

**The Interpretation of Article 4(1) of the American Convention on Human Rights  
Consistently with the Human Rights of Women**

by

Joanna Erdman, J.D.

Fellow, International Programme on Reproductive and Sexual Health Law  
and

Rebecca J. Cook, J.D. J.S.D., F.R.S.C.

Professor of Law, & Faculty Chair in International Human Rights

International Programme on Reproductive and Sexual Health Law

Faculty of Law

University of Toronto

84 Queen's Park

Toronto, Ontario Canada M5S 2C5

Tel: 416-978-1751, Fax: 416-978-7899

May 16, 2005

## TABLE OF CONTENTS

1. Introduction
2. The *Vienna Convention*: A Framework of Interpretation
  - a. The Textual Approach: “in general, from the moment of conception”
  - b. The Purposive Approach: The Object and Purpose of the *American Convention*
    - i. The Supranational Character of the *American Convention*
    - ii. The Protection of Personal Liberty, Social Justice and the Basic Attributes of the Human Personality
  - c. The Contextual Approach: the *American Convention*, the Inter-American System and the International System
    - i. The Scope of Article 4(1) in Context
    - ii. Article 4(1) - A Woman’s Right to Life
    - iii. Article 5 - Woman’s Right to Physical, Mental, and Moral Integrity and the Right not to be Subjected to Cruel, Inhuman and Degrading Treatment.
    - iv. Articles 1(1) & 24 - Right to Non-Discrimination and Due Respect for Difference
  - d. Supplementary Means of Interpretation
3. Conclusion: Interpreting Article 4(1) Compatibly with the Human Rights of Women

Table of Cases

## 1. Introduction

The World Health Organization (WHO) estimates that each year almost 4 million unsafe abortions are performed in Latin America.<sup>1</sup> Each year, thousands of Latin American women die from complications related to unsafe abortions, accounting for 17% of all maternal deaths in the region.<sup>2</sup> Unsafe abortion is the second leading cause of maternal mortality in Colombia.<sup>3</sup> Many more women in Colombia specifically and in Latin America generally suffer chronic health complications, including sepsis, pelvic trauma, and sterility. Moreover, women are often unwilling to risk prosecution to obtain post-abortion care.

The Colombian Penal Code, Article 343, defines abortion as a crime against life and personal integrity and prohibits it without exception.<sup>4</sup> Abortion is even criminalized in cases where a woman has become pregnant as the result of rape. Despite these strict criminal provisions, some 450,000 abortions are performed annually in Colombia. Criminal laws do not restrict access to abortion. They only prohibit access to *safe* abortion.

Given that millions of preventable and premature deaths and injuries are the consequences of criminal prohibitions on access to abortion, it cannot be argued that international human rights law requires the enactment of such criminal laws. Nevertheless, some States Parties to the *American Convention on Human Rights* (the *American Convention*)<sup>5</sup> defend their criminal sanctions as necessary to protect the “right to life” as guaranteed in the Article 4(1). It provides that the 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.”

It is claimed that because Article 4(1) is a non-derogable right, the termination of pregnancy must be strictly prohibited to protect life of the fetus from the moment of conception. Article 4(1), it is argued, demands heavily restrictive if not prohibitive criminal abortion laws.

Our submission demonstrates the incorrectness of this interpretation. According to the principles of treaty interpretation embodied in the *Vienna Convention on the Law of Treaties* (the *Vienna Convention*),<sup>6</sup> Article 4(1) of the *American Convention* permits legal abortion. The right to life as

---

<sup>1</sup> World Health Organization. *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000*. Geneva WHO, 2004. Full references available at: [http://www.who.int/reproductivehealth/publications/unsafe\\_abortion\\_estimates\\_04/estimates.pdf](http://www.who.int/reproductivehealth/publications/unsafe_abortion_estimates_04/estimates.pdf)N.

<sup>2</sup> SOURCE

<sup>3</sup> SOURCE

<sup>4</sup> SOURCE

<sup>5</sup> American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). Online: <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (last accessed May 20, 2003).

<sup>6</sup> 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980. The *Vienna Convention* has been widely signed and ratified. Even countries that have failed to ratify the *Vienna Convention*, generally view it as binding by way of its ascension as a customary norm of international law.

guaranteed in the *American Convention* is a qualified right. The phrase "in general" indicates that Article 4(1) does not protect life from the moment of conception in its absolute sense or in all of its dimensions. Limits on the scope of Article 4(1) are discernable by reference to the object and purpose of the *American Convention*, as well as the immediate and broader context in which the right is found and the relationships between it and the other provisions in the *American Convention*.

These considerations demonstrate that the scope of Article 4(1) extends to the protection of prenatal life in ways that are compatible with women's rights guaranteed by the *American Convention*, for example, to require state provision of prenatal care, nutrition and essential obstetric care. The Article, however, cannot sustain an interpretation that extends the scope of the right to life to force a woman to continue a pregnancy by denying access to a health care procedure. The *American Convention* cannot bear an interpretation that would compel women under threat of criminal sanction to continue a pregnancy or to otherwise risk their health and lives to obtain an illegal and unsafe abortion.

Such an interpretation is contrary to the object and purpose of the *American Convention*, foremost among them, respect for personal liberty, social justice and equality, and the inherent worth and dignity of the human person. The *American Convention* is designed to protect the human rights of all persons without discrimination, and cannot be construed to violate the rights of women to liberty and security of the person, freedom from inhuman and degrading treatment as well as non-discrimination and due respect for difference.

## 2. The *Vienna Convention*: A Framework of Interpretation

The Inter-American Commission on Human Rights (the "Commission") and the Inter-American Court of Human Rights (the "Inter-American Court") routinely interpret the scope and interrelation of articles in the *American Convention* according to the general and supplementary rules of interpretation outlined in Articles 31 and 32 of the *Vienna Convention*.<sup>7</sup>

Article 31.1 provides that 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 light of its object and purpose."

Where necessary, Article 32 allows recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." Article 32 explains that the supplementary means are available only to confirm a meaning derived from the general rules of interpretation or to determine a meaning where Article 31 has "left a meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."

---

<sup>7</sup> Inter-American Court of Human Rights, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983) at para 48. In this case the Court was asked to deliver an interpretation of the last sentence of Article 4(2) (conditional use of the death penalty) of the American Convention on Human Rights. It held that that the Convention imposes an absolute prohibition on the extension of the death penalty.

The *Vienna Convention* offers a flexible instrument of interpretation rather than a fixed code. It embodies basic principles of interpretation, foremost among them, the importance of interpreting the words of a treaty in their context and not in the abstract. These principles are generally conceived of as interpretive approaches: the textual approach, the purposive approach, the contextual approach, and the use of supplementary means approach.

This brief employs the four interpretive approaches to establish the scope of Article 4(1) of the *American Convention*, and to demonstrate that the phrase “in general, from the moment of conception” requires an interpretation of the right to life that facilitates access to safe, legal abortion.

a. The Textual Approach: “in general, from the moment of conception”

The textual approach emphasizes “the ordinary meaning to be given to the terms of the treaty.” As recognized by the Inter-American Court, the *Vienna Convention* “respects the principle of the primacy of the text ... objective criteria of interpretation that look to the texts themselves ... [rather] than subjective criteria that seek to ascertain only the intent of the Parties”.<sup>8</sup> The written text of the *American Convention* is thus presumed to capture the authentic expression of the rights and freedoms protected therein. As such, the textual approach to treaty interpretation calls for a strict and detailed analysis of the language, phraseology and structure chosen to articulate a right or freedom.

The construction of Article 4(1) is notably distinct. The right to life of every “person” is protected “in general, from the moment of conception.” The *American Convention* is the only regional human rights instrument that expressly protects the right to life “from the moment of conception.” Other regional and international instruments are silent as to any temporal limitations on the right to life.<sup>9</sup> Moreover, in international law, there is no precedent for interpreting terms such as 'human being' or 'person,' to include a fetus.<sup>10</sup> In the recent case of *Vo v. France*, for example, the European Court of Human Rights held that

---

<sup>8</sup> **Joanna...I am confused about this fn????** *Restriction to the Death Penalty*, supra note X at para 50. The Inter-American Court also relied upon the textual approach in the *Right to Reply* case Advisory Opinion Oc-7/85 of August 29, 1986, *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)* requested by the Government of Costa Rica.

<sup>9</sup> For example, Article 2 of the *European Convention on Human Rights* provides that “Everyone's right to life shall be protected by law.” Article 6 of the *International Covenant on Civil and Political Rights* recognizes that “Every human being has the inherent right to life”. Article 3 of the *Universal Declaration on Human Rights* guarantees that “[e]veryone has the right to life, liberty and security of person.” During debates on this provision, two amendments were submitted to apply the article “from the moment of conception.” The General Assembly refused to adopt these amendments and preferred a general formula not addressing this issue. Relationship Between Human Rights and Population Issues: Standard-Setting Activities of the United Nations Organization, U.N. ESCOR, Population and Human Rights: Proceedings of the Expert Group Meeting on Population and Human Rights, at 54, U.N. Doc. ST/ESA/SER.R/107 (1989)

<sup>10</sup> Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 Hum. Rts. Q. 156, 173 (1990) at 170.

“it is neither desirable, not 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 Convention [the right to life].”<sup>11</sup>

The language of the *American Convention* confirms that, in the abstract, life is protected from the moment of conception. However, the phraseology of the Article 4(1) also confirms that in practice the scope of protection afforded to fetal life is not absolute. Rather, the right to life is protected “*in general*, from the moment of conception” (emphasis added). The deliberate insertion of the phrase “in general” qualifies the right to life. It indicates that the provision does not protect life from the moment of conception in its absolute sense or in all of its dimensions.

Dictum from the European Court lends support to the interpretation of this construction. In *Vo*, the majority of the Court recognized that if the right to life under the *European Convention on Human Rights* (the *European Convention*) extends to the fetus, it is an implicitly qualified right:

... if the unborn do have a “right” to “life”, it is implicitly limited by the mother’s rights and interests ... [t]he Convention institutions have not ... ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child”[emphasis added].<sup>12</sup>

Judge Rozakis in his separate opinion similarly recognized that:

Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth ... this protection ... [is] distinct from that given to a child after birth, and far narrower in scope.<sup>13</sup>

While the phrase “in general” does not elucidate the parameters of the right, the broad language in which Article 4(1) is formulated cannot be taken to mean that there are no discernable limits on the right of life from the moment of conception. The question of scope cannot be answered abstractly. Rather, limits implicit in the terms of Article 4(1) are best discerned by reference to the object and purpose of the *American Convention*, as well as the context in which the right is found and the relationships between it and the other articles in the *American Convention*. The interpretation of the scope of Article 4(1) must be guided by these considerations to preserve the coherence of the *Convention* text and to maintain the integrity of the Inter-American human rights system.

#### b. The Purposive Approach: The Object and Purpose of the *American Convention*

Under the *Vienna Convention*, the “ordinary meaning” of a provision is not determined solely by its literal construction. Rather, a provision must be interpreted in light of the object and purpose of the treaty in which it is embodied. It must be read in a manner consistent with the distinctive

---

<sup>11</sup> *Vo v. France* concerned ... The case was decided on the basis that even if ...

<sup>12</sup> *Vo* majority

<sup>13</sup> Rozakis

character of a treaty, which infuses all of the substantive provisions. The object and purpose are largely discerned from the text of the treaty itself, and its preamble.

According to the first paragraph in the preamble, the purpose of the *American Convention* is “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.” The second paragraph further recognizes that “the essential rights of man” justify international protection precisely because they “are not derived from one's being a national of a certain state, but are based upon attributes of the human personality.”<sup>14</sup> The third paragraph emphasizes the supranational character of the *American Convention* by explicitly situating it in the international context. It states that the principles embodied in the 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.”

In *Fairén Garbi and Solas Corrales*,<sup>15</sup> the Inter-American Commission further confirmed that the purpose of the *American Convention* is the “effective protection of human rights.” The Commission continued that:

[t]he *Convention* must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its "appropriate effects."

In summary, the attributes of the human person are the essence of the *American Convention*. Its object and purpose is to establish a system of protection of personal liberty and social justice wherein the essential rights and freedoms of individual human beings, by virtue of their human person alone, and irrespective of their nationality, are *effectively* protected. Effective protection requires that human rights and freedoms are not merely recognized in law, but can be meaningfully exercised in practice.

#### (i) The Supranational Character of the *American Convention*

The scope of Article 4(1) must be read in a manner consistent with the distinctive character of a human rights instrument. The preamble confirms that the object and purpose of the *American Convention* is the protection of the individual, and not the interest of any contracting state. The *American Convention* therefore protects every individual within its jurisdiction irrespective of nationality. Moreover, its rights and freedoms are universal in nature as underscored in the *American Declaration of the Rights and Duties of Man*, the *Universal Declaration of Human Rights* and other regional and international human rights instruments.

Given the *American Convention*'s supranational character, Article 4(1) cannot be interpreted in a manner that privileges any particular religion, culture or tradition. It must be interpreted to

---

<sup>14</sup> In *Restrictions to the Death Penalty*, the Inter-American Court likewise confirmed: “the object and purpose [of human rights treaties] is the protection of the basic rights of individual human beings, irrespective of their nationality.”

<sup>15</sup> IACHR 1 (26 June 1987).

protect the freedom of conscience and religion of all people. It cannot be interpreted in a way that allows those of one religious faith to impose that faith on others.

The construction of Article 4(1) to protect life from the moment of conception as an absolute guarantee indicates an adherence to a uniquely Roman Catholic doctrine.<sup>16</sup> Catholic doctrine, however, cannot dictate the interpretation of a human rights instrument. The interpretation of the *American Convention* is not a moral or religious endeavour. It is a question of the legal protection of rights according to the object and purpose of the *American Convention*.

If the rights and freedoms guaranteed the *American Convention* are to be effectively protected, their interpretation cannot depend upon the tenets of one religion or the will of a majority. Rather, the interpretation the right to life must remain within the legal sphere and facilitate the respect of the beliefs of conscience or religion of all. Article 12 of the American Convention specifically explains that “Everyone has the right to freedom of conscience and religion (emphasis added).” Women too have a right to exercise their conscience. Moreover, they should not be denied access to safe and legal abortion simply because they are nationals of a country that facilitates the imposition of one religious doctrine at the expense of their freedom of conscience and religion.

#### (ii) The Protection of Personal Liberty, Social Justice and the Basic Attributes of the Human Personality

The *American Convention* is predicated on respect for personal liberty, social justice and equality, and the basic attributes – the inherent worth and dignity - of the human person. The scope of Article 4(1) must be guided by these very same values and principles. Given that fetal “life” is intimately connected with, and cannot be regarded in isolation from, the lives of pregnant women, any interpretation of the right to life from the moment of conception will impact upon the rights and interests of the pregnant woman.

The decision of a woman to reproduce or not to reproduce has profound psychological, economic and social consequences. The circumstances giving rise to a pregnancy, its continuation or its termination, are complex and varied. It is a decision that is properly perceived “as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being”<sup>17</sup> (emphasis in the original).

An interpretation of Article 4(1) that restricts access to abortion and thereby compels a woman under threat of criminal sanction to continue a pregnancy denies women the freedom to make informed decisions about matters of fundamental personal importance. That is, “[f]orcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria

---

<sup>16</sup> In 1869, the Catholic Church redefined the mortal sin of abortion as applying not simply from ‘quickening’, which generally occurred between the twelfth and thirteenth week of gestation, but from conception. Conception is Roman Catholic doctrine is thus recognized as the moment when god gives life to the “unborn.” See R.J. Cook and B.M. Dickens, “Human Rights Dynamics of Abortion Law Reform” (2003) Hum. Rts. Q. 1 at 9.

<sup>17</sup> *R v. Morgentaler* (1988) 44 DLR (4<sup>th</sup>) 385 (Supreme Court of Canada) at 491 (per Justice Bertha Wilson).



unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."<sup>18</sup>

The freedom to make decisions of fundamental personal importance without state interference is a quintessential aspect of personal liberty, a principle that underlies the object and purpose of the *American Convention*. Liberty in a democratic society does not require the state to approve the personal decisions made by its citizens. It only requires the state to respect them.

### **c. The Contextual Approach: The American Convention, The Inter-American System and The International System**

Article 31 of the *Vienna Convention* requires that the words of a treaty be interpreted in their context. The term "context" is defined in Article 31(2) as comprising the treaty text, including its preamble and annexes, as well as, agreements and instruments related to the treaty and made in connection with its conclusion.

In addition, the *Vienna Convention* recognizes a broader framework that surrounds and provides meaning to the words of a treaty. Article 31(3) states that:

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.

These provisions recognize concentric contexts that inform the interpretation of the *American Convention*: the context of the treaty and its related agreements and instruments, the regional context of the Inter-American human rights system, and the broader context of international human rights law.

The contextual approach presumes that the provisions of the *American Convention* are intended to work together in a consistent framework of human rights protection. There is no hierarchy of rights. Rather, all articles are of equal value and interrelated. Therefore, no single right can suppress or exclude the operation of another, nor is any one right interpretable in isolation from the others. The interpretive principle of internal consistency is explicitly recognized in Article 29(a) of the *American Convention*, which provides that:

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

---

<sup>18</sup> *Ibid* at 402, Chief Justice Brian Dickson.

freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein....

The *American Convention* should thus be construed, if at all possible, to avoid any inconsistency or incompatibility between its provisions.

The interpretive principle of coherence also applies to the relationship between the *American Convention* and the regional and international human rights systems that surround it. In *The Word "Laws"* case,<sup>19</sup> the Inter-American Court stated that “[t]he 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.”<sup>20</sup>

The contextual approach recognizes the *American Convention* as an indivisible part of the Inter-American system of human rights system. The provisions of related human rights treaties adopted and ratified in the region inform the interpretation of the *American Convention*. These treaties include, among others, the *Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights*,<sup>21</sup> and the *Convention on the Prevention, Punishment and Eradication of Violence against Women*.<sup>22</sup> The interpretation of the *American Convention* is also guided by the opinions and reports of various regional bodies and specialized organizations that monitor and enforce OAS member states’ compliance with human rights obligations. These include, among others, the Commission and Court, as well as the Inter-American Commission of Women (CIM) and the Special Rapporteur on the Status of Women in the Americas (“Special Rapporteur”). The CIM the Special Rapporteur are intended to specifically monitor and promote the protection of women’s human rights in the region.

In the *Other Treaties* case<sup>23</sup>, the Inter-American Court also recognized that “[a] certain tendency to integrate the regional and universal systems for the protection of human rights can be perceived in the [*American*] *Convention*.” The preamble affirms that the principles underlying the *American Convention*

“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 ... have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.”

---

<sup>19</sup> Inter-American Court of Human Rights, Advisory Opinion Oc-6/86 of May 9, 1986 *The Word "Laws" in Article 30 of the American Convention on Human Rights* Requested by The Government of Uruguay. Here the Government of Uruguay submitted to the Inter-American Court of Human Rights a request for an advisory opinion on the scope of the word "laws" used in Article 30 of the American Convention on Human Rights. The Court found that the word "laws" in Article 30 of the Convention means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose.

<sup>20</sup> *Ibid.* at para. 21.

<sup>21</sup> *Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights*, “*Protocol of San Salvador*”, adopted 17 November 1988, entered into force 16 November 1999.

<sup>22</sup>

<sup>23</sup> *Other Treaties case*

Moreover, Articles 29(b) and (c) of the *American Convention* expressly recognize that:

No provision of the Convention may be interpreted as (b) 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 ... (d) 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.

In recognition of the universal nature of human rights, the Inter-American Court has demonstrated a willingness to adopt existing interpretations of parallel provisions in regional and international human rights treaties when construing the articles of the *American Convention*.<sup>24</sup> This interpretive approach preserves a harmony, coherence and consistency among systems of human rights protection.

#### (i) The Scope of Article 4(1) in Context

The limits implied by the phrase “in general,” which serve to define the scope of Article 4(1), are interpretable only by reference to these multiple contextual frameworks. The right to life from the moment of conception should be construed in a manner that recognizes and accommodates the enjoyment and exercise of all rights and freedoms protected in the *American Convention* as well as other regional and international human rights instruments.

The contextual approach militates against an interpretation of Article 4(1) that compels a woman under threat of criminal sanction to continue a pregnancy that is medically ill advised or unrelated to a woman’s own priorities and aspirations. An interpretation of the right to life that demands heavily restrictive if not prohibitive criminal abortion laws denies women their basic human rights.

The effective protection of women’s human rights is increasingly recognized as an important objective of regional and the international human rights systems. Respect for women’s equal entitlement to human rights protection was decisively affirmed in the 1990s through a series of U.N. conferences and world summits of governments.<sup>25</sup> The treaty monitoring bodies of all major international human rights instruments, among them the *Convention on the Elimination of All Forms of Discrimination against Women* (the *Women’s Convention*), have elaborated on the content and meaning of women’s human rights.

The Inter-American system has long recognized the formal rights of women. Established in 1928, the CIM was the first official intergovernmental agency in the world created expressly 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 every country report. In its 1997 Annual Report, the Commission presented a substantial report on the status of women in

---

<sup>24</sup> In the “*Street Children*” case, the Court relied heavily on jurisprudence from the European Court of Human Rights throughout this judgment. For example, see *supra*. **note 65** at paras. 29-30.

<sup>25</sup> among them the *Fourth International Conference on Population and Development* and the *Fourth World Conference on Women*. The American Commission’s appointment of the Special Rapporteur was prompted in part by these international events.

the Americas.<sup>26</sup> The report focused on the principle of non-discrimination and emphasized the scarce jurisprudence in the Inter-American system addressing issues of gender. In November 1998, the Twenty-ninth Assembly of Delegates of the CIM adopted the *Declaration of Santo Domingo*, which recognizes that “the rights of women throughout their entire life cycle are an inalienable, integral, and indivisible part of universal human rights”. The Declaration further recognizes that “it is imperative to ensure the observance of the human rights of women for the purpose of eliminating all discriminatory situations and to recognize women's legal capacity and equality under the law.”

As there is no hierarchy of rights in the *American Convention*, neither is there a hierarchy of persons entitled to its protections. The *American Convention* is designed to protect the human rights of all persons without discrimination. The Convention, and the human rights systems which surround it, can therefore not bear an interpretation of Article 4(1) that compels pregnant women under criminal sanction to continue a pregnancy or otherwise risk their health and lives to obtain an illegal and unsafe abortion. This interpretation privileges fetal life to the detriment of the rights of pregnant woman. It denies women their equal entitlement to enjoy and exercise the rights to life, respect for physical, mental, and moral integrity and freedom from inhuman and degrading treatment, and the right to non-discrimination and due respect for difference. The *American Convention* cannot be interpreted to mean that a woman loses her basic human rights upon becoming pregnant.

#### (ii) Article 4(1) - A Woman's Right to Life

The protection of Article 4(1) indisputably extends to pregnant women. Every woman has the right to have her life respected and protected by law, and not to be deprived of her life arbitrarily. Compelling a pregnant woman, under threat of criminal sanction, to continue a pregnancy fails to respect and protect pregnant women's right to life. Rather, criminal laws restricting access to abortion services arbitrarily deprive women of their lives.

It is a well-documented fact that criminal laws do not restrict access to abortion. They only prohibit access to *safe* abortion. As confirmed by the WHO, unsafe abortion is a leading cause of maternal mortality in countries with prohibitive or restrictive criminal abortion laws. Every year, an estimated 4 million unsafe abortions are performed in Latin America.<sup>27</sup> Due to the hazardous conditions under which these abortions are performed and women's unwillingness to risk prosecution to obtain post-abortion care, thousands of women die from abortion complications related to clandestine procedures.<sup>28</sup>

The Inter-American Commission and international human rights committees have documented serious concerns about the criminalization of abortion and its effect on unsafe abortion and high rates of maternal mortality. In its 1999 report on Colombia, the Inter-American Commission on Human Rights stated that:

---

<sup>26</sup> 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, 13 October 1998. The Special Rapporteur submitted the Report to the Commission, which approved it during its 98th session.

<sup>27</sup> World Health Organization. *Unsafe Abortion*, supra note 1.

<sup>28</sup> SOURCE

The criminalization of abortion, together with the inadequate techniques and unhygienic conditions in which abortions are performed, make it the second leading cause of maternal mortality in Colombia. According to statistics provided by the State, 23% of maternal deaths in Colombia result from poorly administered abortions.<sup>29</sup>

In its 1999 Concluding Observations on Costa Rica, the Human Rights Committee similarly noted:

... with concern the consequences for women, including the danger to life involved in clandestine abortions, of the continuing criminalization of all abortions.<sup>30</sup>

The CEDAW Committee, the Committee on the Rights of the Child (the “CRC”) and the Committee on Economic, Social and Cultural Rights have also recognized the effect of criminalization on the rates of unsafe abortion and maternal mortality.<sup>31</sup>

Moreover, the known prevalence of clandestine abortions and the high rates of related maternal mortality in the face of criminal prohibitions render the deprivation of women’s lives arbitrary. Jurisprudence from the European Court of Human Rights is instructive on this point. In *Open Door Counselling Ltd. and Dublin Wellwomen Centre Ltd.*,<sup>32</sup> the European Court held that an injunction which banned women’s health clinics from providing non-directive counselling on abortion services abroad violated the right to freedom of information under the *European Convention*. The European Court’s decision was partially based on the fact that

... information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women's health [e.g. magazines and telephone directories]. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain.<sup>33</sup>

Criminal laws that deny access to abortion for the purpose of protecting life from the moment of conception are largely ineffective in achieving their intended objective. They do not restrict

---

<sup>29</sup> cite needed [footnotes omitted].

<sup>30</sup> Costa Rica, 08/04/99, U.N. Doc. CCPR/C/79/Add.107, ¶ 11

<sup>31</sup> For CEDAW see e.g., Argentina, 23/07/97, U.N. Doc. A/52/38 Re v.1, Part II , ¶ 304; Belize, 01/07/99, U.N. Doc. A/54/38, ¶ 56; Bolivia, 31/05/95, U.N. Doc. A/50/38, ¶¶ 82–83; Chile, 09/07/99, U.N. Doc. A/54/38, ¶ 228; Chile, 31/05/95, U.N. Doc. A/50/38, ¶ 152; Colombia, 04/02/99, U.N. Doc. A/54/38, ¶ 393; Paraguay, 09/05/96, U.N. Doc. A/51/38, ¶ 123; Peru, 08/07/98, U.N. Doc. A/53/38/Re v.1, ¶ 339; Peru, 31/05/95, U.N. Doc. A/50/38, ¶ 443. Venezuela, 12/08/97, U.N. Doc. A/52/38/Rev.1, ¶ 236. For the CRC, see Colombia, 16/10/2000, U.N. Doc. CRC/C/15/A dd.137, ¶ 48; Guatemala, 09/07/2001, U.N. Doc. CRC/C/15/A dd.154, ¶ 40; Nicaragua, 24/08/99, U.N. Doc. CRC/C/15/A dd.108, ¶ 35; Nicaragua, 20/06/95, U.N. Doc. CRC/C/15/A dd.36, ¶ 19. For the CESRC, see e.g. Bolivia, 01/04/97, U.N. Doc. CCPR/C/79/Add.74, ¶ 22;

<sup>32</sup> *Open Door Counselling and Dublin Well Women v. Ireland* (1992) 15 EHRR 244.

<sup>33</sup> *Ibid.* para needed

access to abortion, but force women to risk their lives to obtain an illegal and unsafe abortion. It is an arbitrary deprivation of the right to life to maintain an ineffective law that risks the lives of thousands of women.

The arbitrariness of criminal abortion laws does not detract from the legitimacy of the objective such laws are intended to achieve. The protection of life from the moment of conceptions remains an important objective, however, the criminalization of abortion is neither the sole nor the most effective or reasonable means of protecting fetal life. The protection of life from the moment of conception can and should be accomplished in a manner respectful of women's rights.

The criminalization of abortion, given its effects on unsafe abortion and high rates of maternal mortality, violates women's right to life under Article 4(1) of the *American Convention*. This interpretation is supported by the concluding observations of both the *Human Rights Committee* and *CEDAW*, which have explicitly characterized criminal abortion laws as a violation of the right to life.<sup>34</sup>

In CEDAW's most recent Concluding Observations on Colombia, the Committee found that "the legal provisions on abortion constitute a violation of the rights of women to health and life" and called upon the Government of Colombia to repeal existing law criminalizing abortion.<sup>35</sup>

In its 1999 concluding observations on Chile, the *Human Rights Committee* stated that:

The criminalization of all abortions, without exception, raises serious issues, especially in the light of unrefuted reports that many women undergo illegal abortions that pose a threat to their lives ... The State party is under a duty to take measures to ensure the right to life of all persons, including pregnant women whose pregnancies are terminated. In this regard, the Committee recommends that the law be amended so as to introduce exceptions to the general prohibition of all abortions ...<sup>36</sup>

In its 2001 Concluding Observations on Guatemala, the *Human Rights Committee* reiterated the duty on state parties "to adopt the necessary measures to guarantee the right to life [Article 6 of the Civil and Political Rights Covenant] of pregnant women who decide to interrupt their pregnancy."<sup>37</sup> To this end, it called on the government of Guatemala to amend its prohibitive legislation "to provide for exceptions to the general prohibition of all abortions except where the mother's life is in danger."<sup>38</sup>

---

<sup>34</sup> For CEDAW *see e.g.*, Belize, 01/07/99, U.N. Doc. A/54/38, ¶ 56; Chile, 09/07/99, U.N. Doc. A/54/38, ¶ 228; Dominican Republic, 14/05/98, U.N. Doc. A/53/38, ¶ 337; and Paraguay, 09/05/96, U.N. Doc. A/51/38, ¶ 131. For the HRC *see e.g.*, Bolivia, 01/04/97, U.N. Doc. CCPR/C/79/Add.74, ¶ 22; Colombia, 01/04/97, U.N. Doc. CCPR/C/79/Add.76, ¶ 24; Costa Rica, 08/04/99, U.N. Doc. CCPR/C/79/Add.107, ¶ 11; Paraguay, 03/10/95, U.N. Doc. CCPR/C/79/Add.48; A /50/40, ¶¶ 208, 219; Peru, 15/11/2000, U.N. Doc. CCPR/CO/70/PE R, ¶ 20; Peru, 18/11/96, U.N. Doc. CCPR/C/79/Add.72, ¶ 15.

<sup>35</sup> Colombia, 04/02/99, U.N. Doc. A/54/38, ¶ 393

<sup>36</sup> Chile, 30/03/99, U.N. Doc. CCPR/C/79/Add.104, ¶ 15

<sup>37</sup> Guatemala, 27/08/2001, U.N. Doc. CCPR/CO /72/G TM, ¶ 19.

<sup>38</sup> *Ibid.*

Article 4(1) might well require member states to improve pre- and post natal care, provide better nutrition during pregnancy, and improved obstetric services to enable women and their children to survive childbirth. For example, many stillbirth deaths are the consequence of inadequate or inappropriate care during pregnancy and delivery. Million of babies who survive the birth process are so badly injured that they will require extended care throughout their lives. Protecting fetal life in these circumstances does not compromise, but complies with the rights of pregnant women who are eagerly awaiting the birth of a healthy child.

This qualified interpretation of the right to life from the moment of conception is supported by the interpretive practices of the Committee on the Rights of the Child. Article 6(1) of the *Convention on the Rights of the Child* (the *Children's Convention*) protects the "inherent right to life" of every child. Article 1 of the Children's Convention explicitly states that "a child means every human being", that is a human in being.

The ninth paragraph of its preamble recognizes that "the child ... needs special safeguards and care, including appropriate legal protection, before as well as after birth" [emphasis added]. The concluding observations of the Committee reveal that it does not interpret this preambular language as prohibiting legal abortions. Rather, the Committee has routinely encouraged the legalization of abortion to protect the life and health of pregnant female children.

For example, in its 1999 Concluding Observations on Chad, the Committee was concerned about the impact that "punitive legislation regarding abortion can have on maternal mortality rates for adolescent girls" and "encourage[d] the State party to review its practices under the existing legislation authorizing abortions for therapeutic reasons, with a view to preventing illegal abortions and improving protection of the mental and physical health of girls."<sup>39</sup> In its 2001 concluding observations on Palau, the Committee "note[d] that abortion is illegal except on medical grounds and expresse[d] concern regarding the best interests of child victims of rape and/or incest in this regard."<sup>40</sup> The Committee recommended that Palau "review its legislation concerning abortion, with a view to guaranteeing the best interests of child victims of rape and incest."

### (iii) Article 5 - Woman's Right to Physical, Mental, and Moral Integrity and the Right not to be Subjected to Cruel, Inhuman and Degrading Treatment.

In its 1999 Report on Colombia, the Inter-American Commission on Human Rights felt it necessary to address the issue of abortion because "it constitutes 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 ...". The object of Article 5, as well as of the whole of the *American Convention*, is to protect the personal integrity of the human person.

---

<sup>39</sup> Concluding Observations: Chad, U.N. Committee on the Rights of the Child, 21st Sess., U.N. Doc. CRC/C/15/Add.107 (1999).

<sup>40</sup> Concluding Observations: Palau, U.N. Committee on the Rights of the Child, 26th Sess., U.N. Doc. CRC/C/15/Add.149 (2000).

Article 5(1) provides that “[e]very person has the right to have his physical, mental and moral integrity respected.” An interpretation of Article 4(1) that compels a woman under threat of criminal sanction to continue a pregnancy that is medically ill advised, follows a sexual assault or is unrelated to a woman’s own priorities and aspirations denies women this right.

Pregnancy can involve serious physical and psychological health risks for women. Unintended pregnancy is associated with higher maternal morbidity, a greater risk of depression, and maternal and child abuse. Adolescent pregnancy carries an increased risk of obstetrical complications, as well as premature and distressed delivery. Moreover, maternal mortality is not the only consequence of unsafe and illegal abortion. For every maternal death, there are many women who suffer serious complications with continued suffering and incapacity, such as sepsis, pelvic trauma, and sterility. When a pregnant woman’s health is endangered, either due to the pregnancy itself or the known risks of illegal abortion, it is a violation of her physical and psychological integrity to criminally prohibit access to safe and effective medical care.

Forced pregnancy in cases of sexual assault and fetal abnormality also violate the physical, mental and moral integrity of women. Criminal abortion laws that do not provide a sexual assault exemption perpetuate a woman’s victimization. She is forced to physically and psychologically bear the consequences of a severely intrusive assault. Criminal laws that require a woman to endure the trauma of induced labour and the delivery of a dead fetus in cases of severe fetal abnormality incompatible with life cause undue psychological hardship.

In these cases, criminal prohibitions do not merely violate women’s rights to personal integrity. They constitute a form of cruel, inhuman and degrading treatment. Article 5(2) of the *American Convention* provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”

In its 1996 Concluding Observations on Peru, the Human Rights Committee expressed its concern "that abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape."<sup>41</sup> The Committee found that criminal restriction subjected women to cruel, inhuman and degrading treatment, contrary to Article 7 of the Political Covenant. In its 1998 Concluding Observations on Ecuador, the Human Rights Committee similarly expressed:

its concern about the very high number of suicides of young females ... which appear in part to be related to the prohibition of abortion. In this regard, the Committee regrets the State party's failure to address the resulting problems faced by adolescent girls, in particular rape victims, who suffer the consequences of such acts for the rest of their lives. Such situations are, from both the legal and practical standpoints, incompatible with Articles 3, 6 and 7 of the Covenant ...<sup>42</sup>

Even where a pregnancy does not threaten the health of women, the physical, mental and moral invasiveness of criminal restrictions on access to treatment is profound. Gestation, childbirth and childcare enlist the most elemental biological and psychological aspects of the female person. Although both men and women participate in the act of conception, women disproportionately

---

<sup>41</sup> Concluding Observations of the Human Rights Committee: Peru, 18/11/96, CCPR/C/79/Add.72.

<sup>42</sup> Ecuador, 18/08/98, CCPR/C/79/Add.92 at para 11



bear the costs of pregnancy and childbirth throughout their lives. For example, young women with unintended births are more likely to terminate their schooling and to require social assistance compared to adolescents who postpone having children. Forced gestation and childbirth thus deny women the most basic attribute of the human person – personal liberty.

Even where a pregnancy does not threaten the health of women, the physical, mental and moral invasiveness of criminal restrictions on access to abortion is profound. Gestation, childbirth and childcare enlist the most elemental biological and psychological aspects of the female person. Although both men and women participate in the act of conception, women disproportionately bear the costs of pregnancy and childbirth throughout their lives. For example, young women with unintended births are more likely to terminate their schooling and to require social assistance compared to adolescents who postpone having children.

Forced gestation and childbirth thus denies women the most basic attribute of the human person – personal fulfillment and liberty. In *Loayza Tamayo* (Reparations), the Inter-American Court recognized that the *American Convention* protects the

... 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, a loss that this Court cannot disregard.<sup>43</sup>

Criminal laws that restrict access to abortion have the discriminatory effect of undermining women's capacity to make fundamental decisions about their bodies and lives. Women are forced to risk their health, life and criminal prosecution to direct the course of their own lives.

#### (iv) Articles 1(1) & 24 - Right to Non-Discrimination and Due Respect for Difference

Discrimination on the grounds of sex is prohibited under the *American Convention* and by all other regional and international human rights instruments. Article 1(1) of the *American Convention* sets out a general obligation on the part of states to protect the guaranteed rights and freedoms without discrimination:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for

---

<sup>43</sup> I/A Court H.R., *Loayza Tamayo* Case. Reparations (Art. 63(1) of the American Convention on Human Rights), Judgment of November 27, 1998. Series C No. 42 at para. 148. (where denial of rights, especially those that relate to personal integrity and liberty, has been established, the Inter-American Court might consider how denial has disrupted a victim's project of life, and where that project was both reasonable and attainable in practice, the Court will order reparations that reasonably compensate or repair that disruption.)

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* further provides that “All persons are equal before the law”. Consequently, they are entitled, without discrimination, to equal protection of the law.

Denying women access to medical procedures on the basis of sex violates the principles of non-discrimination and due respect for difference. Article 12(1) of the *Women’s Convention* requires member states 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.”<sup>44</sup> In its General Recommendation on *Women and Health*, the CEDAW Committee further specifies that women’s biological differences respecting pregnancy and its prevention must be accommodated in ways that adequately reflect those differences.<sup>45</sup>

An interpretation of Article 4(1) that demands criminally restrictive abortion laws fails to provide women access to reproductive health services specific to their health needs. Rather, prohibitions on access to abortion discriminate against women by criminalizing a safe and effective health care procedure that only women need. Women are exposed to health and life risks not faced by men. They alone suffer the physical, mental and moral consequences of unsafe or unwanted pregnancies.

Both the Human Rights Committee and the *CEDAW* Committee have explicitly characterized criminal abortion laws as a violation of the right to non-discrimination. In its Concluding Observation of both Ecuador and Peru, the Human Rights Committee found the criminal prohibition of abortion, especially in cases of rape, to be incompatible with Article 3 of the Political Covenant, which “ensure[s] the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”<sup>46</sup> In its 1999 Concluding Observations on Colombia, the CEDAW Committee found “that legal provisions on abortion constitute a violation of ... article 12 of the [Women’s] Convention.”

Sex discrimination is also aggravated by compound factors such as race, age, nationality and socio-economic status. A reading of Article 4(1) that compels a woman under threat of criminal sanction to continue a pregnancy gives rise to compound forms of discrimination. Despite the imperative that the *American Convention* be interpreted to give equal protection of the law, women marginalized by age, poverty and race disproportionately bear the burden of unsafe and illegal abortion. Without access to reproductive information or contraceptive services, these women are most often in need of abortion services, but lack the social and economic resources necessary to procure illegal abortions under safe medical conditions.

Both CEDAW and the Human Rights Committee have examined the discriminatory and disproportionate impact of restrictive abortion laws. In its 1999 Concluding Observations on Ireland, the CEDAW Committee noted that due to the illegality of abortion in Ireland, women must travel abroad to terminate their pregnancies. The Committee recognized that “[t]his creates

---

<sup>44</sup> CEDAW, *supra* note 25 at Art 12(1).

<sup>45</sup> *General Recommendation*, *supra* note 79 at para. 6.

<sup>46</sup> Ecuador, 18/08/98, CCPR/C/79/Add.92 at para 11, and Peru, 18/11/96, CCPR/C/79/Add.72.

hardship for vulnerable groups, such as female asylum seekers who cannot leave the territory of the State.”<sup>47</sup> In its 2000 Concluding Observations on Argentina, the Human Rights Committee expressed “concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women.”<sup>48</sup>

#### **d. Supplementary Means of Interpretation**

Pursuant to Article 32 of the *Vienna Convention*, supplementary means of interpretation, including the preparatory work of the treaty can be used to confirm a meaning derived from the general rules of interpretation. In case 2141, the Inter-American Commission examined the preparatory work of the *American Convention* to dismiss the claim that Article 4(1) of "the *American Convention* had established the absolute concept of the right to life from the moment of conception."<sup>49</sup>

The Commission recognized that “[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’.” The Commission held that in light of the preparatory history, the phrase “in general, from the moment of conception” was added to Article 4(1) in an effort to strike a balance between the demands of state parties who were adamant about protecting fetal life, and other countries who had concerns about protecting lawful abortion in their respective domestic jurisdictions. The Inter-American Commission confirmed that the words "in general" precluded an interpretation of Article 4(1) that requires the prohibition of abortion.

### **3. Conclusion: Interpreting Article 4(1) Compatibly with the Human Rights of Women**

Article 4(1) protecting the right to life “in general from the moment of conception” should be construed in a manner that recognizes and accommodates women’s enjoyment and exercise of all rights and freedoms protected in the *American Convention* as well as other regional and international human rights instruments.

The phrase "in general" recognize that the protection of the right to life from the moment of conception is intimately connected with, and cannot be regarded in isolation from, the rights and freedoms of the pregnant women. In order to maintain the coherence of the *American Convention*, and the human rights systems which surround it, the scope of Article 4(1) can only extend to the protection of prenatal life in ways that respect, protect and fulfill the human rights of women.

---

<sup>47</sup> Ireland, 01/07/99, U.N. Doc. A/54/38, ¶ 185.

<sup>48</sup> Argentina, 03/11/2000, U.N. Doc. CCPR/CO/70/ARG, ¶ 14.

<sup>49</sup> Case 2141, Inter-american Convention

## Table of Cases