2011


Jesus M. De Ligia

Follow this and additional works at: https://scholar.smu.edu/lbra

Recommended Citation
https://scholar.smu.edu/lbra/vol17/iss3/4

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

Ligia M. De Jesus*

TABLE OF CONTENTS

I. INTRODUCTION .................................................. 436
II. THE RIGHT TO LIFE FROM CONCEPTION IN THE AMERICAN CONVENTION AND THE AMERICAN DECLARATION .................................................. 437
III. INTER-AMERICAN COURT RELEVANT PRECEDENTS .................................................. 437
   A. Reparations for the Death of an Unborn Child .................................................. 438
   B. Reparations for Violations of the Right to Pre-Natal Health .................................. 439
   C. Recognition of Unborn Children as “Children” ........................................ 439
IV. INTER-AMERICAN COMMISSION REPORTS RELATING TO THE RIGHT TO LIFE FROM CONCEPTION .................................................. 440
   A. Baby Boy v. United States (1981): A Non-Authoritative Resolution on Abortion and the American Declaration .................................. 441
   C. James Demers v. Canada: An Admissibility Report Refusing to Address the Unborn Child’s Right to Life ........................................ 449

* Assistant Professor, Ave Maria School of Law, Naples, Florida; LL.M. (Harvard Law School).
I. INTRODUCTION

This article examines the question of whether the Inter-American system of human rights has effectively applied article 4(1) of the American Convention on Human Rights (hereinafter “American Convention” or “Convention”), which protects the right to life from the moment of conception and, if so, to what extent. The paper carries out a critical assessment of the Inter-American system’s current application of article 4(1), which stands out among other international human rights treaties for its explicit recognition that human life begins at conception and for its unequivocal protection of the unborn child’s right to life in utero.

Section II looks at the American Convention’s text and section III examines the Inter-American Court’s application thereof. Section IV conducts a survey of Inter-American Court of Human Rights (hereinafter “IACHR” or “Commission”) reports and resolutions that directly or indirectly relate to the right to life from conception, from Baby Boy v. United States to the in vitro fertilization petitions against Costa Rica, and weighs their authority in the regional human rights system. Finally, section V explores the role played by individual abortion supporters within the Inter-American system and external abortion lobbies that currently exert significant political influence in the IACHR, by advocating for the creation of abortion rights in Latin America and the Caribbean.

II. THE RIGHT TO LIFE FROM CONCEPTION IN THE AMERICAN CONVENTION AND THE AMERICAN DECLARATION

The American Convention on Human Rights is invariably singled out as the most emphatic recognition of the unborn child’s right to life at present in international law. In it, Latin American states-parties to the Convention explicitly recognized that life begins at conception and granted human rights protection to the unborn child in article 4(1) of the Convention, which states: Right to Life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.3

Likewise, in the American Declaration of the Rights and Duties of Man (hereinafter “American Declaration” or “Declaration”), a non-binding regional instrument, all member states of the Organization of American States5 recognized a universal right to life when they stated that “every human being has the right to life” in article I.6 The Declaration’s travaux préparatoires explicitly included right to life protection for “those who are not yet born” and a right to life “from conception,”7 which evinces an original intent to protect the unborn child from acts that would deliberately end his or her life.

III. INTER-AMERICAN COURT RELEVANT PRECEDENTS

To date, the Inter-American Court of Human Rights (hereinafter “Inter-American Court” or “Court”)8 has not issued any judgments or consultative opinions on challenges to the unborn child’s right to life from

3. See American Convention, supra note 1, at art. 4(1).
5. As of February 2011, the following states are members of the O.A.S.: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay and Venezuela. See Charter of the Organization of American States, ONGANIZATION OF AMERICAN STATES, available at http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm.
6. See American Declaration, supra note 4, at art. 1.
8. See American Convention Ratifications, supra note 2.
conception, as established in article 4(1) of the Convention. Nonetheless, it will be hearing Gretel Artavia Murillo v. Costa Rica, discussed in section IV, in the near future, a case where the Commission seeks the creation of a right to artificial reproductive technologies that result in artificial conception and embryo destruction.

So far, however, the Court has referred to unborn children as “children,” “minors,” and “babies” in at least 3 cases: Gómez-Paquiyauri Brothers v. Peru, a case in which it also granted reparations for the death of an unborn child, Miguel Castro-Castro Prison v. Peru, and Goiburú et al. v. Paraguay. Furthermore, the court called induced abortion a “barbaric act” in the case of Las Dos Erres v. Guatemala. In addition, in Sawhoyamaxa Indigenous Community v. Paraguay, the Court found state duties to secure the right to pre-natal health of mothers and unborn children, especially those belonging to vulnerable communities. These instances reflect the Court’s acknowledgement of the unborn child as a subject of human rights entitled to the right to life and the right to pre-natal health and development.

A. Reparations for the Death of an Unborn Child

According to article 63(1) of the American Convention, the Court may order reparations for individuals who have been affected by human rights violations committed by states. In Gómez-Paquiyauri Brothers v. Peru, the Inter-American Court granted reparations to a pregnant mother for the miscarriage of her unborn child. The Court specifically referred to Jorge Javier, the deceased fetus, as a “baby” and a “child.” Jorge Javier was the unborn child of Marcelina Haydéé Gómez Paquiyauri, a sibling of the murder victims, who was nine months pregnant at the time of the murders. She suffered a nervous ailment that eventually resulted in the child’s death before birth. The Court ordered reparations for the loss of her child, to which it referred as one of the “devastating consequences of the facts of the instant case on the [victims’] family as a whole, and

12. The Court stated that “pregnant women were subject to induced abortions and other barbaric acts.” Las Dos Erres Massacre v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶ 139 (Nov. 24, 2009).
14. See American Convention, supra note 1, at art. 63(1).
16. See id. ¶ 67(x).
17. Id.
18. Id. ¶ 197.
individually on each of its members.\textsuperscript{19}

B. **Reparations for Violations of the Right to Pre-Natal Health**

The Court found a right to pre-natal health for both expecting mothers and unborn children in *Sawhoyamaza Indigenous Community v. Paraguay*, where a vulnerable community suffered from the lack of access to health services.\textsuperscript{20} The Inter-American Court affirmed that, especially during pregnancy, delivery, and breast-feeding, the state must guarantee vulnerable indigenous women access to health services, while adopting special measures based on the best interests of the child, according to children's rights enunciated in article 19 of the American Convention.\textsuperscript{21}

C. **Recognition of Unborn Children as “Children”**

The Court also recognized unborn children as “children” in the ruling of *Miguel Castro-Castro Prison v. Peru*, dealing with a military bombing of the Miguel Castro-Castro Prison in Peru. Three pregnant inmates were among the victims of the attack.\textsuperscript{22} Eva Sofia Chalco, Sabina Quispe Rojas, and Vicenta Genua López, seven, eight, and five months pregnant at the time of the events, were forced to lie on their stomach and suffer other threats to their bodily integrity.\textsuperscript{23} Ms. Sofia Chalco was gassed, exposed to submachine gun fire, kicked, locked in a cell with no bathroom, and had rats thrown at her by her captors.\textsuperscript{24} The women gave birth in prison and did not receive opportune pre-natal medical care.\textsuperscript{25} Ms. Quispe did not receive any medical care at all either before or after her child's birth.\textsuperscript{26} The Court granted them compensation for their non-pecuniary damages, such as “feelings of anguish, despair, and fear for the lives of their children.”\textsuperscript{27}

Judge Sergio García Ramírez, in his concurring opinion,\textsuperscript{28} lamented “the extreme pre-natal violence, put in evidence in the brutalities to which pregnant women were submitted in the Castro-Castro prison [emphasis added],” as he wondered about “the consequences of this situation of extreme violence in the mind—or the subconscious—of the children born from the mother's womb so disrespected and violated, even before their
birth [emphasis added]."^{29}

Likewise, in Goiburú et al. v. Paraguay, the Court found that the State of Paraguay violated article 5(1) of the Convention, in relation to article A(1)(1) thereof, to the detriment of Gladis Esther Ríos de Mancuello,^{30} the victim’s wife who spent most of her pregnancy in prison, and to the detriment of her child, Carlos Marcelo Mancuello Ríos, unborn at the time of his father’s forced disappearance and born in prison where he remained with his mother until they were both released almost three years later.\(^{31}\) The Court granted Carlos Marcelo $33,000.00 in compensation,\(^{32}\) indicating he was a “minor”\(^{33}\) at the time of his father’s forced disappearance, thus referring to him as a minor before birth.\(^{34}\)

There is certainly a great deal of room for development of the Court’s jurisprudence regarding the right to life from conception enshrined in article 4(1) of the American Convention; nevertheless, its official attitude towards the unborn child’s right to life has so far been benevolent and in accordance with the American Convention. The Inter-American Commission on Human Rights ("Commission"), on the other hand, has taken somewhat of a different approach.

IV. INTER-AMERICAN COMMISSION REPORTS RELATING TO THE RIGHT TO LIFE FROM CONCEPTION

Before delving into an analysis of the Commission’s reports dealing with the unborn child’s right to life from conception, it is necessary to indicate that the Commission is only a quasi-judicial body and its reports and resolutions are non-binding. A \textit{sui generis} regional human rights body, the IACHR is not an international human rights court or tribunal. Its authority is political rather than legal in nature and its main role is that of a filter for individual complaints before the Inter-American Court on Human Rights, one that provides accused states with an opportunity for alternative dispute resolution between petitioners and their state.

The Commission does not produce binding jurisprudence but only non-binding resolutions, admissibility reports, and merits reports in relation to individual petitions.\(^{35}\) According to the Convention, the Commission may mediate friendly settlements, grant precautionary measures and issue non-binding recommendations on individual petitions involving potential human rights violations, while exerting relatively high political

\begin{itemize}
\item \textit{Id.}
\item \textit{Id.} ¶ 56(d).
\item \textit{Id.} ¶ 161.
\item \textit{Id.} ¶ 160(b)(iii).
\item \textit{See} Provisional Measures Requested by the Inter-American Commission on Human Rights in the Matter of the Republic of Argentina, Reggiardo Tolosa Case, Order of the President of the Inter-American Court of Human Rights, Nov. 19, 1993, available at \url{http://cidh.org/Ninez/Medprovisionaleseng.htm}.
\item \textit{See} American Convention, \textit{supra} note 1, arts. 61-65.
\end{itemize}
influence in Latin American countries. It may submit contentious cases to the Court or request consultative opinions regarding authoritative interpretation of the Convention or its compatibility with domestic laws and other human rights treaties in the Americas. But, the IACHR itself does not have adjudication faculties and its reports are not controlling on decisions of the Court.

To date, the Commission has only directly addressed the unborn child's right to life in two admissibility reports on in vitro fertilization, and other less formal reports and resolutions on abortion, as described infra, starting with Baby Boy. After Baby Boy, at least two petitions have recently been brought before the Commission, attempting to provoke a Commission report recommending that Latin American states create abortion rights and a right to produce children through reproductive technologies; so far, with relatively unsuccessful results.

A. **Baby Boy v. United States** (1981): A Non-Authoritative Resolution on Abortion and the American Declaration

In Baby Boy v. United States, the Commission's first resolution concerning the unborn child, the quasi-judicial regional human rights body concluded that the abortion of Baby Boy, a viable male fetus, was permissible under the American Declaration of the Rights and Duties of Man and, incidentally, the American Convention on Human Rights. In addition, the Commission held that the United States' creation of a funda-

36. Its political influence in the region is fluctuating. Compliance with IACHR recommendations usually remains weak until cases reach the Inter-American Court for a binding verdict. Commissioner Felipe Gonzalez, Chair of the Inter-American Commission on Human Rights, Address to the OAS General Assembly During Its 40th Period of Sessions (June 8, 2010), available at http://www.cidh.oas.org/Discur sos/06.08.10eng.htm; Friendly settlement agreements, according to former IACHR Specialist Ariel Dulitzky, have a higher compliance rate than any other reports or resolutions issued by the Commission. See Ariel Dulitzky, *The 50 Years of the Inter-American Human Rights System: A Proposed Reflection About Necessary Strategic Changes*, CENTRO DE ESTUDIOS DE JUSTICIA DE LAS AMERICAS, 8, available at http://cejameicas.org/doc/documentos/50yearsofinteramericanhumanrights.pdf.


39. See infra, sections IV(b), (c), (d).

40. See Baby Boy, supra note 7.
mental right to abortion through *Roe v. Wade* was not incompatible with the Declaration or the Convention and that neither regional instrument required member states to ban abortion, supposedly according to the original intent behind them.

Given the particular and informal nature of individual petitions against the United States, the *Baby Boy* outcome was neither an admissibility nor a merits report, but rather a resolution stating the Commission's views on the state-party's compliance with the American Declaration only, according to the procedure established in articles 53 to 57 of the 1960 IACHR Rules of Procedure and article 24 of the Commission's Statute. A resolution thus carries substantially less weight than a merits report (or article 50 report) and, like all Commission resolutions, does not enjoy precedential status. It is therefore not binding on either the Inter-American Court or on other states parties that have accepted the Inter-American human rights bodies' jurisdiction.

In spite of its lack of authority or legally binding effect, *Baby Boy* may have affected perceptions and expectations regarding the content of the American Declaration by misleading states-parties to believe that the original intent behind it was to allow for an eventual legalization of abortion in Latin American countries, which it did not. The *Baby Boy* resolution may have also obscured a proper understanding of the expression "in general" in article 4(1) of the American Convention, which the Commission interpreted as creating a specific exception to the right to life allowing for the abortion of unborn children, when, in reality, it did not. A closer examination of original intent and international rules of treaty interpretation, which this author covered in greater depth in a different article, shows that states parties to the American Convention actually intended to protect the unborn child from elective abortion and that the phrase was meant to allow other exceptions to the enjoyment of the right to life.

42. See *Baby Boy*, supra note 7, ¶ 15.
43. The United States has not ratified the American Convention on Human Rights. But, given that the United States became a member of the O.A.S. in 1968, becoming seat to its headquarters since, the Commission considers it was automatically bound by the American Declaration and therefore subject to the individual petitions system under the Declaration only. See *Interpretation of the American Declaration of the Rights and Duties of Man (Article 64 of the American Convention on Human Rights)*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 17 (July 14, 1989).
44. For more on the application of the Declaration to non-parties to the American Convention, see Caballero-Delgado & Santana Case, 1995 Inter-Am. Ct. H.R. (ser. C.) No. 22 (Dec. 8, 1995).
45. See *Baby Boy*, supra note 7, ¶ 19(d).
46. Id. ¶ 19(e).
48. See *Baby Boy*, supra note 7, ¶ 19(e). Capital punishment was the main exception to the right to life debated at the San José Conference. See *Baby Boy*, supra note 7, ¶ 19(b). For that reason, the American Convention later restricted its applica-
In any event, the Commission in *Baby Boy* implicitly accepted *ratione personae* jurisdiction over the alleged victim, Baby Boy, by admitting the petition, therefore considering it a person with protectable rights in the Inter-American system.49 Dinah Shelton, current President of the IACHR and abortion rights supporter, in her commentary of *Baby Boy*, indicated that this assumption that a "person" had been subject to an alleged violation left open the possibility that other cases of fetal injury or death may be brought based on this resolution, to her dismay.50 In addition, even while the IACHR in *Baby Boy* opined that abortion would be a lawful exception to the right to life as stipulated in the Declaration, it failed to recognize an alleged human right to abortion in either instrument.51 The resolution held that legalization of abortion was not prohibited by the Declaration or the Convention but did not declare that abortion was a human right protected by the Convention, nor that states-parties had a positive obligation to authorize, sponsor and provide it.52 It is noteworthy that despite its distorted interpretation of the Convention, the Commission in *Baby Boy* did indicate that an abortion without "substantial cause" would be arbitrary.53

**B. Paulina Ramírez v. Mexico (2007): A Friendly Settlement Agreement Leading to Reparations for Pro-Life Counseling**

The first claim alleging the existence of a right to abortion came to the Commission in March of 2002.54 The individual petition was brought before the IACHR by several abortion lobbies: the U.S.-based Center for Reproductive Rights (CRR) and some if its local affiliates, Alaide Foppa A.C., and the Grupo de Información en Reproducción Elegida (Reproductive Choice Information Group, GIRE), on behalf of Paulina del Carmen Ramírez Jacinto, a fourteen year-old pregnant child.55

---

49. See *Baby Boy*, supra note 7.
51. See *Baby Boy*, supra note 7.
52. Id.
53. Id. ¶ 14(c).
Paulina was sexually assaulted by an adult man, who was later convicted to sixteen years imprisonment; the rape resulted in pregnancy. The child and her mother reported the assault and obtained legal authorization for the abortion at the Public Prosecution Service, since the Baja California Criminal Code allowed for a rape exception to criminal abortion.

During their stay at the public hospital where the abortion was to be performed, Paulina and her mother were counseled by medical staff, pro-life individuals, and a Roman Catholic priest. They were exposed to pro-life materials and were told of the abortion's health risks by the hospital director. Subsequently, Paulina's mother changed her mind about the abortion and asked hospital staff to refrain from carrying out the surgery. In April 2000, Paulina gave birth to a boy, whom she decided to keep and named Isaac de Jesús Ramírez Jacinto, effectively raising him until present time.

The petition alleged human rights violations against fourteen-year old Paulina and her mother, arguing that the abortion had been intentionally delayed and that the counseling they had received constituted an "undue interference" with the pregnant child's purported right to an abortion. They also claimed that the prosecution's failure to inform Paulina on the availability of abortifacients constituted a violation of her rights. Even though Paulina and her mother voluntarily declined the abortion, the petitioners alleged that her case was "indicative of those of a countless number of girls and women forced into motherhood after being raped." They demanded that the state adopt regulations forcing physicians to perform abortions and restricting rape victims' access to pro-life materials or health-related information on abortion risks that may lead them to change their minds on their decision to abort.

56. See Paulina, supra note 54, ¶ 9.
57. Id. ¶ 11.
58. Id. ¶ 19.
59. Id. ¶¶ 11-12.
60. Id. ¶ 13.
61. Id.
62. Id. annex.
63. Id. ¶¶ 1, 10-12.
64. Id. ¶ 9.
65. Id. ¶ 14.
66. See Paulina, supra note 54, at annex; see also CENTER FOR REPRODUCTIVE RIGHTS, PAULINA: FIVE YEARS LATER 72-73 (2005) [hereinafter PAULINA: FIVE YEARS LATER], available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/bo_paulina5years.pdf; see also Mandatory Delays and Biased Counseling for Women Seeking Abortions, CENTER FOR REPRODUCTIVE RIGHTS (Sept. 30, 2010) (CRR claimed that U.S. abortion counseling laws are "unnecessary" and that the materials provided to women pursuant thereto (regarding fetal pain, decision-making or informed consent, for instance) are "biased" and "inappropriate" because they may lead a woman to choose to carry her pregnancy to term or to keep her child), http://reproductiverights.org/en/project/mandatory-delays-and-biased-counseling-for-women-seeking-abortions.
Even though the Commission never actually examined the petition's admissibility or merits, it fully endorsed all of the abortion lobbies' demands and cooperated in their practical enforcement from the outset. From 2002 to 2007, the IACHR facilitated at least four meetings between government representatives of the Mexican state of Baja California and the abortion lobbies that filed the petition. In them, it cooperated with the petitioners in getting the government to admit to the alleged violations and reaching a friendly settlement, the written agreement to which was signed on March 8, 2006. The Commission then held a follow-up meeting in October of the same year to verify state compliance with the commitments assumed vis a vis the petitioning abortion lobbies.

Should an admissibility analysis have been carried out, the petition could have probably been defeated due to the petitioners' failure to exhaust any and all domestic remedies. No domestic amparo or judicial remedy of any sort, other than the complaint before the local Prosecutor's Office, was filed at the local level. Instead, the claim was directly submitted before the IACHR, in contravention of general principles of international law recognized by the American Convention in article 46(1)(a), which provides that remedies under domestic law must have been pursued and exhausted before resorting to international human rights bodies. The petitioning abortion advocates argued they were "prevented" from exhausting local remedies supposedly due to Paulina's "forced" consent in declining the abortion. The Commission never addressed whether these circumstances fit into the exceptions to the exhaustion of domestic remedies permitted by article 46(2)(b); that is, whether the petitioners were effectively denied a right to access domestic remedies or whether they simply chose not to, in light of the obvious fact that they had no legal claim before a court of law.

Similarly, conflicting issues of substance, such as the unborn child's right to life from conception, children's rights, freedom of expression for pro-life individuals, and conscience rights for physicians arising from the petition were never examined by the Commission. The question of whether children, or adults for that matter, had a protected right to abortion under the American Convention was not addressed; the fact that Paulina, like the victim's mother in Baby Boy, was a minor child was ignored. In addition, as in James Demers v. Canada, the Commission

67. See Paulina, supra note 54, ¶ 24.
68. Id. ¶¶ 5-8.
69. Id. ¶ 16.
70. Id. ¶ 8.
71. See Paulina: Five Years Later, supra note 66.
72. See American Declaration, supra note 4.
73. Paulina, supra note 54, ¶ 15.
74. See Paulina, supra note 54.
75. See id.
76. See id.
could have examined whether pro-life speech and pro-life counseling were protected by article IV of the American Declaration or article 13 of the American Convention, but did not.\textsuperscript{78}

Eventually, without any substantial analysis or further explanation, the Commission simply stated that the settlement was “compatible with the object and purpose of the American Convention” and approved the friendly settlement signed by the parties in March of 2006.\textsuperscript{79} The state of Baja California, poorly represented, made no challenges to the petition’s admissibility or merits and succumbed to all of the abortion lobbies’ allegations, committing itself to comply with all of their demands.\textsuperscript{80}

The friendly settlement agreement strikingly resembled a tort agreement in an American “wrongful life” action (except for the fact that this case involved an entirely healthy child.) In it, the state agreed to give generous reparations in cash, around 700,000 pesos—the equivalent of approximately USD $66,000 in March 2006\textsuperscript{81}—and kind to Paulina and her child, Isaac de Jesus, whose unwanted birth allegedly resulted in “consequential damages” and “moral damages” to her.\textsuperscript{82} The amount included, aside from said damages, assistance for housing and maintenance expenses, school enrollment fees, school supplies, and transportation.\textsuperscript{83} The state thus assumed full financial “liability” for all expenses relating to Isaac’s childrearing and education.\textsuperscript{84} In addition, it committed itself to granting Paulina and Isaac generous social assistance (the kind that perhaps should be made available to all low-income single mothers) such as school vouchers, free health care until Isaac’s age of majority, free counseling, financial and technical assistance in setting up a grocery store, and permanent education assistance for Isaac.\textsuperscript{85} Surprisingly, the state also granted the abortion lobbies’ reparations in kind, such as a computer and a printer that were handed out to them “as a one-off presentation.”\textsuperscript{86}

In addition, the government of Baja California undertook astounding commitments vis a vis the Center for Reproductive Rights under the Commission’s supervision and approval:\textsuperscript{87}

- To submit the CRR’s legislative proposals furthering abortion rights for women and pregnant children before the State Congress for their approval.

\textsuperscript{78} See Paulina, supra note 54.

\textsuperscript{79} Id. ¶¶ 18, 24.

\textsuperscript{80} Id.


\textsuperscript{82} Paulina, supra note 54, ¶ 16, items 1, 9.

\textsuperscript{83} Id. ¶ 16, items 2-3, 6.

\textsuperscript{84} Id.

\textsuperscript{85} Id. ¶ 16, items 2-4, 6, 8.

\textsuperscript{86} Id. ¶ 16, item 7.

\textsuperscript{87} Id. ¶ 16, item 12.
- To consult with CRR before the approval of the preliminary draft of an amendment to the government protocol (Official Standard) for treatment of victims of sexual violence.
- To contract out to CRR for training courses on reproductive rights and abortion, to be imparted to the staff of the Attorney General’s Office and the Health Ministry of Baja California.
- To instruct state health services and agencies to strengthen their commitment to ensuring women’s access to abortion.
- To carry out comprehensive research on abortion in Mexico for the CRR.

Remarkably, at the time of the IACHR’s report, March of 2007, the State had actually complied with all but the last item above.88 Baja California Sur eventually reformed its Criminal Code to create an additional “health” exception to the criminalization of abortion and to establish lower penalties for illegal abortion.89 The State also reformed its Criminal Procedure Code to facilitate access to abortion of children conceived by rape.90 These reforms entered into force in September of 2005.91 The State of Baja California also issued a Public Acknowledgement of Responsibility, published in the local newspapers La Voz de la Frontera and La Crónica on December 30, 2005, as well as in the Official Gazette of the State of Baja California on February 10, 2006.92 The statement generally invoked international treaties and conventions signed by Mexico, and suggested that the absence of an appropriate body of regulations forcing physicians to perform abortions and restricting rape victims’ access to pro-life materials or health related information on abortion risks that may lead them to change their decision to abort,93 resulted in the violation of Paulina del Carmen Ramírez Jacinto’s “human rights” which “prevented her from availing herself of the “right” she was demanding.”94

The Commission celebrated the agreement while vaguely alluding to the Convention of Belém do Pará, women’s rights, health care services, rights of equality, non-discrimination and gender-based violence.95 It welcomed the State’s good faith “in complying with its treaty obliga-

88. Id. ¶ 22.
90. Id.
91. Id.
92. Id. Annex; See also CRR report, Paulina 5 years later, (June 01, 2005), http://reproductiverights.org/en/document/paulina-five-years-later-spanish.
94. Paulina, supra note 54 ¶¶ 18-19.
tions" and exhorted other states’ parties to adopt criminal, civil, or administrative measures in order to ensure that “incidents,” such as counseling of a pregnant teen to carry her pregnancy to term or delaying a minor’s abortion, “are duly sanctioned and do not enjoy impunity.”

Like any friendly settlement reports under article 49 of the Convention, Paulina is a non-authoritative application of the American Convention and lacks precedential value. The friendly settlement process at the IACHR did, however, exert significant political pressure in the Mexican State of Baja California, which went to great lengths to comply with the petitioners’ requests, supported by the Commission. Perhaps under the incorrect belief that it was in violation of inexistent state obligations to provide abortions or favor pro-abortion views in patients’ right to information and that any resistance to the alleged claims would lead to protracted, costly international litigation, the state went to the point of reforming its domestic laws in an attempt to satisfy the Commission and the abortion lobbies involved in the petition.

But, the Commission’s pressure to create abortion rights only produced temporary effects in Baja California. After Paulina, in October 2008, the state legislature approved a constitutional amendment protecting the right to life from conception, stating: “[F]rom the moment in which an individual is conceived, he enters under the protection of the law, and is treated as a born person for all corresponding legal effects, until his natural or non-induced death.” The constitution prevails over secondary laws in Mexico, so the amendment would annul incompatible provisions in Criminal Codes and similar laws adopted as a result of Paulina.

Meanwhile, the abortion lobbies involved in Paulina have continued to use the IACHR petition system to further abortion rights by challenging similar personhood amendments in other Mexican states. For instance, in August 2009, GIRE (Assisted Reproduction Information Group), along with the Academia Morelense de Derecho Humanos (Human Rights Academy of Morelos) and the Centro de Investigación y Análisis Fundar (Fundar Center for Analysis and Research) filed a petition against

96. Id. ¶ 17.
97. Id. ¶ 26.
98. Id. ¶¶ 24, 25.
99. Id. annex 3.
100. Constitución Política del Estado Libre y Soberano de Baja California [C.P.], art. 7, Periódico Oficial, 16 de Augusto de 1953 (Mex.). The original text in Spanish reads: “[D]e igual manera esta norma fundamental tutela el derecho a la vida, al sustentar que desde el momento en que un individuo es concebido, entra bajo la protección de la ley y se le reputa como nacido para todos los efectos legales correspondientes, hasta su muerte natural o no inducida.” Id.
Mexico for the Morelos State Human Life Amendment, which, like that of Baja California, amended the state Constitution to protect life from the moment of conception. No admissibility or any other kind of report has been issued by the IACHR on this petition as of February 2011.102

C. **James Demers v. Canada: An Admissibility Report that Refused to Address the Unborn Child’s Right to Life**

*James Demers v. Canada* was a petition involving a pro-life activist’s freedom of expression and speech, and a claim for violation of unborn children’s right to life was rejected.103 The petitioner, James Demers, a resident of British Columbia, Canada, was arrested pursuant to the Canadian *Abortion Services Act* in December of 1996 for peacefully protesting outside a Vancouver abortion clinic.104 He was found to be in violation of the *Abortion Services Access Zone Regulation*, a zoning regulation that made it illegal to disseminate pro-life materials and information on abortion within thirty meters of an abortion clinic.105

Ironically, the day Demers was arrested he was standing quietly with a sign bearing a citation of article 4(1) of the American Convention.106 In 1997, Demers was convicted in the Provincial Court of British Columbia at Vancouver.107 His appeals to the Supreme Court of Columbia in 1999 and the Court of Appeals for British Columbia in 2003 were subsequently dismissed, thus exhausting all domestic remedies.108 In 2005, Demers submitted the petition against Canada before the IACHR, alleging human rights violations against himself, as well as hundreds of thousands of unborn children, and their mothers.109

Like the United States, Canada never signed or ratified the American Convention on Human Rights, nor did it accept its additional protocols or the jurisdiction of the Inter-American Court.110 Therefore, the Commission, consistent with its practice for petitions against Canada and the United States, applied the American Declaration only, in virtue of article 23 of its Rules of Procedure and deriving its jurisdiction from the O.A.S. Charter.111 The report thus examined whether James Demers’s petition alleging state responsibility for violations of the American Declaration was admissible.

The Commission concluded that the facts pertaining to alleged violations of article IV of the American Declaration (right to freedom of ex-

103. *Demers*, *supra* note 77 ¶ 3.
104. *Id.* ¶¶ 12-13.
105. *Id.* ¶ 13.
106. *Id.* ¶ 12.
107. *Id.* ¶ 16.
108. *Id.*
109. *Id.* ¶ 2.
111. *Demers, supra* note 77 ¶ 40.
pression), as stated in the petition, constituted prima facie violations of the American Declaration and the petition was declared admissible in that regard.\textsuperscript{112} Thus, in theory, the Commission or the Inter-American Court of Human Rights may eventually find that the \textit{Abortion Services Act} and the \textit{Abortion Services Access Zone Regulation} prevent a person from protesting and setting a 30-meter anti-free-speech zone around abortion clinics, criminalizing communication with patients or dissemination of pro-life materials or information on abortion to be directly contradictory to article IV of the American Declaration, which reads: "\textit{Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.}"\textsuperscript{113}

The petition was, however, declared inadmissible regarding claims of violations against aborted children and their mothers under articles I, VII, XIII, XVII, and XXIX of the American Declaration, due to the stated vagueness of the petitioner's claim which derived in a lack of jurisdiction \textit{ratione persona}.\textsuperscript{114} The petitioner made a general claim for right to life violations "against hundreds of thousands of unborn children and their mothers."\textsuperscript{115} The unnamed and indeterminate number of victims was found by the Commission to be insufficient to satisfy the requirements of article 23 of the Commission's Rules of Procedure, which requires petitioners to point out individual victims of human rights violations.\textsuperscript{116}

On one hand, the Commission correctly stated that while a petitioner has liberal standing before it, meaning he can bring a claim on behalf of others-in this case aborted unborn children and their mothers-he or she must indicate a specific victim whose rights under the Convention have been specifically violated.\textsuperscript{117} The \textit{Baby Boy} petition can be distinguished here by the fact that the victim, Baby Boy, was a distinct individual: the aborted viable male fetus of a pregnant teenager. The Commission recalled that it previously disallowed petitioners to represent an "indeterminate group of persons,"\textsuperscript{118} and applied the same reasoning in \textit{Demers} where it deemed that the petitioner's mere reference to "unborn children and their mothers" was insufficient and that victims should be "sufficiently specific, defined and identifiable" in the petition.\textsuperscript{119}

On the other hand, it seems unusual for the Commission to partially reject a petition on a technical objection without allowing the petitioner to amend his complaint, despite the fact that Mr. Demers attempted to do

\begin{flushleft}
\textsuperscript{112} Id. \textsuperscript{62}.

\textsuperscript{113} Id. \textsuperscript{61}.

\textsuperscript{114} Id. \textsuperscript{45}.

\textsuperscript{115} Id. \textsuperscript{2}.

\textsuperscript{116} Id. \textsuperscript{45}.

\textsuperscript{117} Id. \textsuperscript{44}.

\textsuperscript{118} Id. (citing inadmissibility of the petition in Felix Roman Esparragoza Gonzalez et. al. v. Venezuela, Petition 12.210, Inter-Am Ct. H.R., Report No. 48/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, (2004)).

\textsuperscript{119} Demers, supra note 77 \textsuperscript{45}.
\end{flushleft}
so, and even though the Commission allowed petitioners to amend similar anonymous and generic complaints in other cases, such as *Petition 12.361* against Costa Rica. In that case, the IACHR not only allowed petitioners to amend their complaint by identifying alleged victims of reproductive rights' violations almost two years after the petition had been submitted, but it also allowed them to expand on the substantive allegations against the State. Petitioners in *Petition 12.361* were adult individuals who had undergone IVF treatment but simply did not want to disclose their identities in order to protect their personal privacy. Abortion victims, however, do not choose anonymity. They are unborn children without given names or any form of legal identification and on whom autopsies are not performed. Their bodies are usually discarded as biological waste. Demers argued he was bringing a petition on these victims' behalf because they never were given recognition as persons before Canadian law in the first place. Given that abortion enjoys legal protection in Canada, the petitioner faced exceptional difficulties in accurately identifying specific, defined victims (i.e. unborn children or their mothers) since identifying information of women who had abortions is protected by privacy laws and not available to the public. The petitioner thus experienced particular obstacles in overcoming the Commission's active legitimation standard, which required Demers to prove he was a representative of the said abortion victims in order to justify his liberal standing before the Commission.

In other petitions, the Commission applied a greater degree of flexibility towards petitioners, particularly at the admissibility stage. In *Petition 12.361*, for instance, the Commission said "the occasion of presenting the petition and that of declaring admissibility are distinct. Article 33 of the IACHR's rules of procedure . . . empowers the Commission to ask the petitioner to fulfill the requirements omitted in the petition, when the Commission considers that the petition is inadmissible or incomplete." Furthermore it emphasized that:

---

120. *Id.* ¶ 3.
122. *Id.* ¶¶ 46, 47. The State argued that the petitioner had "failed to identify the victims individually at the proper time during the proceedings, and [had] not establish[ed] the relationship between those victims and the case in question." *Id.* ¶ 41. "The petitioner argued at first that the victims in the present case could not be identified individually because they chose confidentiality in order to avoid interference in their private lives. Moreover, he declared that the identity of the victims would only be revealed if requested by the Commission. Nevertheless . . . in his later communications the petitioner presented a list of signatures of alleged victims, who declared that they were granting him powers to represent them before the Commission." *Id.* ¶ 4.
123. *Id.* ¶ 14.
124. *Id.* ¶¶ 2, 13.
125. *Id.* ¶¶ 2, 24.
126. *Id.* ¶¶ 41-42.
127. *Id.* ¶ 45
To accept the argument of the state that the complaint should be inadmissible because the individual victims were not identified in the initial petition, although they were subsequently identified, would imply a formalistic decision inconsistent with protecting the human rights enshrined in the Convention, and would place the presumed victims in a position of defenselessness.128

Furthermore, “[t]he Inter-American Court of Human Rights has declared that it is a commonly accepted principle that the procedural system is a means for seeing that justice is done, and that it is not sacrificed for the sake of mere formalities.”129 A similar degree of flexibility should have been applied in Demers, in the interests of procedural justice.

In any case, the IACHR did not deny the personhood of unborn children and did not close the door to petitions on their behalf, as long as they were individual cases and not complaints in abstracto or actio popularis.130 The Commission accepted that unborn children could be victims in the Inter-American system as long as they were individualized and their identity was specified in some manner.131 Furthermore, the Commission did not deny article 4(1)’s prohibition of abortion, in spite of state allegations to that effect.132 Even though the state of Canada alleged that the petitioner’s claims were “manifestly groundless or out of order”133 and that it was “manifestly clear and certain based on the Baby Boy decision that legally provided abortion services do not violate any rights protected under the Declaration,”134 the Commission did not support those claims nor did it give Baby Boy any weight or precedential value at all.

D. IVF Petitions Against Costa Rica: Two Indicative Admissibility Reports on Reproductive Technologies

Currently, the Commission is dealing with two petitions affecting unborn children’s right to life that may, at least theoretically, reach the Inter-American Court: Ana Victoria Sanchez Villalobos v. Costa Rica135 (hereinafter Petition 12.361 or Ana Victoria Sanchez Villalobos v. Costa Rica) and Daniel Gerardo Gomez, Aída Marcela Garita et al. v. Costa Rica

---

128. Id. ¶ 46.
129. Id.
130. Id. ¶¶ 4, 42.
131. Id. ¶ 44.
133. Id. ¶ 39.
134. Id. ¶ 38, see also ¶¶ 24, 25, where the petitioner compared his petition to Baby Boy, indicating, inter alia, that since 1981 (when Baby Boy was decided) “science has not stood still” and that “there is more evidence to be considered regarding the nature of unborn children,” suggesting that suggest Baby Boy was obsolete. The petitioner also argued that the facts in his petition were even graver than those of Baby Boy because Canada “recognizes no restrictions on abortion whatsoever.” He also pointed to the “massive intentional taking of life with the complicity of a government that stands alone in the Western Hemisphere in offering no protection to unborn children.”
135. Petition 12.361, supra note 121.
Rica\textsuperscript{136} (hereinafter \textit{Gomez v. Costa Rica}) both dealing with the same set of facts, alleging human rights violations caused by Costa Rica's ban on in vitro fertilization (IVF). Both petitions demand the creation of a human right to state-sponsored IVF, which brings about embryonic death through embryo selection, embryo disposal and abortion (euphemistically called "embryo reduction").

Unlike the United States, Canada or Mexico, Costa Rica fully ratified the American Convention without reservations\textsuperscript{137} and recognized the Commission and the Court's jurisdiction.\textsuperscript{138} A strong supporter of the Inter-American system of human rights, Costa Rica hosts the Inter-American Court headquarters since 1979.\textsuperscript{139} Should these petitions reach the Inter-American Court on Human Rights, they could potentially produce binding precedent for state parties to the American Convention, as opposed to \textit{Baby Boy} or Paulina, which did not.

Initially, IVF had been authorized in Costa Rica through Executive Decree 24029-S of February 3, 1995.\textsuperscript{140} In an attempt to neutralize some of the ethical questions surrounding IVF, the Decree limited in vitro fertilization and embryo transfers to married couples only and prohibited the insemination of more than six embryos on any single IVF attempt. It required that all embryos be implanted in the mother's uterus and prohibited the freezing, preservation or discarding thereof.\textsuperscript{141} Later, in Judgment 2000-02306, the Supreme Court of Costa Rica found the Presidential Decree failed to meet constitutional scrutiny. The Constitutional Chamber (Sala IV) of the Costa Rica Supreme Court declared Executive Decree 24029-S unconstitutional, emphasizing that the human embryo is a person from the moment of conception and that IVF is an offense against human life and human dignity. The Court found that IVF entails the loss of one or more embryos, deliberately caused by their manipulation, regardless of limitations on the number of embryos to be implanted, and found this predictable loss of embryonic life constitutionally unacceptable.\textsuperscript{142}

In 2008, Ms. Ileana Henchoz Bolaños, an alleged victim in \textit{Gomez v. Costa Rica}, sued the Costa Rican Social Security Fund (case file no. 089-000178-1027-CA) to obtain IVF. In October 2008, the Superior Tribunal of Contentious Civil Treasury Matters, an Administrative Tribunal, de-
cided that IVF could be permitted with the transfer of a single embryo and ordered the Costa Rican Social Security Fund to provide Ms. Henchoz with the procedure.\textsuperscript{143} The judgment was appealed by the Costa Rican Social Security Fund in August 2009 and, ultimately, reversed by the Supreme Court for lack of merit.\textsuperscript{144}

The ban was first challenged before the IACHR in January 2001, when \textit{Ana Victoria Sanchez Villalobos v. Costa Rica} was filed by a Costa Rican attorney, Gerardo Trejos Salas, on behalf of ten couples (one of which later dropped out of the petition) and two private IVF clinics: Ultrasonografía S.A. and Instituto Costarricense de Fertilidad.\textsuperscript{145} In December 2004, the same petitioner brought another claim, \textit{Gomez v. Costa Rica}, on behalf of six additional couples whose names were added to the petition as alleged victims over the course of approximately three years (from 2004 to 2007).\textsuperscript{146} The petition essentially constituted an amended complaint that incorporated all of the arguments the Commission endorsed in its first admissibility report, \textit{Ana Victoria Sanchez Villalobos v. Costa Rica}.

Corporate interests of the reproductive technologies industry in Costa Rica played an important role in bringing \textit{Ana Victoria Sanchez Villalobos v. Costa Rica} to the international arena.\textsuperscript{147} Trejos brought the petition against Costa Rica presenting private IVF clinics, among others, as victims of human rights violations under the American Convention, even though they obviously lacked standing as human rights subjects.\textsuperscript{148} Even though the petition did not at any point concede that the human embryo was a person or a subject of human rights, it affirmed that private corporations were. The petitioner asked that the status of victim be accorded to the companies given that they had acquired medical equipment for IVF in Costa Rica, and were unable to use it due to the Constitutional

\textsuperscript{143}. \textit{See Gomez v. Costa Rica} \§ 36.
\textsuperscript{144}. \textit{See Gomez v. Costa Rica} \§ 37.
\textsuperscript{145}. \textit{See Petition 12.361, supra note 121, \§ 2. The alleged victims identified in the petition were: Ana Victoria Sanchez Villalobos, Fernando Salazar Portilla; Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Victor Hugo Sanabria León, Karen Espinoza Vindas, Hector Jimenez Acuña, María del Socorro Calderán P.; Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solorzano, Julieta González Ledezma and Oriester Rojas Carranza, all patients of Dr. Gerardo Escalante López and Dr. Della Ribas and the Costa Rican companies Ultrasonografía S.A. and Instituto Costarricense de Fertilidad.}
\textsuperscript{146}. The seven couples, alleged victims of the Costa Rican IVF ban, were Daniel Gerardo Gómez Murillo and Aída Marcela Garita Sánchez (added in 2004); Roberto Pérez Gutiérrez and Silvia María Sosa Ulate (added in 2004); Luis Miguel Cruz Comparaz, Raquel Sanvicente Rojas (added in 2006); Randall Alberto Torres Quirós, and Geanina Isela Marín Rankin (added in 2006); Carlos Edgardo López Vega and Albania Elizondo Rodriguez (added in 2006) and Miguel Acuña Cartín and Patricia Núñez Marín (added in 2007). \textit{See Gomez v. Costa Rica} \§ 1.
\textsuperscript{147}. Petition 12.361, supra note 121, \§ 1.
\textsuperscript{148}. \textit{Id.} \§ 41.
Chamber’s decision, which resulted in a financial loss for them.\textsuperscript{149} Naturally, he also asked that the so-called victims be granted the right to fair compensation.\textsuperscript{150}

The IACHR appropriately found the petition to be inadmissible as it related to the private companies Costa Rica Ultrasonografía S.A. and Instituto Costarricense de Fertilidad and decided it had jurisdiction \textit{ratione personae} only over those persons covered by the definition of persons in article 1.2 of the Convention, that is, natural human beings.\textsuperscript{151} With respect to private corporations, the Commission affirmed its practice and doctrine established in the cases of \textit{Banco de Lima},\textsuperscript{152} \textit{Tabacalera Boquerón},\textsuperscript{153} \textit{Mevopal S.A.}\textsuperscript{154} and \textit{Bendeck Cohninsa},\textsuperscript{155} wherein it declared that legal persons or private entities are excluded from human rights protection under the American Convention. It pointed out that the petition against Costa Rica contained no elements that would justify a departure from its previous decisions.\textsuperscript{156}

Several years after Petition 12.361’s admissibility report, in October 2008, the Commission held a hearing where a number of other financial concerns and pecuniary expectations on the part of the petitioners resurfaced.\textsuperscript{157} Both the petitioner and the state informally presented their oral witness testimony. The petitioner brought forward one of the alleged victims, Andrea Bianchi Bruno. The state delegation brought a physician and former IVF practitioner, Marta Garza. Petitioner Trejos announced that the victims would be requesting reparations of around 20 million euros, assigned to an IVF research center, managed by the Social Security Administration in Costa Rica.\textsuperscript{158} In addition, Ms. Bianchi spoke of her need for compensation, indicating she had spent $15,000 dollars for every attempt at pregnancy; and that because she underwent IVF four times, she paid a total of $60,000. Within the private health care system, she indicated IVF in Colombia was, financially, a better option, so she and her husband traveled there for the procedure.\textsuperscript{159} When the alternative of

\begin{itemize}
  \item\textsuperscript{149} \textit{Id.} \textsuperscript{\textdegree} 28.
  \item\textsuperscript{150} \textit{Id.} \textsuperscript{\textdegree} 27.
  \item\textsuperscript{151} \textit{Id.} \textsuperscript{\textdegree} 48.
  \item\textsuperscript{152} Petition 12.361, \textit{supra} note 121, at 49, citing \textit{Banco de Lima}, Case 10.169, Inter-Am, Ct. H.R., Report N° 10/91, (1991). In that case, the Commission recognized its jurisdiction to protect the rights of an individual whose property was expropriated, but not to protect “the rights of juridical beings” such as corporations or banking institutions.
  \item\textsuperscript{153} Petition 12.361, \textit{supra} note 121, at 49, citing Tabacalera Boqueron, Inter-Am, Ct. H.R., N° 47/97(1997).
  \item\textsuperscript{154} Petition 12.361, \textit{supra} note 121, at 49, citing Mevopal S.A Inter-Am, Ct. H.R., N° 39/99 (1999).
  \item\textsuperscript{155} Petition 12.361, \textit{supra} note 121, at 49, citing Bendeck Cohninsa, Inter-Am, Ct. H.R., N° 106/99 (1999).
  \item\textsuperscript{156} Petition 12.361, \textit{supra} note 121, at 49.
  \item\textsuperscript{158} \textit{Id.}
  \item\textsuperscript{159} \textit{Id.}
elective single embryo transfer was raised by the Commission, the petitioners did not accept it as a satisfactory in light of the financial costs involved and small success rate (8-10% according to Trejos) for IVF users. At that point, then-Commissioner Víctor Abramovich suggested his support for the view that IVF should be a state-funded activity.

In 2008, two of the most important alleged victims officially dropped out of the petition, affecting its legitimacy. Ana Victoria Sanchez Villalobos, after whom the case was named, and her husband Fernando Salazar Bonilla, the poster couple for Costa Rican victims of the IVF ban, decided to withdraw from the petition. Local press informed that Ana Victoria Sanchez Villalobos submitted a statement to the IACHR Executive Secretary, Santiago Cantón, in which she stated, among others, that, after adopting two children, she and her husband changed their minds on their initial claim regarding a right to produce children in IVF clinics, and decided to withdraw their claim before the IACHR. Ms. Sanchez stated that she and her husband now realized that the human embryo deserved right to life protection and that, due to the IVF’s high rates of embryonic mortality, the procedure was morally unjustifiable as well as incompatible with the Convention article 4(1). In subsequent statements to the press, she recommended adoption instead of IVF and spoke about embryonic lives lost in IVF procedures as well as health risks for both the mother and the unborn child. She spoke of parenting as a privilege, not a right and on how IVF objectified children.

The IACHR acted as if the petitioners’ withdrawal never happened. Other than changing the petition’s name to petition 12.361, it did not acknowledge the couples’ withdrawal or their arguments in any of the subsequent public reports or press releases.

Ultimately, the IACHR declared petition 12.361 and Gomez v. Costa Rica admissible with respect to articles 1 (obligation to respect rights), 2 (domestic legal effects), 5(1) (right to personal integrity), 11 (right to privacy), 17 (rights of the family) and 24 (right to equal protection) of the American Convention, thus presuming potential human rights viola-

160. Id.
161. Id.
162. Id. ¶ 23.
164. See Letter from Ana Victoria Sánchez, to Santiago Cantón (on file with author).
165. Id.
166. The letter was signed in Moravia, Costa Rica/11 December 08. See Woman Understands that Life begins at Conception and Dismisses Suit Against Costa Rica, ACIPRENSA, http://www.aciprensa.com/noticia.php?n=23767.
167. Ana Victoria Sanchez Villalobos v. Costa Rica was simply referred to as Petition 12.361 in the admissibility report for Gomez v. Costa Rica ¶ 9, 13, 14, 17, 21, 24, 45, 56.
168. See Petition 12.361, supra note 121, at Conclusions, ¶ 1; Gomez v. Costa Rica at Conclusions, ¶ 1. The potential violation of article 5(1), however, was only included in Gomez v. Costa Rica, see ¶¶ 48, 67.
RIGHT TO LIFE FROM CONCEPTION

The report thus accepted claims alleging a violation of the right to equal protection, which derived from the allegation that the IVF ban discriminates against patients suffering from infertility or sterility, denying them what they believe constitutes "medical treatment" as well as the possibility of founding a family, established in article 17. The Commission also admitted prima facie violations of the right to privacy. In both admissibility reports, the IACHR found jurisdiction ratione materiae, that is, deemed that the facts characterized potential human rights violations under the American Convention. It also found jurisdiction ratione tempori and ratione loci (geographic jurisdiction and timeliness) as well as appropriate exhaustion of domestic remedies.

Although the Commission was not yet supposed to issue an opinion on the merits, it openly sided with the petitioner in Petition 12.361, by agreeing to examine a dozen articles of three different treaties, the American Convention, the Protocol of San Salvador and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which Petitioner Trejos claimed the IVF ban violated.

In regard to potential violations of the rights of the family, the admissibility report made a connection between the American Convention's rights of the family, established in article 17, and sexual and reproductive health principles as enunciated in the Teheran Conference, the Cairo Programme of Action, and the Beijing Platform of Action, all non-binding documents, suggesting that the right to found a family may include the right to create children through artificial reproductive technologies. In addition, the Commission announced its intent to apply these international non-binding resolutions at the merits stage while referring to IVF as a "measure in favor of family planning and childbearing."

In regard to the petitioner's allegations under the Protocol of San Salvador, the Commission resolved to declare the petition inadmissible as it relates to articles 3 (obligation of non-discrimination), 10 (right to respect rights), 2 (domestic legal effects), 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 24 (right to equal protection), 25 (right to judicial protection), 26 (progressive development), 32 (relationship between duties and rights), the Protocol of San Salvador article 3 (obligation of nondiscrimination), article 10 (right to health) and article 15 (right to the formation and the protection of families), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Bélem do Pará Convention) articles 1 and 7(h) (duty to undertake legislative measures).

---

170. Id. ¶ 23.
171. See Petition 12.361, supra note 121; Gomez v. Costa Rica ¶ 69.
172. Petition 12.361, supra note 121, ¶¶ 43-50; See also Gomez v. Costa Rica, ¶¶ 47-65 where the petitioner alleged that the ongoing ban on IVF constituted a continuing violation of the Convention, that exempted him from exhausting domestic remedies.
173. Petition 12.361, supra note 121, ¶¶ 2, 27. American Convention article 1 (obligation to respect rights), 2 (domestic legal effects), 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 11 (right to privacy), 17 (rights of the family), 24 (right to equal protection), 25 (right to judicial protection), 26 (progressive development), 32 (relationship between duties and rights); the Protocol of San Salvador article 3 (obligation of nondiscrimination), article 10 (right to health) and article 15 (right to the formation and the protection of families), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Bélem do Pará Convention) articles 1 and 7(h) (duty to undertake legislative measures).
175. Id. ¶ 68.
176. Id. ¶ 69.
177. Id. ¶ 69.
to health) and 15 (right to the formation and protection of families), given that it lacked jurisdiction to establish violations of those articles of the Protocol of San Salvador, but indicated that it would take them into consideration when interpreting the international obligations of the state under the American Convention at the merits stage of the case.\textsuperscript{178}

The IACHR did, however, find both petitions inadmissible as they related to articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 25 (right to judicial protection), 26 (progressive development) and 32 (relationship between duties and rights) of the American Convention, mostly due to the fact that the petitioner failed to characterize any specific violations of the rights enumerated in them.\textsuperscript{179} Additionally, in both petitions, the Commission deferred the state's arguments regarding article 4(1) to the merits stage of the proceedings and appropriately held that the petitioner provided no basis in fact or law that would indicate how the rights of the named adult victims under articles 4 and 32 of the American Convention were affected by the state.\textsuperscript{180} Likewise, with respect to the petitioners' claims under the Belém do Pará Convention, articles 1 (definition of violence against women) and 7(h) (state duty to adopt legislative measures), the Commission declared the allegations under Belém do Pará inadmissible, stating that the petitioner had not provided sufficient information to characterize a violation thereof.\textsuperscript{181}

In August of 2010, the Commission issued an article 50 merits report on Petition 12.361,\textsuperscript{182} still unpublished as of September 2011, in light of the Commission's broad discretion in publishing decisions, according to article 51 of the American Convention.\textsuperscript{183}

Even though the specific contents of the merits report are currently confidential, an IACHR press release indicates that, in it, the Commission found that Costa Rica's ban on in vitro fertilization (referred to as infertility "treatment") constituted arbitrary interference in the right to private and family life, the right to found a family and the right to equality and nondiscrimination (infertile women allegedly suffering a greater

\textsuperscript{178} Petition 12.361, \textit{supra} note 121, ¶¶ 52, 70; \textit{See also} Gomez v. Costa Rica ¶ 49.

\textsuperscript{179} \textit{Id.} ¶ 70

\textsuperscript{180} Petition 12.361, \textit{supra} note 121, ¶ 70.

\textsuperscript{181} \textit{Id.} ¶ 70


From the government’s response, i.e. attempting to approve a new IVF law that would satisfy the Commission and the petitioner’s demands, it is apparent that the IACHR recommended Costa Rica reinstate and sponsor the practice in spite of the American Convention’s protection of the right to life from conception. According to local press, the IACHR has given several deadlines to produce the said legislation authorizing the practice and mandating state sponsorship, which it did not meet.

As a result, the Commission submitted Petition 12.361, now renamed for the second time as Gretel Artavia Murillo et al. v. Costa Rica, before the Inter-American Court on Human Rights on July 29, 2011.

Remarkably, on November 1, 2010, three months after the merits report on Petition 12.361 was issued, the Commission issued the admissibility report on Gomez v. Costa Rica, an unusual procedure, since both petitions were filed by the same petitioner and dealt with the same facts and substantive claims, as acknowledged by the report. Rather than unifying the complaints to Petition 12.361, the Commission chose to issue a whole new admissibility report on Gomez v. Costa Rica, for reasons that remain unexplained. Evidently, publishing a new admissibility report at this point means it will be followed by an independent merits report as well, which may be published or unpublished, thus providing the Commission with a new opportunity to pressure the state of Costa Rica into authorizing and sponsoring IVF.

In any event, Petition 12.361, now Gretel Artavia Murillo et al. v. Costa Rica, currently awaits the Court’s consideration and promises to pose a major challenge to the right to life from conception in states parties to the American Convention. Should the court decide to create a right to artificial reproductive technologies that result in artificial conception and embryo destruction, as the Commission requests, it would be the first

185. Diaz, supra note 182.
190. See Gomez v. Costa Rica ¶ 69.
international court in the world to do so, since even the European Court on Human Rights, usually skeptical of the right to life from conception, has refused to recognize an alleged right to in vitro fertilization when given the opportunity. 191

E. **PM 43-10 “Amelia”, Nicaragua: A Precautionary Measures Request for “Therapeutic” Abortion**

Although the IACHR has inappropriately suggested in *Baby Boy* and *Paulina* that abortion is compatible with the American Convention, it has also, at certain points in time, depending on its composition, declined to recognize an alleged right to abortion. For instance, the Commission was recently asked by several abortion lobbies to create an alleged right to “therapeutic” abortion but declined to do so, thus failing to legitimize the fallacy that abortion constitutes healing treatment for any condition. The IACHR is authorized to issue precautionary measures “in serious and urgent situations,” “to prevent irreparable harm to persons,” according to its Rules of Procedure. 192

In **PM 43-10 “Amelia”, Nicaragua**, issued on February 26, 2010, 193 the IACHR carefully tailored precautionary measures recommending measures to preserve a cancer patient’s right to medical treatment while disregarding the petitioners’ request to order a “therapeutic abortion.” The request, filed by several abortion lobbies including U.S.-based Catholics for Choice, involved Amelia (pseudonym), a pregnant twenty-seven year old woman suffering from an unspecified form of metastatic cancer, whose doctors allegedly refused to treat with chemotherapy unless she aborted her unborn child. The IACHR, in an unusual showing of objectivity in this subject, asked the state of Nicaragua “to adopt the measures necessary to ensure that the beneficiary had access to the medical treatment she needed to treat her metastatic cancer” and refused to order the so-called “therapeutic abortion.” 194 The Commission thus closed the back door, at least momentarily, on a reinterpretation of the right to health that would include abortion as therapeutic, healing or medical treatment while appropriately clarifying that the pregnant cancer patient in question needed chemotherapy, not abortion.

The state of Nicaragua complied with the precautionary measures and “Amelia” received chemotherapy, which eventually resulted in a still-birth. 195 Unhappy with the Commission’s lack of support for abortion in

194. Id.
in this case, the lobbies involved in the petition—the Strategic Group for the Decriminalization of Therapeutic Abortion, Catholics for Choice, Feminists of León, Nicaraguan Center for Human Rights and the Latin American and Caribbean Women’s Health Network—later condemned the fact that Amelia had carried the pregnancy to term and qualified it as “inhumane,” given that the unviable child took away her energy to fight the illness. They insisted that she should have been given an abortion instead.196

F. PRE-NATAL RIGHTS RECOGNIZED IN THEMATIC AND COUNTRY REPORTS

In addition, there is significant evidence that the Commission has, at certain points in time also promoted the unborn child’s right to life by condemning at least some forms of abortion, including elective abortion, by referring to forced abortions as human rights violations and condemning attacks against pregnant women and their unborn children. For instance, the Commission’s 1971 Annual Report stated that elective abortion, often resorted to by poor women in desperate situations, constitutes a “patent and grave violation of human rights.”197 Later, the IACHR referred to abortion as a form of torture in its 1995 Report on Human Rights Situation in Haiti, where it referred to blows to the breasts and stomach inflicted on pregnant women with the intention of causing them to abort as a form of sexual torture.198

In addition, the Commission has reported on complaints received against Latin American states from forced abortion victims during its in loco visits and thematic hearings. For instance, in 2001, the Commission reported and condemned the Operativo Ñemopoti in Paraguay, involving mass arbitrary detentions of farmers, where one woman suffered a forced abortion.199 In 2001, the Commission also reported on human rights violations in Cuba, including an attempted forced abortion on Yesenia Rodríguez Aguilar, a pregnant inmate in a local prison.200 Earlier, in 1998, during its in loco visit to Mexico, the Commission reported receiving information on Luz Elena Corona’s case, who suffered a miscarriage due to a company’s non-compliance with health and safety standards established

196. Id.
200. Id. ¶ 81 (f).
to protect pregnant women at work. In 1980, it reported on human rights violations against Argentinean female inmates and their unborn children, including abortions.

Likewise, in its 1997 country report on Ecuador, the IACHR mentioned state obligations regarding mothers and their unborn children, and referred to the latter as minors when referring to the prohibition of certain types of work for pregnant women as dangerous for both "women and minors." In 2000, the Commission regretted the Peruvian government’s derogation of Law No. 2,851, which established rights for pregnant women and their children, such as prenatal and post-partum leave, among others. In 2001, the Commission pointed out that Guatemala should comply with its domestic legislation, where maternity was protected by law, and pregnant workers may not be required to perform functions placing the unborn child at risk. Even the abortion rights-promoting 2010 report Access to Maternal Health Services from a Human Rights Perspective stressed the importance of increasing coverage levels for pre-natal care and childbirth, and lamented the high rates of perinatal deaths in Latin America and the Caribbean.

V. PROMOTION OF ABORTION RIGHTS IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The Commission's inconsistency in upholding the Convention’s protection of the right to life from conception can be partially explained by the pervasiveness of abortion rights advocacy within the system. During the past few decades, individual abortion supporters within the Inter-American system of human rights, particularly some IACHR members and Inter-American Court judges, have unilaterally attempted to disentitle


205. Fifth Report On The Situation Of Human Rights In Guatemala, Chapter XIII, The Rights Of Women, ¶ 7, Inter-Am. Comm’n H.R. available at http://www.cidh.oas.org/women/chap.13.htm. According to Guatemalan law, working mothers are required to be given one month of fully paid leave prior to the birth of a child, and forty-five days after. During the breast-feeding period, mothers are entitled to two special breaks during the work day.


207. Id. ¶ 10, 100.
unborn children of the right to life protections granted to them in the American Convention by promoting the creation of a right to end the life of one’s unborn children. Even though their unilateral attempts have not succeeded in altering the Convention’s protection of the right to life from conception, legally speaking, they may have had the political effect of distorting a proper understanding of the Convention among uninformed state officials and parties to individual complaints.

Abortion advocacy activities by IACHR members and even Inter-American Court judges are not only incompatible with their role as guarantors of the Convention, but create a conflict of interest in individual complaints affecting the right to life from conception, rendering these officials unable to apply the Convention in good faith, as required by international rules of treaty interpretation.

A. Abortion Rights Advocacy by Individual Commissioners and Judges

Throughout the years, the abortion rights bias among IACHR Commissioners and Inter-American Court judges has been more or less accentuated, depending on its composition. Some Commissioners have actively upheld the unborn child’s right to life from conception, notably former Commissioners Marco Gerardo Monroy Cabra and Luis Demetrio Tinoco, in Baby Boy, who strongly defended the plain meaning of article 4(1) of the American Convention that mandates the protection of the unborn child’s life from abortion. Their analysis of the original intent behind the Convention and the Declaration’s travaux préparatoires, as well as their affirmation of a proper interpretation of article 4(1), will be invaluable for states parties to the American Convention as well as future generations of Commissioners and Court judges in the Inter-American system. Likewise, former Inter-American Court judge Rafael Nieto Navia stated that the expression “in general” contained in article 4(1) must be given its ordinary meaning, which does not lead to the conclusion that taking the life of unborn children through abortion should be a particular exception.

Others, like most of the Baby Boy Commissioners, have favored restrictive interpretations of article 4(1) of the American Convention that would only protect the unborn child against abortion or destruction when wanted or desired by the mother. More recently, some Commissioners

208. Richard G. Wilkins & Jacob Reynolds, International Law and the Right to Life, 4 Ave Maria L. Rev. 123, 135 (2006). The phenomenon is not unique to the Inter-American system of human rights. Richard G. Wilkins and Jacob Reynolds point out that, over the past three decades, many international scholars have taken advantage of their special status to engage in organized advocacy promoting worldwide revision of domestic abortion laws.

209. Baby Boy, supra note 7, dissent of Dr. March Gerardo. See also dissent of Dr. Luis Demetrio Tinoco Castro.

have boldly promoted the creation of a right to take the unborn child's life through abortion, as illustrated below.

For instance, Luz Patricia Mejía, the current Rapporteur on the Rights of Women, has repeatedly advocated for the creation of a right to abortion during the Commission's hearings held every year in Washington, D.C. Likewise, her thematic report Access to Maternal Health Services from a Human Rights Perspective, published on August 2, 2010, referred to abortion as a "maternal health service" and an unwritten "right," allegedly included in the right to personal integrity and the right to privacy, even though neither article 5 nor 11 of the American Convention have ever been interpreted to protect the killing of unborn children in the womb in the Inter-American system. Rather than focus on relevant questions regarding a right to maternal health services for poor, indigenous, or afro-descendent mothers and their unborn children, as the title would suggest, the report focused on abortion among diffuse ideas of freedom from discrimination and a right to personal integrity. The document artificially pitted unborn children's right to life against women's right to personal integrity by reinforcing the common pro-abortion argument, based on--at best-unreliable statistics, that abortion is one of the main maternal mortality causes in Latin America and the Caribbean and that, in order to prevent women's deaths, it ought to be legalized and financially supported by states. Mejía is currently preparing another report on access to information about reproductive matters, expected in 2012, and another on violence against women in the region. The reports will enjoy financial support from the pro-abortion governments of Spain and Finland and the like-minded international organization UNFPA, which indicates they may promote abortion rights, like the last


213. Id. ¶¶ 8, 42, 98, 101-02.

214. The Commission's creative interpretation of the right to privacy, in particular, suggests an Anglo-Saxon reinterpretation of "privacy," as including an alleged right to abort, such as that taken by the United States Supreme Court in Roe v. Wade.


216. Id. ¶¶ 8, 42, 98, 101-02.


RIGHT TO LIFE FROM CONCEPTION

Before Mejía, former Commissioner Víctor E. Abramovich also used the Rapporteurship on the Rights of Women as a venue through which he attempted to impose his views on abortion in Nicaragua. Abramovich, both Rapporteur for Nicaragua and Rapporteur for Women’s Rights in the Americas at the time, with the support of Santiago Cantón, Executive Director of the IACHR, unilaterally exerted political pressure on Nicaragua by demanding that it legalize so-called therapeutic abortion. In 2006, he wrote a letter to the Nicaraguan Health Minister, as the Rapporteur for Women’s Rights in the Americas, declaring that Nicaragua’s abortion ban was contrary to international law, as it allegedly threatened women’s human rights and jeopardized women’s health. He indicated that denying women a supposed right to “therapeutic” abortion attempted against their life, their physical and psychological health and represented an “obstacle” for physicians who performed abortions. He founded his condemnation of the abortion ban, not on the American Convention, but on several non-binding reports and recommendations issued by UN expert committees, such as the UN Human Rights Committee, the CEDAW Committee, CRC Committee, Torture Committee, the UN Special Rapporteur on the Right to Health and non-specified World Health Organization documents.

Later, in an interview with Página 12, an Argentinean newspaper, Abramovich stated that the Commission had never debated the issue of decriminalizing abortion. But, he declared his personal opinion to be that abortion should be widely legalized; that its penalization was a violation of women’s rights and that abortion bans like Nicaragua’s go “against common sense.”

Likewise, Commissioner Felipe González also attacked Nicaragua’s ban on all forms of abortion during the latest session period, where he questioned representatives of the Nicaraguan state on steps taken to declare the unconstitutionality of the said ban and manifested an interest in carrying out a site visit (called in loco visit) to further investigate the issue. Although the Commission does not have authority to apply or

---


221. Id.

222. Id.

223. Id.


225. Id.

enforce recommendations by other international treaty bodies, Gonzalez requested accountability on the U.N. Committee against Torture’s recommendations to legalize therapeutic abortion in Nicaragua.\footnote{227}

Other Commissioners have engaged in similar abortion rights advocacy within the system. Recently, during a hearing entitled “Reproductive Rights of Women in Latin America and the Caribbean,” on March 28 of 2011, Commissioner María Silvia Guillén from El Salvador lamented the Catholic Church’s vocal opposition to abortion in Latin America and indicated legalization of abortion was a priority issue for the Commission. Likewise, Luz Patricia Mejía expressed her sympathy for abortion rights advocacy and condemned “moralistic and religious considerations” opposing abortion. Current Commissioner José de Jesús Orozco Henríquez also sympathized with the abortion lobbies present at the hearing and expressed concern with the lack of sufficient legislative measures to legalize “therapeutic” abortion and the abortion of children conceived by rape.\footnote{228} Previously, Orozco Henríquez had also referred to abortion as “a fundamental right” during a thematic hearing on reproductive rights in Colombia\footnote{229} and supported the decriminalization of abortion in Nicaragua as a measure that would allegedly “contribute to eradicate violence against women” in a recent hearing.\footnote{230} Similarly, former Commissioner Florentín Menéndez, in a thematic hearing on maternal mortality in the Americas referred to “therapeutic” abortion as a matter of “access to justice” and suggested a need to further decriminalize abortion in an \textit{estado de necesidad}- that is, as needed.\footnote{231} Likewise, current Commissioner José de Jesús Orozco Henríquez, called abortion “a fundamental right” during a thematic hearing on reproductive rights in Colombia.\footnote{232}

Inter-American Court judges are not immune to bias in favor of an alleged right to abortion either. To begin with, the Court is almost exclusively financially sustained by Spain and Norway, two staunchly pro-abortion states,\footnote{233} a fact that should not, but, in practice, may affect the court’s impartiality or neutrality when interpreting article 4(1) the Ameri-


\footnote{227} Id.


\footnote{232} Id.

\footnote{233} Organization of American States, General Assembly Meeting in Peru, June 8, 2010.
can Convention. Even though the Court has not yet heard any cases on abortion, some judges have advocated for abortion rights both before and during their appointment or service.

For example, current Court President, judge Diego García Sayán, recently wrote an article advocating for legalization and liberalization of abortion in Latin America, according to him, a necessary “public health” measure, “beneficial to men, women and children” (how it would be beneficial to the latter remained unexplained). He also referred to pro-life advocates as the “religious right wing,” and pro-life views as essentially religious views that had no place in any human rights debate. He celebrated Mexico City’s liberalization of abortion (now legal for any reason up to 12 weeks gestation) and, remarkably, rejoiced that immediately after the legislation passed, the number of abandoned children in the city was drastically reduced from an average of 2.2 to 1.2 infants abandoned every month.

Cecilia Medina Quiroga, a former judge (2004-2009) and President of the Inter-American Court of Human Rights, admitted that the unborn child was a subject of human rights in the Inter-American system but nevertheless advocated for the creation of abortion rights in the Americas. For instance, before she joined the Court, Medina Quiroga expressed her disapproval towards Guatemala’s domestic prohibitions on abortion. She stated that Guatemala should protect women and their rights, and that the best measure to prevent the high percentages of abortion-related deaths (by which she meant maternal deaths only, since the deaths of unborn children are considered irrelevant according to this rationale) would be to legalize the procedure.

In 2003, before becoming an Inter-American court judge, she wrote the following statement about the nature of the unborn child: “[T]he fetus that has not been extracted from the mother’s womb is dependent on her, it is not a person and, therefore, cannot have its own rights, only through


235. Id.

236. Id.


238. See Id. at 78, where Medina Quiroga stated: “In certain cases, such as when continuing the pregnancy would endanger the life of the woman, or when the pregnancy is as a result of rape, the criminalization of abortion would cause a violation of the obligation of the State to protect the life of the woman.”


240. Id.
At that point, Medina opined that the American Convention should be interpreted according to Baby Boy, that is, as allowing elective abortion where legal: “paragraph 1 of article 4 does not forestall the States’ ability to allow abortion in whatever circumstances they see fit.” She held abortion should only be criminalized when the fetus was viable, at which point the state would have a right to intervene.

Once a fetus is separated from the mother, it legally transforms itself into a human being and the right, and thus is born [sic], for this new being the right to life stipulated in article 4(1) of the Convention, in which case the state has a duty to protect it from any arbitrary action against it.

The above assertions obviously constitute a misrepresentation of the Convention article 4(1), the plain reading of which indicates that the right to life is protected “from the moment of conception,” not “from viability” and that the unborn child is considered a full subject of human rights since that moment. Later, in 2009, she gave contradictory statements admitting the American Convention did protect the right to life from conception in an interview by Amnesty International, where she was asked if abortion constituted discrimination against the fetus. Medina answered: “States are obliged to take measures to protect fetal life. But universally agreed human rights treaties and conventions do not accord the fetus a status as rights holder equivalent to that of a woman. The American Convention on Human Rights is the only human rights treaty which calls for the right to life to be protected by law, and, in general, from the moment of conception.

Other Inter-American Court judges have directly cooperated with abortion legalization in their home countries. For instance, in 1983, Sergio García Ramírez (2004-2009), along with then Mexican President Miguel de la Madrid, led a proposed reform to the Mexico City penal code that would legalize so-called therapeutic abortion and abortion of unborn children conceived through rape. Likewise, in his publication

242. Id. at 71.
243. Id. at 78.
244. Id. at 76. It seems, however, that at this time she would have opposed partial-birth abortion, that is, the dilation and extraction procedure which borders on infanticide.
246. Id.
A Legal Consideration of Death, Garcia Ramirez suggested that imposing the “obligation” of motherhood on women would be unjust and that abortion should be legalized in Mexico.

 Likewise, current judge Margarett Macaulay, before her appointment to the court, promoted abortion rights in Jamaica as a member of the National Advisory Group on Abortion, which was commended with reviewing and making the necessary recommendations for reform to allow abortions for unwanted pregnancies in Jamaica. In January of 2006, Macaulay recommended, along with several medical practitioners, that abortion be legalized in Jamaica, arguing that liberalizing abortion would increase the number of “safe” abortions and lessen maternal death and disability. Earlier, in 1997, she wrote that an alleged thirty percent of all maternal deaths in the Caribbean were attributable to unsafe, i.e. illegal, abortions and lamented that the overall trend in Latin America was toward restrictive abortion laws. While serving as a judge, on April 23, 2009 she presented in favor of abortion rights at a conference organized by the Institute of Gender and Development Studies (IGDS) and the Sir Arthur Lewis Institute of Social and Economic Studies (SALISES). The discussion was entitled “Establishing Common Ground: A Conversation on Reforming the Law on Abortion in Jamaica.”

Even though none of the above statements, interviews or writings have any legal weight, since they have been pronounced unofficially or outside Commission or Court decisions, they exemplify how Inter-American court judges and Commissioners may bring personal abortion rights activism to their judicial positions—a bias that is incompatible with the American Convention. They also illustrate how Commissioners or judges may promote their own idea of what the Convention should or should not say in spite of the treaty’s text and original intent.

B. THE GOOD FAITH REQUIREMENT IN INTERNATIONAL RULES OF TREATY INTERPRETATION

Due to the current prevalence of liberal politics in the international human rights movement, the idea of protecting the right to life from con-


ception has been artificially presented as incompatible with liberal human rights principles, thus having liberal judges and Commissioners attack it is no coincidence. Most international human rights scholars, advocates and academics, including the Inter-American system’s elite, have typically adopted an abortion rights dogma, the questioning of which is not considered to be politically acceptable. Abortion is simply presented as an essential element of liberal politics—an individual rights issue. Thus, current orthodoxy on the subject ultimately advocates the odd idea that, rather than combating abortion or other practices against the unborn child’s right to life, states should legalize them, sponsor them and promote them as human rights.

As a result, Commission members have often approached the application of the Convention as advocates for abortion rights rather than as impartial judges charged with the application thereof, e.g., in petitions like Baby Boy, Paulina and the IVF petitions against Costa Rica. In those instances, the Commission failed to apply international rules of treaty interpretation, such as giving the Convention’s terms their ordinary meaning, applying non-restrictive approaches to recognized human rights, looking at current opinio juris and examining original intent behind the adoption of article 4(1). Instead, the IACHR started out from a dogmatic position that abortion and embryo destruction should be acceptable under the American Convention and then devised arguments to support that conclusion.

Nevertheless, the Convention in articles 62(3) and 63 mandates that Commissioners and judges defend and promote the American Convention, which protects the right to life from the moment of conception. Article 71 of the Convention provides for judicial independence and impartiality: “the position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes.” Article 18 of the Statute of The Inter-American Court of Human Rights, article 8 of the Statute of The Inter-American Commission on Human Rights, article 4(1), Rules Of Procedure Of

253. See generally David Kennedy, The Dark Sides of Virtue, Reassessing International Humanitarianism (2004), where this issue is addressed in much greater depth.

254. On the other hand, the stereotype of liberal philosophy as strongly tied to abortion advocacy has sometimes been broken in Latin America where leftist presidents like Daniel Ortega, Nicaraguan Sandinista, and Tabaré Vázquez from Uruguay have approved legislation in favor of the unborn child, against unprecedented pressure from otherwise sympathizing socialist European governments.


The Inter-American Commission on Human Rights on incompatibilities all contain similar provisions. Abortion rights advocacy, that is, advocacy to breach the Convention, therefore constitutes such an activity and creates serious incompatibilities for Commissioners and judges who engage in it.

These norms have particular relevance for current Commission members who are in the process of applying the Convention in the IVF petitions against Costa Rica and other pending petitions affecting the right to life from conception. Emphatic abortion advocacy such as that described in the previous section constitutes direct evidence that some Commissioners and judges cannot possibly interpret the Convention's text "in good faith" as required by international rules of interpretation.

Likewise, the existence of prejudice on a pro-choice reading of article 4(1) of the American Convention may affect a Commissioner's good faith in protecting the right to life from conception as mandated by article 4(1). Current Commission President Dinah Shelton, for instance, wrote an article where she agreed with Baby Boy's ultimate finding that the American Declaration did not protect the unborn child from abortion, even though she believed that the Commission's reasoning was deeply flawed and that the IACHR should have relied on a different analysis, discussing a "balance" of maternal rights and fetal rights rather than original intent. Thus, the fact that she is currently hearing the IVF petitions against Costa Rica and may be hearing other petitions affecting the unborn child's right to life from conception leaves little doubt as to what her recommendations would be.

For Inter-American Court judges, prejudice and lack of good faith may justify recusals, impediments and disqualification, according to the Court's Statute regulations. Article 19 (1) of the Court Statute states: "Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity." This provision would also apply to judges who have represented or worked for abortion lobbies or who have promoted abortion rights from non-governmental, governmental or intergov-

---
260. See Dinah Shelton, Abortion and Right to Life in the Inter-American System: The Case of Baby Boy, 2 Hum. Rts. L.J. 309, 310, 316 (1981), where Shelton supports the Commission's finding that the United States did not violate Baby Boy's right to life in spite of pointing out the resolution's multiple flaws and arguing that its conclusions had been reached through "questionable reasoning, faulty analysis and little or no attention paid to the usual canons of construction of international documents."
ermental boards, committees, courts or academic institutions. Those judges should be prevented from hearing cases on the unborn child’s right to life, either through recusal or disqualification.262

Transparency and accountability of the Commission and the Court before the O.A.S. and the states parties to the American Declaration and the American Convention is essential for the preservation of that body’s integrity and legitimacy. When individual Commissioners and Court judges wish to reverse human rights protection granted by Latin American and Caribbean states to the unborn child under article 4(1), states parties to the Convention should ensure accountability of individuals in these positions as well as their recusal when necessary. Both the Commission and the Court present annual reports to the OAS General Assembly and periodically publish their reports on individual petitions.263 On those occasions, among others, states parties should make sure the lawmaking process in the Inter-American system remains a faculty of state parties to the O.A.S. and not the arbitrary and unilateral interpretation of individuals who wish to turn the taking of unborn children’s lives into a human right, in stark contradiction with the object and purpose of the American Convention.

C. INTERNATIONAL ABORTION LOBBIES: CREATING PARTNERSHIPS AND APPLYING PRESSURE ON STATES PARTIES

For the past few decades, several international abortion lobbies have exerted varying degrees of influence on the Inter-American system on human rights when promoting the creation of abortion rights in Latin America and the Caribbean. Abortion rights advocates have sought to use the IACHR as a platform to persuade states parties to the American Convention that they are bound by inexistent treaty obligations to legalize and publicly fund abortions, while celebrating them as human rights. For instance, the Center for Reproductive Rights itself has admitted to having “used” the Commission to promote, from an individualistic approach to human rights, an unrestricted right to abortion and artificial reproductive technologies that most Latin-American nations have not recognized.264

In the last few years, many of these organizations, often U.S.-based, such as Center for Reproductive Rights, CEJIL, CLADEM, the International Planned Parenthood Federation (Western Hemisphere Region), IPAS and Catholics for Choice, often U.S.-based, have represented themselves as human rights defenders and built partnerships with the IACHR, becoming its main advisors on abortion. Even though they are non-gov-

262. See article 21 of Rules of Procedure of the Inter-American Commission on Human Rights, supra note 183.
263. See articles 41, 49-51 and 65(g) of the American Convention, which mandate annual reporting to the O.A.S General Assembly and individual states parties involved in the petition system.
ernmental, privately-funded organizations, their views and creative interpretations of the American Convention have been allowed to prevail in individual petitions like Paulina and thematic reports like Access to Maternal Health Services from a Human Rights Perspective. In addition, these like-minded non-governmental organizations currently monopolize the public hearing system at the IACHR, along with their local affiliates, where they report to the IACHR on alleged violations of reproductive rights, invariably including protection of the right to life from conception as one of them. The Center for Reproductive Rights, a U.S.-based abortion lobby, has become the primary promoter of abortion rights before the Inter-American system. Along with its local affiliates, CRR has introduced at least two petitions before the Inter-American Commission, including Paulina and has participated at most of the thematic hearings on reproductive rights before the IACHR, held twice a year by the IACHR, where they have advocated for abortion rights in several Latin American countries. In addition, the CRR filed an amicus brief in favor of the petitioner in Petition 12.361, arguing that the state violated the right to health, to form a family, to privacy, and to benefit from scientific progress, recognized under international law. In October 2008, the organization brought another petition against Costa Rica, A.N. v Costa Rica, alleging a violation of the Convention where a woman carried to term her severely disabled unborn child (a stillbirth) which, they allege, affected both her mental and physical health. No report has yet been issued on the petition.

In the United States, where abortion is widely available, CRR litigates impact cases to further liberalize abortion and advocate for a complete deregulation of “abortion services,” which it refers to as ordinary “medical services.” Its agenda includes challenging viability limits established in Casey in order to further liberalize abortion up to the end of pregnancy; challenging mandatory ultrasounds and waiting periods for women considering abortion; challenging abortion clinic regulations, par-

ticularly, anti-coercion statutes; repealing parental involvement in abortions by minors and abortion counseling; increasing public funding for abortion and deregulating the abortion industry, among others. Furthermore, CRR fights human life amendments to state constitutions, that is, constitutional amendments that recognize the unborn child as a person or enunciate a right to life from conception. In Michigan, CRR succeeded in its judicial challenge of a democratically-adopted law, the Legal Birth Definition Act, recognizing fetal rights and prohibiting second trimester and late-term abortions.

Some of their recent lobbying in the United States involves seeking decriminalization of partial-birth abortions, a procedure that late U.S. Senator Daniel Patrick Moynihan (D-NY) likened to infanticide and so egregiously brutal that the U.S. Supreme Court upheld a legislative ban on it in 2007. Additionally, in 2009, CRR litigated a case against the U.S. Food and Drug Administration (FDA), decided on March 23, 2009 by U.S. District Court judge, Edward Korman, who ordered the agency to permit the manufacturer to make plan B, an abortifacient drug, available to underage girls over the counter, without prescriptions, parental consent or notification requirements.

Internationally, the CRR takes pride in promoting the legalization of abortion across the globe by working with more than fifty organizations in forty-four nations including countries in Africa, Asia, East Central Europe, Latin America and the Caribbean. In Latin America, CRR boasts of being at the forefront of abortion litigation in thirteen countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Nicaragua and Peru.

In the region, CRR supports litigation aimed at legalizing or liberalizing several forms of abortion in at least five different countries. In 2008, CRR supported the approval of abortion at will during the first

272. US Abortion Restrictions Overview, Center for Reproductive Rights, http://reproductiverights.org/en/project/us-abortion-restrictions-overview. See also 108 CONG. RECN. 149 at E2540 (2003). See also CRR Communication to UN Human Rights Defender Representative, available at http://reproductiverights.org/en/document.center-communication-to-un-special-rapporteur, where CRR refers to malpractice regulations, civil penalties or criminal sanctions on abortionists are “insidious laws” that prevent them from running their practice in a regular and profitable manner. In CRR’s view, abortionists should not be subject to liability like other medical professionals. They should not be held accountable for their surgeries’ effects on women, and much less, on unborn children, because, as CRR itself admits, “an abortion causes harm to the fetus by definition.”

273. See Communication to UN Human Rights Defender Representative, supra, note 272.


trimester in the Mexican Federal District before the Supreme Court, along with Amnesty International and supported the Nicaraguan Coalition for abortion rights as amicus curiae before the Nicaraguan Supreme Court. Likewise, it intervened as amicus curiae in judicial challenges to abortifacients, so-called emergency contraception, in Ecuador, Colombia and Chile.

Additionally, CRR has brought individual complaints against several Latin American countries before other international human rights bodies besides the IACHR, such as U.N. treaty monitoring bodies. The Center brought an individual complaint, K.L. v. Peru, before the U.N. Human Rights Committee and Alyne da Silva Pimentel v. Brazil before the CEDAW Committee, where it obtained sympathetic, non-binding expert committee recommendations in favor of abortion rights. In 2009, it filed another complaint against Peru before the U.N. Committee on the Elimination of Discrimination against Women: L.C. v. Peru, involving a thirteen-year-old pregnant child whose alleged right to “therapeutic” abortion CRR seeks to affirm.

CRR partners in Latin America include, among others, CEJIL, CLADEM, International Planned Parenthood Federation (Western Hemisphere Region) and IPAS. In conjunction with CRR, CLADEM brought K.L. v. Peru before the United Nations Commission on Human Rights, hoping to force Peru and other Latin American states to provide unrestricted abortions. CLADEM consistently reports to international human rights committees on states’ failure to legalize and liberalize different forms of abortion. For instance, at one of the 2008 CEDAW Committee sessions, CLADEM submitted alternative country reviews for both El Salvador and Uruguay, declaring that Uruguay must legalize abortion” in accordance with CEDAW” and demanded that El Salvador “reform abortion legislation.”

CLADEM also advises like-minded OAS bodies, such as the Committee of Experts on Violence (CEVI) an organ of the MESECVI (Follow

280. Id.
281. Id.
282. Id.
up Mechanism for the Belem do Pará Convention). The Committee, akin to the United Nations CEDAW Committee in their ability to make general recommendations to states parties under the Belem do Pará Convention,\textsuperscript{289} but without the jurisdiction to hear individual complaints against them, has, in the past, distorted maternal mortality statistics to justify its recommendations to legalize abortion, based on CLADEM's advocacy materials.\textsuperscript{290}

Furthermore, CLADEM and CRR now claim their abortion advocacy should enjoy legal protection normally reserved for human rights advocates and claim that both their NGOs as well as private abortion providers should be recognized as human rights defenders. On October 28, 2008, CRR, HRW and CLADEM held a thematic hearing before the IACHR in which they claimed to enjoy human rights defenders status when carrying out their abortion activism activities.\textsuperscript{291} The CLADEM representative asked for "special protection measures" to be ordered by the Commission for abortion activists in Nicaragua, who demand the Nicaraguan government legalize abortion.\textsuperscript{292} The following day, HRW, along with CRR and CLADEM also urged the Commission to press the United States on providing special protection for individuals who perform abortions and their clinics, recognizing them as actual human rights defenders, and to urge the U.S. government to make abortion procedures affordable for both abortionists and their patients.\textsuperscript{293} A month before, in July 2008, CRR submitted a letter to the U.N. Special Representative for Human Rights Defenders, demanding U.N. recognition for abortion lobbyists and particularly for American late-term abortionists as "human rights defenders."\textsuperscript{294} In that communication, CRR complained about the moral opposition they found on their quest to forcing states to recognize a "right to abortion" and stigmatized abortion opponents as "threats" to their quest for "women’s rights."\textsuperscript{295} They argued that the U.S. government had failed to protect them from pro-life groups and, on that basis, asked the U.N. Special Representative to assist them in silencing pro-life


\textsuperscript{291} Thematic hearing, supra note 211.

\textsuperscript{292} Id.


\textsuperscript{295} Id.
speech and encouraging states to strike down all legal regulations on abortions.296

Likewise, IPAS,297 one of the most notorious abortion providers—not just an ordinary lobby in the developing world, appeared as a human rights organization in several hearings before the IACHR. Recently, on March 28 of 2011, IPAS, along with other local NGOs,298 appeared before the IACHR in a hearing entitled “Reproductive Rights of Women in Latin America and the Caribbean,” demanding legalization of all forms of abortion in the region, explicitly including eugenic abortion and abortion rights for minors, among others.299 Previously, in October 2007, they also presented in a hearing on women’s sexual and reproductive rights, where they demanded the Commission condemn Nicaragua’s comprehensive abortion ban and declare it a human rights violation.300

IPAS’s avowed mission is to train health care workers in abortion procedures, particularly in countries where abortion is prohibited by law.301 It also markets its signature product, the manual vacuum aspirator, a handheld device created for the purpose of performing early abortions where surgical abortions are unavailable or illegal.302 Among its abortion lobbying activities, IPAS successfully exerted pressure on the government of Bolivia for the approval of Misoprostol (an abortion-inducing drug, utilized by poor women in countries where abortion is illegal) for all ob-gyn indications, including abortion.303 It also proposed legislative language that would liberalize existing abortion regulations in the new Bolivian criminal code.304 In Uruguay, IPAS established and tested a government protocol to advise women before and after abortion.305 In it, women were instructed on the use of Misoprostol for abortion, in spite of abortion being illegal in that country.306

296. Id.
298. Asociación por los Derechos Civiles (ADC), Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX), Mesa por la Vida y la Salud de las Mujeres, Grupo de Información y Reproducción Elegida (GIRE), IPAS Centroamérica, Campaña 28 de Septiembre, Agrupación Ciudadana por la despenalización del aborto terapéutico, ético y eugenésico, Centro de Derechos de Mujeres (CDM), Centro de Documentación y Estudios (CDE), Colectiva Mujer y Salud, Colectiva por el Derecho a Decidir, Comisión de Ciudadania e Reproducción (CCR), MYSU, Mujer y Salud.
304. Id.
305. Id.
306. Id.
Even previously abortion-neutral human rights organizations, like CEJIL, Human Rights Watch and Amnesty International, have engaged in pro-abortion activism before the Commission during the past few years. Even though, in 2002, Human Rights Watch declared that “CEDAW does not take a position on abortion”\(^\text{307}\) and, in 2005, Amnesty International actually stated that “CEDAW does not address the matter of abortion” and that “there is no generally accepted right to abortion in international human rights law”,\(^\text{308}\) both organizations now claim that abortion is a human right. At national levels, HRW and AI have actively advocated for withdrawing existing legal protections for unborn children.\(^\text{309}\) In Mexico, for instance, HRW sent a letter to lawmakers in the state of Puebla urging them to reject the human life amendment to the state constitution, aimed at protecting the life of unborn children from conception, like the American Convention.\(^\text{310}\) The plea was unsuccessful.\(^\text{311}\) Similarly, in 2009, Amnesty International issued a statement urging that the Dominican Republic Congress not implement a new penal code restricting abortion,\(^\text{312}\) it issued a report claiming that Nicaragua’s 2006 abortion ban violated the country’s obligations under international law and further stressed that abortion should be decriminalized in all circumstances,\(^\text{313}\) and also criticized Peru’s protection of the unborn child by calling the legislation a violation of international human rights law and referring to abortion as a “reproductive health service.”\(^\text{314}\)

Since at least 2005, CEJIL has participated in several hearings before the IACHR where it promoted abortion as a human right under an al-

---


leged right to "voluntary and safe motherhood" and as a supposed remedy to high maternal mortality rates in Latin America. It has also demanded that Costa Rica legalize IVF, that Mexico sponsor so-called emergency contraception, and that Nicaragua legalize abortion in certain situations. In addition, CEJIL joined abortion lobbies such as IPAS and Women's Link Worldwide in 2010, when it requested abortion as a precautionary measure for Amelia, the pregnant cancer patient from Nicaragua.

Also among abortion lobbies with significant influence within the Commission's NGO network is Catholics for Choice (CFC), which has participated in at least three hearings before the IACHR, demanding legalization of abortion in Nicaragua and further expansion of legal and state-sponsored abortion in Colombia and Mexico. The CFC, an anti-Catholic organization, was founded as an affiliate to the Religious Coalition for Abortion Rights (now Religious Coalition for Reproductive Choice). It currently enjoys an annual budget of $3 million USD, is

317. Latin American women must have access to sexual and reproductive health, Center for Justice and International Law, supra note 315.
318. Id.
322. The CFC was founded in the United States in 1973 soon after Roe v. Wade, with brother Joseph O'Rourke, a former Jesuit expelled from the Order in 1974, as its first President. He was followed by Frances Kissling in 1980, a former abortion clinic director and founding President of the National Abortion Federation. According to its own documents, CFC is integrated by dissenting Catholics who reject Catholic teaching on abortion, sexual morality and the dignity of the human person from the moment of conception. See CATHOLICS FOR CHOICE, http://www.catholicsforchoice.org/about/default.asp. The U.S. Conference of Catholic Bishops, however, in 1993, and on many occasions after, declared that CFC is "not a Catholic organization, does not speak for the Catholic Church, and in fact promotes positions contrary to the teaching of the Church." See NCCB/USCC President Issues Statement on Catholics for a Free Choice, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, available at http://www.usccb.org/comm/archives/2000/00-123.shtml.
headquartered in Washington, D.C., and holds international agencies in several Latin American countries, Spain and Canada. Most recently, CFC partnered with CEJIL, Amnesty International, Ipas and Women's Link Worldwide when framing abortion rights as a legitimate response to violence against women and demanding abortion rights for pregnant children upon rape in Nicaragua.

At present, Catholics for Choice, along with CLADEM and International Planned Parenthood, are lobbying for the adoption of an American Convention on Reproductive Rights that would include abortion as a human right. Among others, draft article 18 would provide for an unlimited "right" to abort for both women and pregnant children, for any and all reasons, at any time during pregnancy. Draft article 25(6) would impose on states a duty to sponsor all abortion services, while eliminating conscientious objection legal protections or clinic regulations. In May 2010, the draft proposal was launched at the O.A.S. General Assembly in Lima, Peru. But, the campaign has so far been unsuccessful in getting sponsorship from any Latin American state that would introduce a proposed text before the O.A.S. General Assembly.

Common elements to the above organizations that currently exert influence and apply pressure on states parties through the Inter-American system of human rights may be identified. Their essential demands before the IACHR regarding abortion rights may be summed up as follows:

- Abortion should be declared a human right and observed as such in all Latin American and Caribbean states.
- Abortion should be publicly funded in all Latin American and Caribbean states and made available at public hospitals and clinics.
- States should promote abortion as a public health policy priority and as a solution to high maternal mortality rates.
- States should authorize and pay for abortions to be performed on any woman (including mentally disabled women), at any age (including minors).
ing pregnant children under eighteen), for any reason, at any and all stages of pregnancy, and by any and all methods (without consideration given to fetal pain).

- Parental consent and parental notification requirements should be abolished.

- An unborn child’s disability or a mother’s health complications should be universally accepted as a legal justification for “therapeutic” abortion.

- Abortion counseling or informed consent requirements that may dissuade a woman from aborting her unborn child should be prohibited by law.

- Artificial reproductive technologies should be declared a reproductive right in the region. Like abortion, they should be publicly funded, unregulated and promoted as “medical treatment” for infertility.

- Human life amendments that recognize the unborn child as a person from the moment of conception should be declared violations of women’s rights by international human rights bodies.

- International abortion lobbies like CRR, IPAS, CLADEM and CEJIL should enjoy “human rights defenders” status and their ensuing legal protections, such as being granted precautionary measures when promoting abortion.

- Moral or religious opposition to abortion should be excluded from consideration in public policy-making and from public debate on the subject.

Unless the IACHR and states parties support all of the above, they will be persistently told that women’s reproductive rights or women’s “access to reproductive health” in the region is being undermined. Unless the Commission and the Court create an absolute right to take the unborn child’s life, international abortion lobbies will continue to argue that that Latin American and Caribbean states need to comply with all of the above and that anything else would be a violation of international human rights law.

Abortion lobbies’ demands in the 2010 hearing “Situation of the Sexual and Reproductive Rights of Women in Colombia” illustrate the latter point.331 During the Commission’s 138th period of sessions, a Colombian abortion advocates coalition, led by Catholics for Choice and integrated by Corporación Humanas, Corporación Sisma-Mujer, Grupo de Derechos Sexuales y Reproductivos, GA Juris-Generistas, Fundación Oriéntame and the Red Nacional de Mujeres, Red de Empoderamiento de Mujeres de Cartagena y Bolívar, Organización Conmujer de Florencia Caquetá, appeared before the Commission and focused on obstacles to the further expansion of already permissive abortion laws in Colombia.

Even though the Colombian Constitutional Court legalized abortion in

331. Colombia Reproductive Rights Hearing, supra note 321.
2006 under a broad range of circumstances, the abortion advocates coalition complained that there were not enough abortions in Colombia. They presented statistics showing there were 649 abortions in 2009 (123 of which they had cooperated with), apparently too low a number. The NGOs reported that an astounding sixty-one percent of abortions in Colombia were eugenic abortions, that is, abortions of disabled children, nineteen percent of all abortions were carried out under the “therapeutic” requirement and nineteen percent of them under the rape requirement.

Even though the Beijing Conference stated abortion should never be used as such, the Catholics for Choice and its partners also referred to abortion as a method of family planning during the hearing. They demanded that all forms of abortion be publicly funded by Social Security, including abortifacient drugs. A demand for wider availability of state-sponsored abortion methods was emphasized, allegedly because most abortions in Colombia are performed by D&C (dilation and curettage) which, they admitted, places women’s life at risk, as indicated by WHO. They also demanded that amniocentesis and other tests for genetic disability be mandatory and paid for by the government.

In addition, CFC and its partners also objected to any regulation of abortion in Colombia, except if destined to facilitate it. Unhappy with the appointment of Ilva Hoyos, the founding president of Red Futuro Colombia (a pro-life organization) as the Procuradora for Childhood, Adolescence and Family, the NGOs issued a “red alert” amongst themselves when she regulated the sale of abortifacients. On March 18th, a few days before the IACHR hearing, Women’s Link filed a complaint before the Supreme Court against the Procurador (equivalent to an Attorney General) for the investigation of reversals in women’s rights allegedly caused by Hoyos. At the hearing, the state argued such regulation was in line with the Constitutional Court’s verdict, which asserted that

332. Informe De Vigilancia a la Sentencia C-355 (May 10, 2006), available at http://www.procuraduria.gov.co/descargas/AA%20INFORME%20 VIGILANCIA%20SUPERIOR%20SENTENCIA%20C-355%20de%202006%20VERDEF%20PDI AF%5B1%5D.pdf. The Constitutional Court of Colombia legalized eugenic abortion under broad exceptions, such as when necessary to preserve the life or health of the woman, in cases of severe fetal disability that is “incompatible with life,” rape, incest or error in an IVF procedure. The Court also legalized the eugenic abortion of “malformed” or disabled fetuses.

333. Colombia Reproductive Rights Hearing, supra note 321.
335. Id.
336. Id.
337. Id.
338. Id.
339. Id.
340. Id.
the state may choose to encourage other methods of family planning.341

Finally, the Colombian abortion lobbies present at the hearing also objected to patients’ informed consent and waiting periods.342 Opposed to women getting information on abortion’s risks to women’s health, post-abortion consequences or pain management, they suggested patients’ sole exposure to materials be to “pro-choice” information.343 Furthermore, worried that waiting periods for medical diagnoses, evaluation by medical boards or medical ethics committees may lead women to change their minds on getting an abortion or delay such decision, abortion advocates demanded the abolition of the said waiting periods and immediate access to abortion for all women, including minors.344 In response, the state representative indicated the regulations attempted to protect women’s liberty interest in informed decisions as well as the unborn child’s right to life, especially for women who chose to carry their pregnancy to term and keep their children.345

The above descriptions of abortion lobbies’ unreasonable claims and demands are indicative of why they have been generally unable to achieve liberalization of abortion domestically through democratic means. For that reason, these organizations now seek to use international human rights bodies, such as the IACHR, where some individuals sympathize with their pro-abortion views, in order to impose a right to abortion in Latin American and Caribbean countries, where traditional societies normally reject it. These NGOs are currently attempting to influence the IACHR, as well as other international human rights bodies,346 seeking the Commission’s cooperation with the imposition of false state obligations to create abortion rights.

Nevertheless, Commission members and states parties ought to keep in mind that NGO advocacy for abortion rights does not create international law in any form whatsoever. Commissioners who intend to lawfully apply article 4(1) of the Convention should be reminded that they are under no duty to cooperate with their agendas, because abortion is not a human right and abortion advocates are not human rights defenders.347 International abortion lobby pressure on the IACHR to promote

341. Id.
342. Id.
343. Id.
344. Id.
345. Id.
347. Because abortion is not an internationally recognized human right in the Inter-American system of human rights, those who perform or promote abortion cannot be considered “human right defenders” pursuant the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fun-
unfettered violations of the right to life of unborn children as human rights is fundamentally in contravention with the object and purpose of the American Convention and should be denounced and countered by Commissioners as well as states parties to the American Convention.

VI. CONCLUSIONS

States parties to the American Convention granted explicit protection to unborn children’s right to life from conception in article 4(1), fundamentally protecting them from any acts that intentionally cause their death. The Inter-American Court has effectively applied this provision by candidly recognizing the unborn child as a “child”, by generally acknowledging abortion as a human rights violation and by affirming prenatal rights through its jurisprudence, as described in section III.

The Inter-American Commission on Human Rights, on the other hand, has been relatively inconsistent in its treatment of the unborn child’s protection from different forms of abortion. At certain points in time, depending on its composition, some of its thematic and country reports have promoted the unborn child’s right to life by condemning some forms of abortion, including elective abortion. Recently, in 2010, the IACHR declined to create a right to so-called therapeutic abortion in PM 43-10 “Amelia”, a precautionary-measures request against Nicaragua. On the other hand, since Baby Boy v. United States, many IACHR reports evidence a tendency to favor right to life exceptions for abortion or even abortion rights themselves. The Commission has so far issued one non-binding resolution, a friendly settlement report and two admissibility reports, examined in section IV, in which it attempted to undermine the Convention’s protection of the right to life from conception and ultimately promote the creation of abortion rights in the Inter-American system of human rights. Still, it has not published any article 50 (merits) reports, its most formal type of resolution, suggesting a state obligation to legalize abortion.

IACHR reports have so far been unsuccessful in actually creating international abortion rights, given the Commission’s quasi-judicial nature and its inability to issue legally binding opinions or authoritative interpretations of the American Convention. Nevertheless, the Commission has effectively exerted its political influence to force individual states like Mexico and Costa Rica to legislate in favor of abortion rights— an inexist-ent duty according to the American Convention.

The Commission’s bias in favor of creating abortion rights in spite of the Convention’s patent protection of the right to life from the moment of conception may be explained by the influence of individual Commis-

---

348. See American Convention, supra note 1, at art. 4(1).
349. Precautionary Measures, supra note 193.

sion members who engage in abortion rights activism, advised by like-minded international abortion lobbies. At present, some Commission members (as well as some Inter-American Court judges) engage in abortion advocacy aimed at de-recognizing the right to life from conception granted by states parties upon the approval of the American Convention, an incompatibility that prevents them from carrying out good-faith interpretations of the American Convention in this matter. In addition, the IACHR works closely with several international abortion lobbies that routinely pressure Latin American and Caribbean states to authorize and sponsor abortion in its different forms, thus effectively supporting and endorsing their activities.

These attempts to disentitle unborn children from right to life protection have so far been unsuccessful, but need to be denounced and countered by other Commissioners and judges who intend to uphold a lawful interpretation of the Convention and, more importantly, need to be challenged by states parties that want to preserve human rights protection of unborn children from the moment of conception as granted by them upon the Convention’s adoption. Finally, states parties ought to keep in mind that even though individuals, NGOs, and even the IACHR in some instances may be pressuring for the creation of abortion rights, only states can impose obligations on themselves, and the only obligation states parties to the American Convention have so far assumed is that of protecting the right to life from the moment of conception.