit within a ‘protectable exception’ (over six months past conception and/or alive outside the womb) to the Supreme Court of the United States’ rubric in the Wade and Bolton cases.”¹²⁵ On appeal, the Supreme Judicial Court of Massachusetts subsequently reversed this decision on three grounds: insufficient evidence of recklessness and belief in the viability of the fetus, insufficient evidence of life outside the womb, and procedural error.¹²⁶ The petitioners considered that this decision violated the American Declaration of the Rights and Duties of Man. There was no controversy concerning the facts of the case.¹²⁷

Several issues of admissibility were discussed in this case, but “the seemingly fundamental question of whether the fetal ‘Baby Boy’ on whose behalf the petition [was] brought, [was] a ‘person’ for purposes of jurisdiction [was] totally ignored.”¹²⁸ As Dinah Shelton notes, “[i]t was simply taken as true that a ‘person’ had been subject to an alleged violation, leaving open the possibility that other cases of fetal injury or death may be brought based on this jurisdictional precedent.”¹²⁹ This conveys the idea that “the fetus is a ‘person’ for jurisdictional purposes.”¹³⁰ Something analogous occurred in an individual’s case against Canada about freedom of speech of a pro-life campaigner.¹³¹ Furthermore, in its application to the *Xákmok* case, the Commission goes even further, by giving the label “person” to each one of the two unborn who died together with other members of the Indigenous Community.¹³² This could be read not

¹²⁴ Shelton, *supra* note 30, at 313. Furthermore, the IACtHR has stated that, for member States of the OAS “the Declaration is the text that defines the human rights referred to in the Charter [of the OAS]. Moreover, Articles 1(2)(b) and 20 of the Commission’s Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.” Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R., (ser. A) No. 10, ¶ 45 (July 14, 1989).

¹²⁵ “*Baby Boy*” case, *supra* note 121, ¶ 3(d) (quoting *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)).

¹²⁶ *Id.*

¹²⁷ *Id.*, at “Whereas” ¶ 7.

¹²⁸ Shelton, *supra* note 30, at 312.

¹²⁹ *Id.* at 312.

¹³⁰ *Id.* at 312.

¹³¹ In this case the petitioner also claimed the violation of some rights of unborn children and their mothers. However, these claims were considered inadmissible because petitions to the Commission are not intended to be *actio popularis*, and therefore, should not be presented *in abstracto*. The Commission did not assert the unborn children’s lack of personhood. It made no juridical distinction between the unborn and their mothers. *Demers v. Canada*, Petition P-225-04, Inter-Am. Comm’n H.R., Report No. 85/06, Decision on Admissibility, ¶¶ 41-42 (2006), available at <http://www.cidh.oas.org/annualrep/2006eng/CANADA.225.04eng.htm>

¹³² The Commission does so in accordance with the will of the Community’s representatives. However, in doing so, this body endorsed the *Xákmok Kásek*’s claim regarding the unborn. Inter-Am. Comm’n H.R., Application with the Inter-American Court of Human Rights in the case of *Xákmok*

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only as considering the unborn to be a person for jurisdictional purposes, but also as entitled to rights according to the ACHR.

In the *"Baby Boy"* case, the Commission analyzed both the American Declaration and the ACHR in light of their *travaux préparatoires*, but dismissed other interpretative methods for elucidating the meaning of these instruments' provisions. This was particularly true when it referred to the ACHR. After doing so, the Commission concluded, by five votes to two, that the decision of the Massachusetts' Supreme Court did not violate the American Declaration.¹³³ The most probable explanation for this decision was the text of the American Declaration, which allows a more flexible interpretation of the right to life than the ACHR; for instance, it remains silent with regard to the death penalty.¹³⁴ An earlier draft of the American Declaration used to have an explicit reference to "the right to life from the moment of conception, to the right to life of incurables, imbeciles and the insane," but this instrument's *travaux préparatoires* do not explain why this explicit reference was suppressed.¹³⁵ The two dissenting opinions considered that the American Declaration intended to protect life from the moment of conception.¹³⁶

The Commission also asserted, by way of *obiter dictum*, that the ACHR's sentence "in general, from the moment of conception," did not mean "that the drafters of the Convention intended to modify the concept of the right to life that

Kásek Indigenous Cmty. of the Enxet-Lengua People and Its Members (Case 12,420) against the Republic of Paraguay, ¶ 105 (2009), available at <http://www.cidh.oas.org/demandas/12.420%20Xakmok%20Kasek%20Paraguay%203jul09%20ENG.pdf>.

¹³³ Among the majority was the *Rapporteur* who years earlier recommended to exclude from the ACHR the notion of conception. INTER-AM. YRBK. ON HUM. RTS., *supra* note 69, at 193.

¹³⁴ See American Declaration on the Rights and Duties of Man, OEA/Ser.L/V/I.4, rev. 9, ch. 1, art. XXVI (1948). Its prohibition of "cruel, infamous or unusual punishment" is silent with respect to the death penalty.

¹³⁵ Shelton, *supra* note 30, at 313-14. Similarly, Dr. Tinoco argues in his dissenting opinion: "I do not find . . . any specific explanation of the reasons that motivated the elimination of the supplementary phrase contained in the Draft Declaration of the International Rights and Duties of Man presented by the Inter-American Juridical Committee (Document CB-7), which recognized 'the right to life for all persons, including (a) the unborn, as well as (a) [sic] incurables, imbeciles, and the insane.' For which reason I must deduce that the reason for that elimination was none other than that expressed by the *Rapporteur*, Mr. Lopez de Mesa, in these terms: 'likewise, it was decided to draft them (the rights and duties) in their mere essence, without exemplary or restrictive listings, which carry with them the risk of useless diffusion and of the dangerous confusion of their limits.'" Dissenting opinion of Dr. Luis Demetrio Tinoco Castro, *"Baby Boy" Case*, *supra* note 121, ¶ 3. The majority's position in the *"Baby Boy"* case disagrees with this assertion by arguing that it was modified in order to make it compatible with domestic laws governing abortion and capital punishment. *"Baby Boy" Case*, *supra* note 119, ¶ 19 (this appears as part of ¶ 18 in the online version). However, this latter assertion does not explain why the protection of incurables, imbeciles and the insane was also taken out of the Declaration. Similarly, if the framers of the Declaration wanted to make this instrument compatible with domestic legislation on the issue of capital punishment, they would have maintained the Draft's reference to the possibility of applying capital punishment "in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity," since the current wording leaves an absolute formulation of the right to life. *Id.* ¶ 18(b). It seems that the reasons for reformulating Article I of the American Declaration are not as straightforward as the Commission portrayed them to be, and that they are not clear enough in the *travaux préparatoires*.

¹³⁶ *"Baby Boy" case*, *supra* note 121. The dissenting commissioners were Marco Gerardo Monroy Cabra and Luis Demetrio Tinoco Castro.

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prevailed in Bogota, when they approved the American Declaration.”¹³⁷ This *obiter dictum* is contrary to what had been previously stated by the Commissioner Tom J. Farer—who was among the majority—when issuing a congressional testimony about the ACHR in 1979. He said “the United States should refuse to accept Article Four’s *categorical preclusion* of abortion.”¹³⁸ Similarly, this *obiter dictum* does not seem to equate with Commissioner Andrés Aguilar’s understanding, since his concurring opinion stressed that he had reached his decision only because the United States should not be judged in the light of the ACHR, but in that of the American Declaration, which allows each State to regulate the issue of the protection of life before birth.¹³⁹ He also stressed, “human life begins at the very moment of conception and ought to warrant complete protection from that moment, both in domestic law as well as international law.”¹⁴⁰

B. Other Cases

A more recent case regarding abortion is the petition of *Paulina del Carmen Ramírez Jacinto against Mexico*.¹⁴¹ The applicants in this case were NGOs who alleged the violation of several articles of various international conventions. The facts concerned a minor who was pregnant as a consequence of rape. With the consent of her mother, she had tried to have an abortion according to the laws of the Mexican state of Baja California. However, many obstacles were set against the performance of this legal action, with the result that the applicant gave birth to her child, Isaac de Jesús. The juridical issues of this case resemble those considered by the European Court of Human Rights in *Tysiāc v. Poland* and *A, B & C v. Ireland*.¹⁴²

México and Paulina Ramírez settled this case with an agreement, whereby the State acknowledged its responsibility for not implementing an adequate procedure for enabling women to perform abortions authorized by law. México also agreed to create and implement these procedures, and pay some monetary compensation to both Paulina Ramírez and her child.¹⁴³ Noticeably, this case does not refer to the issue of whether abortion is permissible or required according to the ACHR, but rather to the admissibility of obstacles to the performance of

¹³⁷ *Id.* ¶ 30.

¹³⁸ Alston, *supra* note 35, at 176-77 (quoting “Prepared Statement of Professor Thomas J. Farer,” in *International Human Rights Treaties*, Hearings Before the Comm. on Foreign Relations, United States Senate, 9th Cong., 2d sess. 97, at 99 (1979)).

¹³⁹ “Baby Boy” case, *supra* note 121, Concurring decision of Dr. Andrés Aguilar M., ¶¶ 4, 5 7.

¹⁴⁰ *Id.* ¶ 8.

¹⁴¹ Ramírez Jacinto v. Mexico, Petition 161-02, Inter-Am. Comm’n H.R., Report No. 21/07, Friendly Settlement (2007), available at <https://cidh.oas.org/annualrep/2007eng/Mexico161.02eng.htm> (last visited Feb. 27, 2011).

¹⁴² Tysiāc v. Poland, 45 Eur. Ct. H.R. 42 (2007); A, B & C v. Ireland, 43 Eur. Ct. H.R. 16 (2010), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

¹⁴³ The text of the public recognition of responsibility published in an official Mexican newspaper is appended to Ramírez Jacinto v. Mexico, Report No. 21/07, Inter-Am. Comm’n H.R., *supra* note 141, annex.

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legally accepted abortions. Therefore, the Commission did not explicitly develop its understanding on the status of the unborn.¹⁴⁴

On February 26, 2010, the Inter-American Commission issued a precautionary measure against Nicaragua in the matter of “*Amelia*.”¹⁴⁵ This case referred to a pregnant woman who was denied the necessary medical assistance for treating cancer. The reason for denying this treatment was that chemotherapy or radiotherapy could provoke a spontaneous abortion. Thus, the Commission requested the State to adopt the necessary measures for assuring that “*Amelia*” would receive the relevant medical treatment. Within the five-day deadline, the State of Nicaragua informed the Commission that the requested treatment had already been initiated. This was a case in which physicians in Nicaragua refused to perform a legal medical intervention. Indeed, this State’s legislation proscribes every form of direct termination of pregnancies, but abortions occurring as the consequence of indispensable and urgent therapeutic interventions for saving the life of the mother, without directly taking the life of the unborn, are allowed by the law.¹⁴⁶

The most recent report about the unborn was issued as an answer to several claims against the prohibition of in vitro fertilization in Costa Rica.¹⁴⁷ This ban was established by this country’s Supreme Court, which forbade in vitro fertilizations at their present stage of development. This highest court stated that this procedure currently involves the death of a high proportion of embryos, constituting a violation of the right to life.¹⁴⁸ It is interesting to consider that the judge who delivered the opinion of the Costa Rican Supreme Court was Rodolfo Piza Escalante, a former President of the IACtHR who deemed this judgment to be in accordance with the ACHR.

The Inter-American Commission considered that this decision violated the following Articles of the ACHR: 11(2) (to private and family life), 17(2) (to raise a family), and 24 (equality before the law and equal protection of the laws), in relation to the general obligations established in Articles 1.1 and 2.¹⁴⁹ The Commission’s report did not analyze the content of Article 4(1), despite the fact that Costa Rica’s defense was mainly based on this right. Regarding this Article, the Commission only asserted that the State had a legitimate aim in general terms, consisting of protecting a protected legal good such as life.¹⁵⁰

¹⁴⁴ See *id.* ¶ 19. The Commission makes a reference to women’s rights and the Belém do Pará Convention, but makes no statement about the unborn.

¹⁴⁵ *Precautionary Measures Granted by the Commission during 2010*, “*Amelia*,” Nicaragua, PM No. 43-10 INTER-AM. COMM’N H.R., <http://www.cidh.oas.org/medidas/2010.eng.htm> (last visited Mar. 20, 2012).

¹⁴⁶ This paper will refer later on to the distinction between direct and indirect abortions.

¹⁴⁷ Gretel Artavia Murillo et Al. (*In Vitro* Fertilization), Costa Rica, Case 12.361, Inter-Am. Comm. H.R., Report No. 85/10 (2010), available at http://www.asamblea.go.cr/Centro_de_informacion/biblioteca/Documentos%20compartidos/TA-FIV/Costa%20Rica/185-10.pdf (last visited Nov. 16, 2011).

¹⁴⁸ See Corte Suprema, *supra* note 54, (stating that, “the human embryo is a person from the moment of conception” (translated by author)).

¹⁴⁹ *In Vitro* Fertilization case, *supra* note 147.

¹⁵⁰ *Id.* ¶ 96.

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The Commission studied in detail whether Costa Rica's prohibition violated the rights established in Articles 11, 17, and 24. When analyzing whether the restriction of the first two rights was adequate, this body stated that the measure of prohibiting in vitro fertilizations fulfilled the requirements of legality, legitimate aim, and adequacy, but that there were less restrictive ways of satisfying the State's objective.¹⁵¹ When deciding this, the Commission took into consideration that Costa Rica, while not the only nation of the Americas protecting the embryo, is the only one banning this technique.¹⁵² Regarding Article 24, the Commission asserted that Costa Rica's decision had prevented the victims from using scientific progress for overcoming their disadvantaged situation, and that it had a disproportionate impact regarding women.¹⁵³ There were three dissenting opinions to the Commission's reading of Article 24, including that of the President and of the Second Vice-President of the Commission.

The report against Costa Rica does not explain the Inter-American Commission's reading of Article 4(1), but it shows that this body does not allow laws which, under the rationale of defending of the unborn, forbid the performance of actions which are widely accepted among the American States.

After being notified of the Commission's report, the Costa Rican Government presented a bill aimed at avoiding the filing of an application before the Court.¹⁵⁴ This bill allowed in vitro fertilizations in a very particular fashion, trying to make this procedure as compatible as possible with Costa Rica's traditional position towards life.¹⁵⁵ The Costa Rican Parliament, however, rejected this bill. Hence, the Commission brought the matter before the IACtHR.¹⁵⁶ This new case before the Court has some features that, despite the text of the ACHR, could make it

¹⁵¹ *Id.* ¶110.

¹⁵² *Id.* ¶ 100. The Constitution of the Mexican state of Nayarit contains a provision that declares and ensures the right to life from the moment of natural *or artificial* fertilization. CONSTITUCIÓN POLÍTICA DEL ESTADO LIBRE Y SOBERANO DE NAYARIT, 1918, art. 7(XIII)(1) (emphasis added). However, the author of this paper has no information about whether this provision has any effects in Nayarit's regulation of in vitro fertilizations. This provision was introduced in a constitutional reform of 2009. Regarding the issue of a widespread consensus in a particular matter, the European Court stated, when upholding Ireland's broad protection of the unborn's life, that, "consensus cannot be a decisive factor in the Court's examination." A, B & C v. Ireland, Eur. Ct. H.R. 25579/05, at ¶ 237 (2010).

¹⁵³ *In Vitro Fertilization Case*, *supra* note 147, ¶ 128.

¹⁵⁴ *Costa Rica Presenta Ley de Fecundación In Vitro Para Evitar Juicio*, AL DÍA (Oct. 22, 2010), <http://www.pontealdia.com/america-latina/costa-rica-presenta-ley-de-fecundacion-in-vitro-para-evitar-juicio.html> (last visited Feb. 27, 2011).

¹⁵⁵ This position was even expressed during the drafting of the ACHR, when it strongly opposed the death penalty. Costa Rica abstained from voting for the ACHR's provision allowing capital punishment in exceptional circumstances, and expressed its desire of a total abolition of this practice in the Americas. SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 73, at 162. Costa Rica also declared its "unyielding adhesion to the principle of inviolability of human life" and its non-acceptance of dispositions which "do not tend to ensure, in an absolute fashion, this sacred principle." *Id.* at 441 (translated by author from the original Spanish version).

¹⁵⁶ Press Release, Inter-Am. Comm'n H.R., IACHR Takes Case Involving Costa Rica to Inter-American Court, No. 91/11 (Aug. 16, 2011), available at <http://www.cidh.oas.org/Comunicados/English/2011/91-11eng.htm>.

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easier for the Commission to obtain a favorable result.¹⁵⁷ However, it is not absolutely clear what the Court will assert regarding the unborn's personhood. Nevertheless, the Court's decision regarding the right to life should have a different effect than other human rights conventions, such as the European, because otherwise the reference to the moment of conception would be rendered useless.

C. Commission's Overall Approach

The Commission seems to grant the unborn legal personality for jurisdictional purposes, as can be observed in petitions presented before this body.¹⁵⁸ Apparently it also endorses the unborn's capability of being injured by third parties.¹⁵⁹ Nevertheless, the Commission seems to grant States a wide margin of appreciation for determining the protection given to the unborn. However, this latitude appears to have some exceptions, as has been shown in some general documents, country reports, and in the Costa Rican case. Indeed, the Commission does not agree with laws forbidding the performance of actions accepted within the Americas, such as in vitro fertilizations and abortions in certain serious or exceptional cases, e.g. when the mother's life is at risk. The Commission's country reports do not sufficiently explain its rationale for recommending that countries refrain from prohibiting abortions in every situation.¹⁶⁰

However, the Commission's opinion in this matter is not conclusive because the IACtHR is the body that sets the definitive interpretation of international instruments of human rights in this regional system. In doing so, "the Court cannot easily borrow legitimization of its interpretations" from the Inter-American Commission.¹⁶¹ Indeed, "the Court's opinions generally treat the Commission as a hierarchical subordinate that proposes arguments for the Court's consideration, rather than as an independent source of expertise on the elaboration of human rights norms."¹⁶² In fact, the IACtHR often rejects the Commission's findings, and it has disagreed with some of this body's interpretations of the ACHR.¹⁶³

¹⁵⁷ The features which make easier for the Commission to obtain a favorable judgment are: that Judge Ventura Robles, the only current judges who has referred to the existence of rights from the moment of conception in a previous decision, will not hear this case because of being a Costa Rican citizen (Art. 19(1) of the Rules of Procedure of the IACtHR); that in vitro fertilization is widely accepted in the Americas, so an IACtHR's order to implement it would not require other States to modify their legislation; and that the death of embryos does not give rise to the same negative reactions as abortion.

¹⁵⁸ See "*Baby Boy*" case, *supra* note 121; James Demers v. Canada, Case P-225-04, Report, Inter-Am. Comm'n H.R., Report No. 85/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2007).

¹⁵⁹ See generally *Xákmok* *supra* note 1.

¹⁶⁰ The Commission explains it by briefly mentioning some rights, such as personal integrity and privacy, but does not take into consideration other relevant norms, notably the reference to the *nasciturus* in Article 4.1.

¹⁶¹ Neuman, *supra* note 15, at 108.

¹⁶² *Id.*

¹⁶³ See, e.g., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5 (Nov. 13, 1985).

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IV. Extent of the Phrase “In General”

This paper has shown the ACHR’s intention is to grant personhood from the moment of conception and to require States to protect, as a general rule, the unborn’s life by law. Until now, this study has not elucidated the meaning of the expression “in general.” Before interpreting this phrase, it should be noted that while allowing an exception to legal protection of the unborn, the ACHR is not stating that States have no duty to protect this life through other actions, such as administrative actions. In fact, the latter should be the case, especially by ensuring appropriate maternity care. This paper’s interpretation of Article 4(1) will address mainly the issue of abortion and its prohibition, because this is the most controversial topic.

A. Preliminary Issues

Some may argue that a prohibition on abortion is not necessary for protecting life by law and generally from the moment of conception because alternative means of protection could be used. The German Federal Constitutional Court analyzed a similar issue when undergoing an abstract judicial review of a bill in 1975 and another in 1993.¹⁶⁴ This court considered that the German Basic Law allowed the legislature to define circumstances in which a woman should not be obliged to carry a pregnancy to its conclusion, but stated in the 1993 case that the standard of minimal protection of the unborn requires

that abortion be declared illegal [as a general rule] during all stages of pregnancy [citing *Abortion I*].¹⁶⁵ If the law does not declare abortion to be illegal, the unborn child’s right to life would be trumped by the legally unrestrained decision of the mother or other third party, and the legal protection of its life would no longer be guaranteed.¹⁶⁶

The German Federal Constitutional Court concluded that the process of loosening restrictive abortion laws, no matter how humane its motivations, is usually interpreted as an entitlement to the procurement of abortions.¹⁶⁷ Interestingly, this court drew this conclusion despite the German Basic Law’s lack of an explicit reference to the unborn or to the protection of their life by law, issues in which the American Convention is clear and direct. The German Federal Consti-

¹⁶⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 1; BVerfG, 1993, 88 BVerfGE 203, both *translated in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 336-56, (2d ed. 1997). These decisions in their original language use at times the expressions *Kind* (child) or *ungeborenen Kindes* (unborn child) for referring to the unborn.

¹⁶⁵ “Abortion I” refers to the German decision of 1975, *supra* note 164.

¹⁶⁶ KOMMERS, *supra* note 164, at 352-53 (brackets in the original). This Court also required the State to take positive action in order to encourage the mother to carry her child to term. After doing so, it analyzed the rest of the bill that was being abstractly reviewed, and determined which exceptions to the right to life were permissible under the German Basic Law. However, contrary to what is allowed by the ACHR, the German Court considered admissible a wide range of exceptions to the prohibition of abortion.

¹⁶⁷ In several cases the IACtHR has upheld the deterrent effect of penalties.

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tutional Court's position is at odds with the opinion that "unrestrictive abortion laws do not predict a high incidence of abortion, and by the same token, highly restrictive abortion laws are not associated with low abortion incidence."¹⁶⁸ However, the accuracy of the latter arguments does not make the German Court's assertion less convincing because it is true that restrictive abortion laws may not predict low rates of termination of pregnancies, but it does not follow that a legal prohibition has no effect in the reduction of abortion rates. Indeed, evidence shows that restrictive abortion laws have the effect of reducing the number of pregnancy terminations performed in a given region.¹⁶⁹

Similar to Germany, the Inter-American system requires an explicit prohibition of violations to the right to life of the unborn. Furthermore, the ACHR will allow only the exceptions covered by the "in general" expression. There are at least three reasons why the Inter-American system requires the explicit prohibition of abortion. First, the right to equal protection established in Article 24 of the ACHR supports the use of the same means for the protection of both born and unborn people. This is further supported by the fact that the ACHR places in the same sentence both the protection of life before and after birth, suggesting that protection of both born and unborn individuals should be given in analogous terms—apart from the exceptions allowed by the "in general" expression. Moreover, a non-prohibiting approach to the violations of the right to life would be at odds with the Court's case law in this regard.¹⁷⁰ Finally, the ACHR framers'

¹⁶⁸ Elisabeth Åhman, Stanley Henshaw, Gilda Sedgh, Iqbal H. Shah, & Susheela Singh, *Induced abortion: estimated rates and trends worldwide*, 370 LANCET 1338, 1343 (2007).

¹⁶⁹ To properly analyze the effect of abortion laws on the reduction of the number of pregnancy terminations, one cannot simply compare countries with and without restrictive abortion laws. Comparisons between countries with and without this kind of regulation should be done—as far as possible—in all-other-things-being-equal conditions. A study which is not set in *ceteris paribus* conditions could be dismissing other factors which may have an influence on the analysis. Therefore, in order to understand the effects of restrictive abortion laws a study should compare countries or regions with contrary positions on abortion, but sharing similar conditions in other areas. If comparisons are made on these terms, it seems that regions with restrictive abortion laws have lower rates of termination of pregnancies. For instance, if regions are distinguished on the basis of socio-economic circumstances (in a very rough fashion, due to the little pertinent information contained in the report that this study is quoting), those with liberal abortion laws seem to have higher abortion rates. This happens if Eastern Europe is compared with South America, or if Middle Africa is compared with South-Eastern Asia (making abstraction of the developed countries in the latter region), or even if Western Europe is compared with the U.S.A. and Canada (where the grounds on which abortion is permitted are not substantively dissimilar, but there is a different time limit in which abortions may be performed). See *id.* at 1342. In a less recent publication, it has been noted that a tentative explanation of the tendency for socio-economic development to affect the rates of terminations of pregnancies could be that the social problem of abortion cannot be tackled only via restrictive laws; rather, it requires other provisions, such as education and support for pregnant mothers. These provisions are more likely to be provided in regions with a higher socio-economic development. Something similar is noted in a less recent publication. Taylor Haas, Stanley Henshaw, & Susheela Singh, *The Incidence of Abortion Worldwide*, 25 INT'L FAM. PLAN. PERSP. S30, S31 (1999). A tentative explanation of the tendency for socio-economic development to affect the rates of terminations of pregnancies could be that the social problem of abortion cannot be tackled only via restrictive laws; rather, it requires other provisions, such as education and support for pregnant mothers. These provisions are more likely to be provided in regions with a higher socio-economic development.

¹⁷⁰ Among other things, the IACtHR has been quite consistent in interpreting the ACHR as imposing on the State a duty "to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishments on them, and to ensure . . . the victim adequate compensation." *González et al. ("Cotton Field") v. Mexico*,

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opposition to suppressing the reference to conception, and the terms in which the discussion was carried on in the *travaux préparatoires*, suggests that the framers had prohibitive rules in mind.¹⁷¹ In view of the foregoing, this paper considers that the obligation to protect the unborn *by law* requires domestic legislations to prohibit attempts against the life of the unborn, except for the cases covered by the “in general” proviso. The permissible exceptions to this prescription will be analyzed in the following section.

B. Three Admissible Interpretations

The text of the ACHR is clear when stating that the general rule should be to defend the unborn, and that the non-protection of life by law and from the moment of conception is only allowed in exceptional circumstances.¹⁷² The obligation to protect life before birth will generally require the State to defend mothers from third parties’ actions which could damage their children (e.g. if an employer requires a pregnant woman to complete physically demanding tasks as part of her job) and to protect the unborn from their mothers whose actions could injure their unborn children. However, the text of Article 4(1) allows some exceptions to this principle of protecting life. These exceptions could seem to be philosophically incompatible with the spirit of the ACHR, but not if they are interpreted in light of other provisions of this treaty.

Neither the ACHR nor its *travaux préparatoires* left many clear clues for solving the question of which permissible exceptions to the right to life are allowed by the ACHR. When interpreting Article 4(1), the reader should follow the effectiveness principle, excluding interpretations that render useless the clause “in general, from the moment of conception.”¹⁷³ On the one hand, this will exclude elucidations that interpret the “in general” phrase in a way that is hardly compatible with its ordinary literal meaning, such as that of Rodolfo Barra. He inter-

Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 236 (Nov. 16, 2009). Similarly, it has considered it most important to determine whether “the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.” *Id.* For a critique of the IACtHR’s requirement to punish human rights violations, see generally Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding State’s Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT’L L. REV. 195 (2007). Even if this doctrine is narrowed down to cover only grave violations, it would be difficult to consider that violations of the right to life are not included within this group.

¹⁷¹ Furthermore, this could be the reason why the ACHR states that protection of the unborn had to be established “by law,” since the principle of legality affirms that sanctions may only be imposed by legal norms. This principle is provided for in Article 9 of the ACHR. The English version of the ACHR calls this right “Freedom from Ex Post Facto Laws,” but the heading in the Spanish version reads “Principio de Legalidad y de Retroactividad,” which could be translated as *Principle of Legality and of Retroactivity*. ACHR, *supra* note 3, art. 9.

¹⁷² Otherwise, the relevant norm would provide: “and, *exceptionally*, from the moment of conception.”

¹⁷³ This principle is also called the principle of effectiveness, and it provides that “[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.” *Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int’l L. Comm’n 219, Art. 28(6).

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preted the word “general” as in the expression “general education,” that is, with no exceptions and granting the same conditions to all. Barra considered that this expression makes no exception to the protection of the unborn, but stresses the unlimited protection of the right to life.¹⁷⁴ This is not a plausible explanation, because it is at odds with the ordinary reading of the expression “in general.” Ricardo Bach de Chazal interprets this norm in the same way as Rodolfo Barra.¹⁷⁵

On the other hand, Article 4(1) also excludes interpretations that render meaningless the general rule of protection from the moment of conception. This is the case with the elucidation of Cecilia Medina, who seems to find in the United States’ acceptance of abortion *on-demand* an example of what the ACHR wanted to endorse.¹⁷⁶ This interpretation forgets that, according to the ACHR, the protection of unborn children’s life should be the general rule, forbidding thus the implementation of abortion *on-demand*. Likewise, this interpretation disregards that Article 4(1) of the ACHR establishes that “[n]o one shall be arbitrarily deprived of his life.”

As a consequence, there are only three interpretations for the exceptions referred to in the phrase “in general,” which are not demonstrably incompatible with the relevant provision of the ACHR. The first two interpretations are based on the fact that the framers of the ACHR did not accept the proposal of the United States and Brazil, whose legislation at the time allowed abortion in very limited cases.¹⁷⁷ The first of these two interpretations is that of Rita Joseph, who views the *travaux préparatoires* of the ICCPR as the key for interpreting Article 4(1) of the ACHR. She considers that the expression “in general” was not added as a compromise for allowing States to maintain their abortion laws,

but rather as a practical indication that the term “from the moment of conception” was to be read figuratively rather than literally. That is, the phrase “in general, from the moment of conception” is to be understood as roughly from earliest moments of existence, or more practically speaking, from first knowledge of the child’s existence by the mother, her doctor and/or the State.¹⁷⁸

In contrast to Barra and Bach de Chazal, Joseph utilizes the phrase “in general” in its ordinary meaning, that is, as expressing the existence of exceptions to

¹⁷⁴ His interpretation is also shared by Corral Talciani. BARRA, *supra* note 62, at 86; TALCIANI, *supra* note 62.

¹⁷⁵ BACH DE CHAZAL, *supra* note 63. Piero Tozzi et al., *supra* note 63 (sharing Bach de Chazal’s opinion).

¹⁷⁶ MEDINA QUIROGA, *supra* note 44, at 76. This article understands that abortion *on demand* is that in which the person asking for an abortion does not require to give reasons for requesting them. States which allow this kind of abortions usually establish a timeframe for requesting them.

¹⁷⁷ As it was already stated, Brazil allowed abortion only in a few cases, and *Roe v. Wade* had still not been decided in the U.S. For an extensive list of the latter country’s limited state laws regarding abortion before this case, see *Roe v. Wade*, 410 U.S. 113, 118-19 n. 2, 140 n. 37 (1973).

¹⁷⁸ JOSEPH, *supra* note 42, at 225.

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a general rule.¹⁷⁹ She considers, following what was discussed during the drafting of the ICCPR,¹⁸⁰ that the reasons for adding the expression “in general” could be two practical ones: 1) That it is “impossible for the State to determine the moment of conception and hence, to undertake to protect life literally from that moment;”¹⁸¹ and 2) That it would not be feasible to establish universal standards regarding the protection of the unborn across national medical associations and different legal jurisdictions¹⁸² because domestic “legislation on the subject was based on different principles.”¹⁸³ However, Rita Joseph asserts that the only weighty reason why the phrase “in general” was introduced was the impossibility of knowing that conception had already happened.¹⁸⁴ The problem with this interpretation is that it is mainly based on arguments given in a discussion of a different international treaty, which may be illustrative, but not decisive.

A second interpretation based on the rejection of the proposal of Brazil and the United States would allow only indirect abortions. This reading considers that the framers of the ACHR did not wish to allow the kind of abortions accepted by legislations such as that of Brazil. Therefore, it asserts that the “in general” proviso only allows as exceptions to the right to life those accepted by the legislation of States banning direct abortion. These legal systems consider as non-punishable abortions resulting from the application of the principle of double effect.¹⁸⁵ These are abortions that come about as the foreseen, but unwanted, effects of medically indispensable and proportional interventions on the mother’s body.¹⁸⁶ They are not produced by directly harming the unborn. An example of these indirect abortions would be the case of a pregnant woman who requires immediate radiation therapy as the only way of treating a life-threatening cancer, a pro-

¹⁷⁹ In practice, Joseph’s reading could be similar to that of Barra or to the second interpretation of the expression “in general.”

¹⁸⁰ See A/3764 ¶ 112, reprinted in *THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 43, at 53. This discussion followed an amendment proposed by several States to include the phrase “from the moment of conception” in the clause of the right to life of the ICCPR. Among these countries was Brazil, ironically

¹⁸¹ JOSEPH, *supra* note 42, at 229. An example of this could be in cases where a State applied the death penalty to a pregnant woman whose condition was not known.

¹⁸² *Id.* at 230.

¹⁸³ *Id.* at 229.

¹⁸⁴ She affirms that the second reason “could not have carried much weight at that date,” since in September of 1948 the World Medical Association had already issued the Geneva Declaration—subsequently reaffirmed unanimously by the Declaration of Geneva of 1968— which included at that time “a solemn duty to ‘maintain respect for human life from the time of conception’ and to protect it ‘according to the laws of humanity’.” *Id.* at 230.

¹⁸⁵ The case in respect of Chile is described in Alejandro Miranda Montecinos, *El Principio del Doble Efecto y Su Relevancia en el Razonamiento Jurídico*, 35 R. CH. D. 485, 510-13 (2008) (Chile). For an in-depth debate about this principle, see *THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE* (P. A. Woodward ed. 2001). Another interesting work is Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L.R. 469, 482-84 (2005).

¹⁸⁶ This assertion does not intend to be a precise and exhaustive application of the principle of double effect to the issue of abortion, since this principle contains some conditions in which this study will not dwell. These conditions are referred to in Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 No. 4 ETHICS 527, 528-29 (1980).

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cedure which would probably result in the death of the unborn, as it was apparently the case of “*Amelia*,” analyzed by the Inter-American Commission.¹⁸⁷ Many argue that the dangers of an ectopic pregnancy can also be addressed by the principle of double effect.¹⁸⁸

Notwithstanding the foregoing paragraph, a system where abortion is forbidden is compatible with criminal rules which may lessen or even extinguish criminal responsibility for those who take part in forbidden actions, as might occur in the application of extenuating circumstances. A much more contested exception to the legal protection of the unborn’s right to life in countries where abortion is forbidden, is the case of criminal legislation enshrining a broad concept of the state of necessity. The judiciary may apply such a provision to absolve those who procure an abortion in the context of a life-threatening pregnancy.¹⁸⁹ This latter system does not explicitly allow abortion, but may leave unpunished its performance.

A third way of interpreting the ACHR is by paying attention only to its text, regardless of the fact that the position of Brazil and the United States was not accepted. This reading would see in the current wording of Article 4(1) a political compromise between countries allowing abortion in certain cases and those forbidding it. As a consequence, this interpretation would be compatible with State legislation allowing abortion exceptionally, as when pregnancy constitutes a real threat to a woman’s life, or when it is the consequence of rape. The delegate of Brazil described these two cases when Brazil opposed the relevant provision. The following paragraphs will show why this third interpretation is not convincing.

The Commission’s interpretation seems to be similar to this third reading.¹⁹⁰ However, the Commission has considered, inadequately, that States are *obliged* to establish some exceptions to the right to life. This fails to take account of the fact that the phrase “in general” establishes—at the most—an escape valve, not a commandment. No interpretation of Article 4(1) allows considering abortion a right in the Inter-American system. Even the loosest possible interpretation of this provision would consider abortion as an exception to the right to life.

¹⁸⁷ *Precautionary Measures Granted by the Commission during 2010*, “*Amelia*,” Nicaragua, PM No. 43-10 INTER-AM. COMM’N H.R., <http://www.cidh.oas.org/medidas/2010.eng.htm> (last visited Mar. 20, 2012).

¹⁸⁸ Two different interpretations of what the principle of double effect would allow in the case of ectopic pregnancies may be found in Philip E. Devine, *The Principle of Double Effect*, 19 AM. J. JURIS. 44 (1974) and Christopher Kaczor, *Moral Absolutism and Ectopic Pregnancy*, 26 J. MED. & PHIL. 61 (2001).

¹⁸⁹ According to the U.N., this is the case of the Dominican Republic. 1 U. N., ABORTION POLICIES: A GLOBAL REVIEW 130 (2001), available at <http://www.un.org/esa/population/publications/abortion/index.htm> (last visited Jan. 31, 2011).

¹⁹⁰ It must be remembered that the Commission has applied the ACHR only in cases like *Ramírez* (*supra* note 16) and *In Vitro Fertilization* (*supra* note 147), as well as in general documents such as country reports. However, in the “*Baby Boy*” case the Commission applied the American Declaration, not the ACHR. Gros also seems to interpret art. 4(1) in accordance with this third reading. Gros ESPIELL, *supra* note 62, at 82-83.

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C. The Most Convincing Interpretation

The foregoing three interpretations are not demonstrably incompatible with the text of the ACHR. However, the second solution seems the most convincing in light of the provisions of the ACHR analyzed as a whole. The first reason for its persuasiveness is that it takes into account, together with the first interpretation, the fact that the proposal of Brazil and the United States was rejected, an important reality to which the third interpretation is blind. Indeed, this rejection can only mean that the American countries did not want to allow the very limited exceptions to the right to life accepted by Brazil and the United States. Among the two interpretations which take this fact into account, that of Rita Joseph does not seem as convincing as the second, mainly because it is based on the preliminary works of a different convention on human rights.

The presence of provisions like those of Brazil and the United States in some other countries of the Americas does not espouse an interpretation that the American States wanted to allow these particular cases of abortion.¹⁹¹ Indeed, human rights treaties usually reflect the intention of States to modify their laws in accordance with what is stated in these instruments. This is the reason why Article 2 of the ACHR obliges States to adapt their legislation to the Convention. For instance, several State delegates voted in favor of a provision establishing equal rights for children born in and out of wedlock, while explicitly stating that the legislation of their countries was at odds with this provision.¹⁹² Besides, it must be remembered that the framers of the ACHR decided to maintain this reference to conception "for reasons of principle."¹⁹³

Another reason why the second interpretation seems more plausible than the third is the distinction between *protection* and *respect* enshrined in the first and second sentences of Article 4(1). The ACHR states that there will be cases in which the right to life might not be *protected*, but the *respect* of the right to life has no exception according to the ACHR. This wording is enigmatic because both concepts usually go together. It is not easy to understand how a right can be respected but not protected. However, this enigma could be solved if the second interpretation of the "in general" phrase is adopted. This reading does not disrespect the unborn child's right to life because it does not allow actions performed directly against the *nasciturus*. At the same time, this interpretation allows cases in which the protection of the unborn's right to life is not granted because the *nasciturus* may perish if his or her mother is in need of undergoing some necessary life-saving medical treatments.

The second interpretation is also more convincing because it accords with the right to equal protection established in Article 24, providing that, "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination,

¹⁹¹ Unfortunately, we do not know if States with abortion laws voted in favor of or against the ACHR's reference to the moment of conception. The lack of details in the *travaux préparatoires* can be seen in, SECRETARÍA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, *supra* note 73, at 160.

¹⁹² *Id.* at 227-29.

¹⁹³ INTER-AM. YRBK. ON HUM. RTS., *supra* note 69, at 97.

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to equal protection of the law.”¹⁹⁴ This provision is applicable to the unborn, who is considered a person before the ACHR, as was submitted earlier in this work. A consistent interpretation of the ACHR would consider that the right to life of the unborn should stand on equal terms with that of his or her mother, and, therefore, would admit as exceptions only those in which there is no direct attack upon the *nasciturus*. An interpretation allowing actions directly intended to end the life of the unborn, even if performed after balancing some interests of the mother against those of the unborn, would go against Article 24 of the ACHR.¹⁹⁵ Consequently, only an interpretation that does not go directly against the right to life would be an admissible exception to the protection of the right to life under Article 4(1) of the ACHR.

The second reading is not only more coherent with the text and history of the ACHR, but it also requires less subsequent interpretation by the IACtHR than the third reading. The main issue that the third interpretation leaves open to further elucidation by the Court is which kind of abortions would be exceptionally allowed and how they would be determined. It might be possible to argue that these abortions are those referred to by the Brazilian delegate, but even these limited grounds for terminations of pregnancy would give rise to the inconsistencies already discussed (*e.g.*, disrespect for life, inequality, etc.). Similarly, the establishment of exceptions to the protection of the right to life without a mechanism to gradually abolish them, as in the case of capital punishment, would seem to be philosophically incoherent in the context of the ACHR when considered as a whole.¹⁹⁶

Another issue that should be elucidated if the third interpretation is adopted is whether the phrase “in general” was aimed at granting a political escape only for the countries that already had abortion laws when this provision was enacted, or also for those that did not permit abortion at that time. In this particular regard because neither the ACHR nor the *travaux préparatoires* give clues for elucidation, the reader could apply two interpretative rules which lead to opposite results. Applying the principle that when the law makes no distinction the interpreter should not do so,¹⁹⁷ it could be understood that States whose laws forbade abortion during the drafting of the ACHR could also apply this exception. On the other hand, if the reader follows the interpretative principle that exceptions to a general rule must be applied restrictively, especially when they exclude the application of a human right, the result would be the opposite.

¹⁹⁴ ACHR, *supra* note 3, art. 24.

¹⁹⁵ This is especially so if the unborn is aborted for being disabled, since that action would go against the understanding that every human being—no matter their physical or mental condition—are of equal human dignity. See Alison Davis, *Right to Life of Handicapped*, 9 J. MED. ETHICS 181, 181 (1983).

¹⁹⁶ ACHR, *supra* note 3. Art. 4(2) *in fine* provides: “The application of such punishment shall not be extended to crimes to which it does not presently apply.” Art. 4(3) states: “The death penalty shall not be reestablished in states that have abolished it.”

¹⁹⁷ *I.e.*, *Ubi lex non distinguit, nec nos distinguere debemus*.

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V. Conclusion

The *Xákmok Kásek* case was the first in which the IACtHR was directly faced with the matter of the unborn child. However, this court decided not to address the issue, alleging that neither the Commission nor the representatives presented enough legal arguments. This refusal to decide on the issue of the unborn may have been due to the controversial nature of this matter. However, avoidance was not an appropriate approach, because a court of law has a duty to interpret legal norms which are presented before it. This is especially the case for the IACtHR, which has a very broad understanding of the principle of *iura novit curia*.

In deciding this case, the Court should have had recourse to the ACHR, which is clear in stating that the unborn has a right to life, even though the law may not always protect this right. Furthermore, the ACHR recognizes the personhood of the unborn, a conclusion which is apparently shared by the Commission for jurisdictional purposes. This body's negative stance towards the prohibition of widely accepted actions affecting the unborn (as happens with in vitro fertilizations) is no obstacle for the foregoing assertion. In any case, the Commission's interpretation of the ACHR does not bind the Court. In fact, the IACtHR has disagreed with the Commission's reading of the ACHR in many cases.

The ACHR resolves what in some juridical systems has been understood as a clash between the rights or interests of unborn children and those of their mothers. It does so because "the right to life plays a key role in the American Convention as it is the essential corollary for realization of the other rights."¹⁹⁸ Thus, according to this treaty, the right to life would trump other conflicting rights or interests. Notwithstanding the foregoing, without explicitly describing them, the ACHR's wording allows exceptions to the legal protection of the right to life of the unborn. Thus, this study engaged in deciphering the meaning of the ACHR's right to life in respect of the unborn.

Three interpretations of the exceptions allowed by the ACHR to the unborn's right to life are not demonstrably incompatible with the Treaty's text. Among them, the most convincing reading is one considering that the ACHR authorizes only indirect abortions. These are the terminations of pregnancy which come about as the foreseen, but unwanted, effects of medically indispensable and proportional interventions on the mother's body. The main reasons for this assertion stem from the text of Article 4(1), the analysis of the ACHR as a whole, and the relevant *travaux préparatoires*.

Finally, it should be noted that none of the interpretations described in this article would consider deaths due to a State's negligent actions as permissible exceptions to the right to life under the ACHR. For this reason, the solution in

¹⁹⁸ "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 156 (Sept. 2, 2004).; *Xákmok case*, *supra* note 1, ¶ 186. The IACtHR continues by saying that "[w]hen the right to life is not respected, the other rights vanish because the bearer of those rights ceases to exist. States have the obligation to ensure the conditions required for full enjoyment and exercise of that right." "Juvenile Reeducation Institute" v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 156.

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the *Xákmok case* was straightforward enough in the matter of the unborn; the Court should have granted the compensation requested by the Indigenous Community because the State did not grant the necessary safeguards and care required by the Xákmok Kásek children before their birth.