

IN THE SUPREME COURT OF MEXICO

Acción de Inconstitucionalidad 11/2009

26 December 2008 Amendment to Article 7 of the *Constitución Política del Estado Libre y Soberano de Baja California*

WRITTEN COMMENTS BY:

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I. Introduction

1. The International Reproductive and Sexual Health Law Programme, Faculty of Law, University of Toronto submits these written comments for consideration of the *Supreme Court of Mexico* in Acción de Inconstitucionalidad 11/2009, presented by Mr. Francisco Javier Sanchez Corona, Human Rights Prosecutor of the State of Baja California.
2. These comments address the December 26, 2008 amendment to Article 7 of the *Constitución Política del Estado Libre y Soberano de Baja California* (Baja California Constitution).
3. Prior to the amendment, Article 7 read:

The state of Baja California fully adheres to the Political Constitution of the Mexican United States and secures the individual and social guarantees as well as all the other rights granted therein.

The amendment added the following clause to Article 7:

In addition, the Constitution protects the right to life, stating that from the moment in which an individual is conceived, he or she enters under the protection of the law, and is treated as a born person for all corresponding legal effects, until his or her natural or non-induced death.

4. The constitutional amendment to Article 7 includes no express clause exempting lawful abortion as permitted by Article 136 of the *Código Penal para el Estado de Baja California*. Temporary Article 3 of the Decree amending the *Baja California Constitution* annuls all legal provisions that contravene Article 7.
5. We respectfully request that the *Supreme Court of Mexico* interpret the amendment to Article 7 of the *Baja California Constitution* consistently with the right to life from the moment of conception as guaranteed in Article 4(1) of the *American Convention on Human Rights* (the “*American Convention*”).¹ Article 4(1) cannot be interpreted to require the criminalization of abortion, but properly interpreted, permits lawful abortion.
6. An interpretation of Article 7 of the *Baja California Constitution* consistent with Article 4(1) of the *American Convention* would not require the criminalization of abortion or the annulment of any legal provision that permits lawful abortion.

II. Interest of the Programme

7. The International Reproductive and Sexual Health Law Programme, Faculty of Law, University of Toronto, is an academic programme dedicated to improving the legal protection and promotion of reproductive and sexual health. The Programme has particular expertise in the application of equality and non-discrimination rights in the regulation of reproductive health care. It has collaborated with government and international agencies,

non-government organizations, and academic institutions to develop policies and scholarship on this subject.

III. Summary of the Argument

8. Article 4(1) of the *American Convention* provides:

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.

9. To protect against a restrictive interpretation of Article 4(1), Mexico ratified the *American Convention* with the following *Interpretive Declaration*:

With respect to Article 4, paragraph 1, the Government of Mexico considers that the expression "in general" does not constitute an obligation to adopt, or keep in force, legislation to protect life "from the moment of conception," since this matter falls within the domain reserved to the States.

10. These comments support the *Interpretive Declaration* by demonstrating that Article 4(1) of the *American Convention* cannot be interpreted to require the criminalization of abortion. Article 4(1), properly interpreted, permits lawful abortion.

11. Based on principles of treaty interpretation expressed in the *Vienna Convention on the Law of Treaties* (the *Vienna Convention*):²

- The text and structure of Article 4(1) indicates that state protection of the right to life from the moment of conception is limited not absolute.
- This limitation is informed by the object and purpose of the *American Convention* and the context of human rights protection. The right to life can be protected only in a manner consistent with the human rights and freedoms of women as guaranteed in the *American Convention* and other regional and international instruments of human rights protection.
- Article 4(1) cannot be interpreted to require the criminalization of abortion, which is inconsistent with women's rights to life and physical integrity (physical health), the right to personal and moral integrity, and the right to non-discrimination.

12. An interpretation of Article 4(1) of the *American Convention* that permits lawful abortion does not negate the right to life from the moment of conception. This right can be interpreted to require state protection consistent with the human rights and freedoms of women.

IV. Interpretation of Article 4(1) of the *American Convention* based on the principles of treaty interpretation expressed in the *Vienna Convention*

13. In the Inter-American system, the *American Convention* is interpreted according to principles of treaty interpretation in international law.³ These principles are expressed in the general and supplementary rules of interpretation in Articles 31 and 32 of the *Vienna Convention*.

14. Article 31 expresses the general rule of treaty interpretation:

31(1). A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

31(2). The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

31(3). There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

15. Article 32 expresses the supplementary rule of interpretation.

32. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

16. The interpretive principles in Articles 31 and 32 of the *Vienna Convention* are generally conceived of as four basic approaches of treaty interpretation in international law:

- the textual approach (section V),

- the purposive approach (section VI),
- the contextual approach (section VII), and
- the supplementary means approach (section VIII)

17. By reference to the four approaches of treaty interpretation in international law, these comments demonstrate that Article 4(1) of the *American Convention* cannot be interpreted to require the criminalization of abortion, but properly interpreted, permits lawful abortion.

V. The Textual Approach: The language and structure of Article 4(1) indicate that state protection of the right to life from the moment of conception is limited not absolute

18. The general rule of treaty interpretation, expressed in Article 31 of the *Vienna Convention*, indicates that interpretation should be based first and foremost on the text of the treaty:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty ...

This textual priority is recognized in the Inter-American system. The *Vienna Convention* “respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation.”⁴

19. The written text of a human rights treaty is presumed to capture the authentic expression of the rights and freedoms guaranteed therein. The textual approach of treaty interpretation insists upon a strict and detailed analysis of the language and structure in which a right or freedom is articulated.

20. The language and structure of Article 4(1) is unique in two respects. Article 4(1) indicates the temporal scope of the right to life, and qualifies the state protection required by the right to life from the moment of conception.

A. Article 4(1) guarantees the right to life from the moment of conception

21. Article 4(1) states that: “Every person has the right to have his life respected. This right shall be protected by law ... from the moment of conception.”

22. The *American Convention* is the only human rights treaty that expressly protects the right to life from the moment of conception. Other regional and international instruments of rights protection are silent to the temporal scope of the right to life. Article 2(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the “*European Convention*”),⁵ for example, states: “Everyone’s right to life shall be protected by law.”

23. There is no precedent in international law to interpret terms such as “human being” or “person” to include a fetus.⁶ In *Vo v. France*, the European Court of Human Rights explained “it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the [*European Convention*].”⁷

24. The express statement on the temporal scope of the right to life in the *American Convention* does not allow for such ambiguity. An unborn child or fetus has the right to have his or her life respected and protected by law for the purpose of Article 4(1).

B. Article 4(1) qualifies the right to life and the state protection it requires

25. In its complete articulation, Article 4(1) states that the right to life “shall be protected by law *and, in general,* from the moment of conception” (emphasis added). The Inter-American Commission has stated that the “[t]he legal implications of the clause ‘in general, from the moment of conception’ are substantially different from the shorter clause ‘from the moment of conception’.”⁸

26. The phrase “in general” qualifies the right and the protection by law it requires. The phrase “in general,” modifying the phrase “from the moment of conception,” indicates that state protection of the right to life from the moment of conception is limited not absolute.

27. The phrase “in general” expresses a limitation implied in other human rights instruments. The European Court of Human Rights, for example, stated: “... if the unborn do have a “right” to “life”, it is *implicitly limited* by the mother’s rights and interests ... in *certain circumstances* safeguards may be extended to the unborn child” (emphasis added).⁹

28. The text and structure of Article 4(1) does not establish the scope of the limitation on the right to life from the moment of conception and the state protection that it requires. These considerations cannot be determined in the abstract. According to the general rule of treaty interpretation, the phrase “and, in general, from the moment of conception” is to be interpreted in the context of the *American Convention* and in light of its object and purpose.

VI. The Purposive Approach: The object and purpose of the *American Convention* require that the interpretation of Article 4(1) not privilege any one religion, culture or tradition, and reflect the values of personal liberty, social justice and the inherent dignity and worth of all persons, including women

29. The meaning of a treaty term is not determined solely by its literal construction. Article 31(1) of the *Vienna Convention* states:

A treaty shall be interpreted ... in the light of its object and purpose.

30. The substantive articles of a treaty are infused by the distinctive character of that treaty, and are to be interpreted in light of this character. The character of a treaty, its object and purpose, can be discerned from its Preamble.

A. The Object and Purpose of the *American Convention*

31. By signing, ratifying or acceding to the *American Convention*, according to the first paragraph of its Preamble, a State:

Reaffirm[s] [an] ... intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

32. By the second paragraph of the Preamble, a State:

Recogniz[es] that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

33. By the third paragraph of the Preamble, a State recognizes:

... that these principles have been set forth in the *Charter of the Organization of American States*, in the *American Declaration of the Rights and Duties of Man*, and in the *Universal Declaration of Human Rights*, and ... in other international instruments, worldwide as well as regional in scope;

34. The Preamble establishes that the object and purpose of the *American Convention* is to consolidate, within a framework of democratic institutions, a system of personal liberty and social justice based on the protection of human rights. Human rights derive not from nationality but attributes of the human personality. The universal nature of human rights justifies and is reflected in their protection through regional and international instruments. The Preamble emphasizes the supranational character of the *American Convention* and its related object and purpose in reinforcing or complementing human rights protection in domestic law.

35. The Inter-American Court of Human Rights has referenced the language of the Preamble in describing the object and purpose of the *American Convention*. The Court has further emphasized the importance of interpreting the treaty terms in light of this object and purpose so as to give the *American Convention* its full meaning and effect:

The object and purpose of the *American Convention* is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights ... to attain its "appropriate effects."¹⁰

B. Article 4(1) in light of the object and purpose of the *American Convention*

36. Article 4(1) of the American Convention is to be interpreted in light of the object and purpose of the *American Convention*, the protection of human rights which derive from the human personality and are thus universal in nature.

Interpretation of Article 4(1) cannot privilege any one religion, culture or tradition

37. An interpretation of Article 4(1) that requires state protection of the right to life from the moment of conception in an absolute sense, including criminal laws that prohibit abortion, indicates adherence to uniquely Roman Catholic doctrine. In 1869, the Catholic Church redefined the mortal sin of abortion as applying not from ‘quickenings’, the initial motion of the fetus in the uterus generally between the twelfth and thirteenth week of gestation, but from conception.¹¹
38. Given the universal nature of human rights, the right to life from the moment of conception and the state protection that it requires under Article 4(1) of the *American Convention* cannot be interpreted in a manner that privileges any one religion, culture or tradition. Life from the moment of conception is a subject on which persons may and do hold differing views. All of these views are entitled to respect in a system of personal liberty based on respect for human rights. Article 12(1) of the *American Convention* provides: “Everyone has the right to freedom of conscience and of religion.”
39. The object and purpose of the *American Convention* is to protect the human rights of every person within its jurisdiction. In accordance with the supranational character of the *American Convention*, persons should not be denied human rights protection because they are nationals of a state that imposes through its laws and policies the belief system of any one religion, culture or tradition.

Interpretation of Article 4(1) is to reflect the values of personal liberty, social justice and the inherent dignity and worth of all persons, including women

40. The object and purpose of the *American Convention* is to protect human rights within a system of personal liberty and social justice. Human rights derive from attributes of the human personality. These attributes include the inherent dignity and worth of the human person. The interpretation of Article 4(1) is to be guided by these same values: personal liberty, social justice and the inherent dignity and worth of the human person.
41. Interpretation of the right to life from the moment of conception and state protection of this right implicate the personal liberty and inherent dignity and worth of women. As recognized in the European system, “[t]he ‘life’ of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman.”¹² State regulation of pregnancy and its termination affect the physical, mental and social health of women. The decision to terminate a pregnancy is an aspect of personal liberty and as an integral part of woman's assertion of her dignity and worth as a human being.
42. Given the object and purpose of the *American Convention*, Article 4(1) is to be interpreted in a manner that reflects the inherent dignity and worth of women as human persons, equally entitled to respect and protection of their rights and freedoms as guaranteed in the *American Convention* and other instruments of human rights protection.

VII. The Contextual Approach: Article 4(1) can be interpreted only in a manner consistent with the human rights and freedoms of women as guaranteed in the *American Convention* and other instruments of human rights protection

43. The general rule of treaty interpretation emphasizes that the terms of a treaty are to be interpreted in their context. Article 31(1) of the *Vienna Convention* states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context ...

44. Context is defined by Article 31(2) of the *Vienna Convention* as comprising:

- A. the text of the treaty, including its preamble and annexes;
- B. agreements or instruments relating to the treaty

45. Additional to the context of the treaty itself, Article 31(3) of the *Vienna Convention* states that account should be taken of a broader context comprising:

- any agreement regarding the interpretation or application of the treaty;
- any practice in the application of the treaty;
- any relevant rules of international law

Article 31(3) reflects the interpretive principle of coherence, which requires that a treaty be interpreted and applied within broader systems of human rights protection.

A. The Contexts of Treaty Interpretation and the *American Convention*

46. The *American Convention* is to be read as a whole and consistently with its object and purpose, and to be applied consistently with other instruments of regional and international human rights protection.

47. The following contexts are thus relevant to the interpretation of the *American Convention*:

- the context of the *American Convention*;
- the context of the Inter-American human rights system;
- the context of international human rights law

The Context of the *American Convention*

48. The *American Convention* is to be interpreted as a whole, with its substantive articles working together in a consistent framework of human rights protection. Article 29(a) of the *American Convention* reflects this interpretive principle of internal consistency.

No provision of this Convention shall be interpreted as ... permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein....

49. There is no hierarchy of rights and freedoms in the *American Convention*. All are of equal value and interrelated. No single right or freedom can be interpreted in isolation from another. No interpretation of a single right or freedom can suppress or unduly restrict the enjoyment or exercise of another. The interpretive principle of internal consistency requires that the substantive articles of the *American Convention* be interpreted to avoid any incompatibility among the rights and freedoms protected therein.

The Context of the Inter-American Human Rights System

50. The Preamble of the *American Convention* situates the convention within a regional system of human rights protection. Its underlying principles:

have been set forth in the ... *Charter of the Organization of American States*, [and] in the *American Declaration of the Rights and Duties of Man*.

These instruments, as well as other treaties adopted and ratified in the Inter-American region, such as the *Convention on the Prevention, Punishment and Eradication of Violence against Women*,¹³ inform the interpretation of the *American Convention*.

51. The interpretation of the *American Convention* is also informed by the opinions and reports of institutions that monitor and enforce compliance with, and therefore apply in practice, the terms of these regional treaties. These institutions include:

- A. the Inter-American Commission and Court
- B. the Inter-American Commission of Women (CIM);
- C. the Special Rapporteur on the Status of Women in the Americas (Special Rapporteur);

The CIM and the Special Rapporteur focus on the protection of women's human rights.

52. The Inter-American Court of Human Rights has recognized that the *American Convention* cannot be interpreted apart from this regional system of human right protection:

The meaning of [a] ... word in the context of a system for the protection of human rights cannot be disassociated from the nature and origin of that system.¹⁴

The Context of International Human Rights Law

53. The *American Convention* situates the treaty within the context of international human rights law. As stated in its Preamble, the underlying principles of the *American Convention* have been set forth:

... in the *Universal Declaration of Human Rights*, and ... have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.

Article 29 of the *American Convention* on restrictions regarding interpretation states:

No provision of this Convention shall be interpreted as: ...

2. restricting the enjoyment or exercise of any right or freedom recognized ... by virtue of another convention to which one of the said states is a party; ...

4. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

54. The Inter-American Court has adopted in practice the interpretive principle of coherence, whereby the articles of the *American Convention* are applied consistently with other instruments of international human rights protection. The Court has perceived in the *American Convention*:

A certain tendency to integrate the regional and universal systems for the protection of human rights.¹⁵

In its interpretation of the *American Convention*, the Inter-American Court has adopted interpretations of parallel provisions in regional and international human rights treaties.¹⁶

B. Article 4(1) in the contexts of the *American Convention*

55. The right to life from the moment of conception in Article 4(1) cannot be interpreted to require a state to suppress the enjoyment or exercise of any other right or freedom in the *American Convention*. The interpretive principles of internal consistency and coherence require that Article 4(1) be interpreted to avoid any incompatibility among rights and freedoms protected in the *American Convention*, the Inter-American human rights system and international human rights law.

56. The right to life from the moment of conception and state protection of this right implicate the human rights and freedoms of women. The recognition and protection of women's human rights is an important objective of regional and international human rights systems.

57. The Inter-American human rights system has long recognized the formal rights of women. Established in 1928, the CIM was the first official intergovernmental agency worldwide to ensure recognition of women's civil and political rights. Since 1995, the Inter-American Commission has dedicated a chapter on the condition of women in its country reports. In its 1997 Annual Report, the Commission presented a report on the status of women in the Americas.¹⁷ In 1998, the Twenty-ninth Assembly of Delegates of the CIM adopted the *Declaration of Santo Domingo*, which declared:

the rights of women throughout their entire life cycle are an inalienable, integral, and indivisible part of universal human rights ... it is imperative to ensure the observance of the human rights of women ... and to recognize women's legal capacity and equality under the law.¹⁸

58. International human rights treaties guarantee equality between men and women in the enjoyment and exercise of human rights. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) is an international human rights treaty dedicated to the elimination of discrimination against women in all its forms and manifestations.¹⁹

59. Pursuant to the contextual approach of treaty interpretation, the right to life under Article 4(1) of the *American Convention* can be protected only in a manner consistent with the human rights and freedoms of women as guaranteed in the *American Convention* and other regional and international instruments of human rights protection. For this reason, Article 4(1) cannot be interpreted to require the criminalization of abortion. Criminal abortion laws are incompatible with the following human rights of women:

- The rights to life and physical integrity (physical health);
- The right to personal and moral integrity;
- The right to non-discrimination

The Rights to Life and Physical and Mental Integrity

60. Women enjoy an equal right to have their lives respected and protected by law under Article 4(1) of the *American Convention*. Women are also entitled to the right and protection of Article 5 of the *American Convention*:

Every person has the right to have his physical, mental and moral integrity respected.

61. The adverse effect of criminal abortion laws on the lives and physical and mental integrity of women worldwide is well-documented. Criminal laws do not restrict access to abortion. They restrict access to *safe* abortion.²⁰ It estimated that every year almost four million unsafe abortions are performed in Latin America.²¹ 17% of all maternal deaths in the region, the equivalent of thousands of deaths every year, are attributable to unsafe abortion.²² In Mexico, criminal laws lead hundreds of thousands of women every year to seek unsafe abortions.²³ Abortion-related complications are a leading cause of maternal death among Mexican women.²⁴

62. Human rights treaty monitoring bodies have recognized the contribution of criminal abortion laws to unsafe abortion and related maternal mortality and morbidity,²⁵ and declared such laws inconsistent with and in violation of women's right to life and health.²⁶ Under CEDAW, states have been called upon to withdraw punitive legal measures imposed on women who undergo abortion.²⁷

The Right to Moral and Personal Integrity

63. In its 1999 Report on Colombia, the Inter-American Commission described unsafe abortion as “a very serious problem for Colombian women, not only from a health perspective, but also considering their rights as women, which include the rights to personal integrity and to privacy.”²⁸
64. Criminal abortion laws constitute a profound interference with the moral and personal integrity of women. Criminal abortion laws limit the capacity of women to make autonomous decisions about their health care, and their private and family lives, according to their health needs and personal conscience. Criminal laws obstruct a woman from accessing abortion services unless she meets criteria unrelated to her own best health interests, priorities and aspirations.
65. As recognized by the Inter-American Court, the *American Convention* protects a:

... concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset ...²⁹

The Right of Non-Discrimination

66. Discrimination is prohibited under the *American Convention* and by all regional and international human rights instruments. Article 1(1) establishes a general obligation on the state:

to ensure to all persons ... the free and full exercise of those rights and freedoms [recognized in the *American Convention*], without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 24 of the *American Convention* provides:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

67. Human rights treaty monitoring bodies have interpreted criminal abortion laws as constituting discrimination against women.³⁰ Under CEDAW, “laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures” constitute discrimination against women in the field of health care.³¹ Criminal abortion laws restrict access to services that are distinctive to women's health needs, and that enable the reduction of maternal mortality and morbidity.
68. Criminal abortion laws constitute discrimination for reason of sex, contrary to Article 1(1), because they deny women the free and full exercise of rights and freedoms recognized in the *American Convention* and other regional and international instruments. These rights include, for example, the right to life, the right to health and the right to moral integrity.
69. Criminal abortion laws violate Article 24 by failing to ensure equality before the law without discrimination on the compounded basis of sex, race, age, income and other social conditions. Women belonging to vulnerable and disadvantaged groups are in practice disproportionately affected by criminal laws. Human rights treaty monitoring bodies have commented on the high rates of abortion-related maternal mortality among poor, rural, indigenous and Afro-descendent women,³² and the link between high rates of unsafe abortion and poverty, exclusion and a lack of access to information, among other causes.³³ In Mexico, women belonging to socio-economically advantaged groups tend to circumvent the law through private providers or by traveling abroad, while poor women and women with low levels of education are more likely to resort to unsafe abortion.³⁴
70. Given that criminal abortion laws are inconsistent with women's rights to life and physical integrity, personal and moral integrity and non-discrimination, the right to life from the moment of conception under Article 4(1) of the *American Convention* cannot be interpreted to require state protection in the form of criminal abortion laws.

VIII. The Supplementary Means Approach: The preparatory work of the *American Convention* confirms that Article 4(1) cannot be interpreted to require the criminalization of abortion

71. To confirm the meaning of Article 4(1) of the *American Convention* resulting from the textual, purposive and contextual approaches of treaty interpretation, Article 32 of the *Vienna Convention* allows recourse:

to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

72. The Inter-American Commission rejected an interpretation of Article 4(1) as establishing absolute state protection of the right to life from the moment of conception based on the preparatory work of the *American Convention*.³⁵ In light of the preparatory history, the phrase “in general, from the moment of conception” was intended to strike a balance between protecting of fetal life and allowing lawful abortion.

73. The preparatory work of the *American Convention*, as a supplementary means of interpretation, confirms that the right to life from the moment of conception under Article 4(1) cannot be interpreted to require the criminalization of abortion, but properly interpreted, permits lawful abortion.

IX. Article 4(1) of the *American Convention* can be interpreted to require state protection consistent with the human rights and freedoms of women

74. An interpretation of Article 4(1) of the *American Convention* that permits lawful abortion does not negate the right to life from the moment of conception. Criminal abortion laws are neither the sole nor most effective means of state protection. The high rates of unsafe abortion and maternal mortality and morbidity related to criminal abortion laws speaks to the ineffectiveness of such measures.

75. The right to life from the moment of conception can be interpreted to require state protection consistent with the human rights and freedoms of women. Article 4(1) can be interpreted to require, for example, the provision of safe motherhood services and prenatal assistance,³⁶ the reduction of spontaneous miscarriages, including recurrent miscarriages, and, welfare measures to ease the social and economic burdens of pregnant women.³⁷ States parties may also be required to enact measures to reduce the need for abortion by ensuring that appropriate family planning and contraceptive services are available and accessible.³⁸

X. Conclusion

76. We respectfully request that the *Supreme Court of Mexico* interpret the amendment to Article 7 of the *Baja California Constitution* consistently with the right to life from the moment of conception as guaranteed in Article 4(1) of the *American Convention*.

77. Based on principles of treaty interpretation expressed in the *Vienna Convention*, an interpretation of Article 7 of the *Baja California Constitution* consistent with Article 4(1) of the *American Convention* cannot require the criminalization of abortion or the annulment of any legal provision that permits lawful abortion.

¹ *American Convention on Human Rights*, 22 November 1969, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 19 July 1978, ratification by Mexico 24 March 1981) [hereinafter *American Convention*]. This practice was recently adopted by the Colombia Constitutional Court, which interpreted the right to life consistently with the state's human rights treaty obligations. The Court explained that the state may only protect prenatal life in a manner compatible with the rights of women, including their rights to life and health as protected by the Colombian *Constitution* and international human rights treaties *In re Abortion Law Challenge*, Corte Constitucional de Colombia, Sentencia C-355/06 (10 de mayo de 2006).

² *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980, ratification by Mexico 25 September 1974).

³ See e.g. *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)* (1983), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (Ser. A) No. 3. In order to ascertain the meaning and scope of Articles 4(2) and 4(4) of the *American Convention*, the Inter-American Court applied the rules of interpretation set out in the *Vienna Convention*, which it deemed to state the relevant international law principles applicable to treaty interpretation.

⁴ *Ibid* at para. 50.

⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953).

⁶ P. Alston, "The Unborn Child and Abortion under the Draft Convention on the Rights of the Child" (1990) 12 *Hum. Rts. Q.* 156 at 170.

⁷ *Vo v. France*, (2005) 40 E.H.R.R. 12 at para 85.

⁸ *Case 2141*, (1981) Inter-Am. Comm. H.R. No. 23/81, Annual report of the Inter-American Commission on Human Rights: 1980-81, OEO/ser. L/V/1154, Doc. 9 rev.1 at para. 30.

⁹ *Vo v. France*, *supra* note 7 at para. 80.

¹⁰ *Fairén Garbí and Solís Corrales*, (1994), Inter-Am.Ct.H.R. (Ser. D) No. 2. at para. 35.

¹¹ See R.J. Cook & B.M. Dickens, "Human Rights Dynamics of Abortion Law Reform" (2003) *Hum. Rts. Q.* 1 at 9, translated into Spanish: "Dinámicas de los derechos humanos en la reforma de las leyes del aborto". Online: <<http://www.gire.org.mx/phpnuke/modules.php?name=prueba&opgire=61>> (date accessed: 12 April 2009).

¹² *Paton v United Kingdom (X v United Kingdom)* (1980) 19 DR 244; (1981) 3 EHRR 48 at para 19.

¹³ *Convention on the Prevention, Punishment and Eradication of Violence against Women*, 9 June 1994, 33 I.L.M. 1534 (entered into force 5 March 1995, ratification by Mexico 19 June 1998).

¹⁴ *The Word "Laws" in Article 30 of the American Convention on Human Rights* (1986), Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (Ser. A) No. 6. at para. 21.

¹⁵ "Other Treaties" *Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)* (1982), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (Ser. A) No. 1 at para. 41.

¹⁶ In *Villagran Morales et al. Case (The "Street Children" Case)* (1997), Preliminary Objections, Inter-Am. Ct. H.R. (Ser. C) No. 32, the Inter-American Court referred to the European Court of Human Rights' jurisprudence to interpret parallel provisions in the *American Convention*.

¹⁷ Inter-American Commission on Human Rights. *Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas*. OEA/Ser.L/V/II.100, Doc. 17 (1998).

¹⁸ CIM/RES. 195 (XXIX-O/98), (adopted 18 November 1998).

¹⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, 18 Dec 1979, GA Res. 34/180, UN GAOR, 34th Sess, Supp. No. 46 at 193 (entered into force 3 Sept 1981, ratification by Mexico 23 March 1981).

²⁰ World Health Organization (WHO). *Unsafe abortion: global and regional estimates of incidence of unsafe abortion and associated mortality in 2000*. 4th ed. (Geneva: WHO, 2004).

²¹ *Ibid*. at 13-14.

²² *Ibid*. at 13.

²³ D. Walker et al. "Deaths from Complications of Unsafe Abortion: Misclassified Second Trimester Deaths" (2004) 12(24 Supp) *Reproductive Health Matters* 27 at 27.

²⁴ *Concluding Observations of the Committee on the Elimination of Discrimination against Women* (which monitors state compliance with CEDAW): *Mexico*, U.N. Doc. A/61/380 (2006) at para 613: "The Committee notes with concern that abortion remains one of the leading causes of maternal deaths." See also: Secretaría de Salud. *Mortalidad materna en México 2002, 2003, 2004* (Mexico City: Secretaría de Salud, 2004).

²⁵ See e.g. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Peru*, U.N. Doc. CEDAW/C/PER/CO/6 (2007) at para 24; Paraguay, U.N. Doc. A/60/38 (2005) at para 287; Chile, U.N. Doc. A/54/38, (1999) at para. 228. *Concluding Observations of the Human Rights Committee* (which monitors state compliance with the *U.N. International Covenant on Civil and Political Rights*) Bolivia, U.N. Doc. CCPR/C/79/Add.74 (1997) at para 22; Colombia, U.N. Doc. CCPR/CO/80/COL (2004) at para 13; Costa Rica, U.N. Doc. CCPR/C/79/Add.107 (1999) at para 11. *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (which monitors state compliance with the *International Covenant on Economic, Social and Cultural Rights*): Mexico, U.N. Doc. E/C.12/MEX/CO/4 (2006) at para 25; Brazil, U.N. Doc. E/C.12/1/Add.87 (2003) at para 27; Chile, U.N. Doc. E/C.12/1/Add.105 (2004) at para 26.

²⁶ See e.g. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Belize*, CEDAW, 01/07/99, U.N. Doc. A/54/38: "... the Committee notes that the level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its women citizens" (para. 56); *Colombia*, CEDAW, 05/02/99, U.N. Doc. A/54/38/Rev.1: "The Committee notes with great concern that abortion, which is the second cause of maternal deaths in Colombia, is punishable as an illegal act ... The Committee believes that legal provisions on abortion constitute a violation of the rights of women to health and life and of article 12 of the Convention" (para. 393).

²⁷ U.N. Committee on the Elimination of all forms of Discrimination against Women, *General Recommendation No. 24. Women and Health*. UN Doc. A/54/38/Rev.1 (1999) at para. 31(c). *General Recommendation No. 24* is an authoritative commentary on aspects of Article 12(1) of CEDAW, which requires "States Parties ... [to] take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services."

²⁸ OAS, Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, "Chapter XII – The Rights of Women", OEA/Ser.L/V/II.102, Doc. 9 Rev. 1 (1999) at para. 49.

²⁹ *Reparations (Art. 67 American Convention on Human Rights)*, (1999) Inter-Am. Ct. H.R. (Ser.C) No. 42 at para. 148.

³⁰ *Concluding Observations of the Human Rights Committee*: Ecuador, U.N. Doc. CCPR/C/79/Add.92 (1998) at para. 11; Peru, U.N. Doc. CCPR/C/79/Add.72 (1996) at para. 15; *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Colombia*, U.N. Doc. A/54/38 (1999) at para. 393.

³¹ *General Recommendation No. 24*, *supra* note 27 at para. 13.

³² See e.g. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Colombia*, CEDAW, UN Doc. CEDAW/C/COL/CO/6 (2007), at para. 22.

³³ See e.g. *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Brazil*, CEDAW, UN Doc. A/58/38 at para. 126; *Ethiopia*, CEDAW, U.N. Doc. A/59/38 (2004) at para. 257. *Concluding Observations of the Human Rights Committee: Argentina*, U.N. Doc. CCPR/CO/70/ARG (2000) at para. 14.

³⁴ A. Kulczycki. "The Abortion Debate in Mexico: Realities and Stalled Policy Reform" (2007) 26(1) *Bulletin of Latin American Research* 50, 53.

³⁵ *Case 2141*, *supra* note 8.

³⁶ See e.g. *General Recommendation No. 24*, *supra* note 27 at para. 31(c). *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Chile*, CEDAW, U.N. Doc. A/61/38 (2006) 216: "The Committee also calls on the State party to reduce maternal mortality rates through safe motherhood services and prenatal assistance" (para. 314).

³⁷ See R.J. Cook & S. Howard. "Accommodating Women's Differences under the Women's Anti-Discrimination Convention" (2007) 56(4) *Emory L.J.* 1039, 1050.

³⁸ *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Nicaragua*, CEDAW, UN Doc. CEDAW/C/NIC/CO/6 (2007): "It [the Committee] requests the State party ... to take measures to ensure that women do not seek unsafe medical procedures, such as illegal abortion, because of the lack or inaccessibility, including due to cost, of appropriate family planning and the contraceptive services" (para. 18).