

*AMICUS CURIAE* CASE BEATRIZ VS. EL SALVADOR

PRESENTED BY

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THE BRIEF IS ACCOMPANIED BY [119 ACADEMICS, LAWYERS AND LEGISLATORS.](#)

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#### **I. SUMMARY AND STRUCTURE OF *AMICUS CURIAE BRIEFS***

This contribution questions the legal validity of the IACHR Commission's claim that the State of El Salvador has violated its international human rights obligations by criminalizing

abortion and protecting human life from conception. Accordingly, this *amicus curiae* challenges the IACHR Commission's recommendation that El Salvador should:

*Adopt the necessary legislative measures to establish the possibility of termination of pregnancy in situations of non-viability or incompatibility of the fetus with extrauterine life, as well as risk to life and serious risk to the health and personal integrity of the mother (...) including the design of public policies, training programs, protocols and guidance frameworks to ensure that access to termination of pregnancy as a result of the above legislative adaptation, is effective in practice, and that no de facto or de jure obstacles are generated that affect its implementation.*<sup>1</sup>

We will formulate the following two arguments against this claim.

**Argument number 1. Exercise of the social and cultural self-determination of peoples and guarantee of the right to participate in the conduct of public affairs.**

In exercise of the right to social and cultural self-determination of peoples (Art. 1.2 of the *Charter of the United Nations*, Art. 1.1 of the *International Covenant on Civil and Political Rights*; Art. 1.1 of the *International Covenant on Economic, Social and Cultural Rights*) and guaranteeing the right of all Salvadoran citizens to participate in the conduct of public affairs through their representatives (Art. 23.1.a *American Convention on Human Rights*), El Salvador has opted for:

1 A. The right to social and cultural self-determination of peoples allows El Salvador to decide, in a democratic manner and respecting the rule of law, how to regulate abortion.

1 B. Recognition of the Right to Life of the Unborn and Abortion in El Salvador

1 C. Reasonableness of the protection of the life, health and physical integrity of the unborn person with the force of the criminal law

1 D. Reasonableness of the criminal sanction for abortion through: 1) the non-criminalization of wrongful abortion and 2) the state of necessity, as an exoneration of criminal liability in the case of risk to the mother's life.

1 E. Protection of the life, health and physical integrity of the unborn person and of the pregnant woman with sexual and reproductive health policies designed to make the exercise of both rights compatible.

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<sup>1</sup> IACHR Commission, Report No. 9/20, Case 13.378, Merits Report, *Beatriz v. El Salvador*, OEA/Ser.L/V/II.175, March 3, 2020, p. 48.

Argument number 2. Full coherence of the social and cultural self-determination of El Salvador with the obligations assumed in the international system and in the Inter-American system of Human Rights.

The manner in which El Salvador has exercised its right to social and cultural self-determination and in which citizens have exercised their right to direct public affairs (art. 23.1.a *American Convention on Human Rights*) is fully consistent with the Salvadoran State's obligations under the international and regional human rights systems. This argument is divided into the following sub-arguments:

2 A. The non-existence of a human right to abortion, according to conventional human rights law.

2 B. The non-existence of a human right to abortion under customary international law.

2 C. The non-existence of a human right to abortion under "Soft Law": The non-binding instruments and the jurisprudence of the European Court of Human Rights, cited by the IACHR Commission, cannot be interpreted as recognizing a human right to abortion.

D. International human rights system: the right to life of the unborn person as a result of the ordinary meaning of the terms (art. 31.1 Vienna Convention on the Law of Treaties) and as an effect of the teleological-systematic interpretation (object and purpose of the treaty).

2 E. Regional human rights system: the right to life of the unborn person as a result of the ordinary meaning of the terms (Art. 31.1 Vienna Convention on the Law of Treaties) and of the teleological-systematic interpretation (object and purpose of the treaty).

2 F. Principle of reasonableness: protection of the right to life of the unborn person from the very moment of conception prescribed in the Artavia Murillo Case ("In Vitro Fertilization").

2 G. Principle of vulnerability and reasonableness of the criminal sanction of abortion: the dependence of the life of the unborn person as a circumstance of vulnerability.

2 H. Principle of prohibition of regression of fundamental rights: regressing fundamental rights not only violates the *American Convention on Human Rights* but also a peremptory clause of the Constitution of El Salvador.

**II. ARGUMENT NUMBER 1. EXERCISE OF THE SOCIAL AND CULTURAL SELF-  
DETERMINATION OF PEOPLES AND GUARANTEE OF THE RIGHT TO PARTICIPATE IN THE  
CONDUCT OF PUBLIC AFFAIRS.**

*1. The right to social and cultural self-determination of peoples allows El Salvador to  
decide, in a democratic manner and respecting the rule of law, how to regulate  
abortion.*

The right to self-determination of peoples constitutes one of the pillars of the UN system (Art. 1.2 of *the UN Charter*) and a human right, in accordance with the first common article of the *Covenant on Civil and Political Rights* and the *Covenant on Economic, Social and Cultural Rights*. According to the UN International Law Commission, this right constitutes a norm of *jus cogens*,<sup>2</sup> and has the character of *erga omnes*.<sup>3</sup>

The self-determination of peoples is not a right of the State, the purpose of which is the protection of political interests unrelated to the needs of its citizens. On the contrary, as is clear from the text of these treaties, the holder of this right is the "people" inhabiting a given territory and not the State or the rulers in office.<sup>4</sup> Therefore, the right to self-determination of peoples protects **popular sovereignty**, as distinct from **state sovereignty**,<sup>5</sup> as ANTONIO CASSESE argues:

Self-determination sought to set aside the old statist approach that prevailed in international relations. According to this approach, the world community was made up of potentates: the sovereign states, each concerned primarily with the interests of its political elites (...).

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<sup>2</sup> International Law Commission, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens)* of 2022, Yearbook of the International Law Commission, 2022, vol. II, Part Two, p. 6.

<sup>3</sup> International Court of Justice, *Timor Leste (Portugal v. Australia)*, Judgment, I. C.J. Reports 1995, para 29. It was reiterated in ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, para 156.

<sup>4</sup> ANTONIO CASSESE, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge University Press, 1995), 94; HELEN QUANE, "The United Nations and the Evolving Right to Self-Determination," *The International and Comparative Law Quarterly* 47, no. 3 (1998): 558-62; PATRICK THORNBERRY, "Self-Determination, Minorities, Human Rights: A Review of International Instruments," *The International and Comparative Law Quarterly* 38, no. 4 (1989); MALCOLM SHAW, "Peoples, Territorialism and Boundaries," *European Journal of International Law* 3 (1997); CHRISTIAN TOMUSCHAT, "Self-Determination in a Post-Colonial World," in *Modern Law of Self-Determination*, ed. CHRISTIAN TOMUSCHAT (Martinus Nijhoff, 1993), 16; JAMES SUMMERS, *Peoples and International Law*, 2nd ed. (Martinus Nijhoff, 2014), 71; ALLAN ROSAS, "Internal Self-Determination," in *Modern Law of Self-Determination*, ed. CHRISTIAN TOMUSCHAT (Martinus Nijhoff, 1993), 227; FERNANDO R TESÓN, *The Theory of Self-Determination* (Cambridge University Press, 2016), 883.

<sup>5</sup> ROBERT ARAUJO, "Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law," *Fordham International Law Journal* 24, no. 5 (2001); W MICHAEL REISMAN, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law* 84, no. 4 (1990).

By contrast, free termination meant that peoples and nations should have a voice in international dealings: sovereign Powers could no longer freely dispose of them (...). Clearly, this set of principles was aimed at undermining the very core of the traditional principles on which international society had been based since its inception: dynastic legitimization of power, despotism (albeit in increasingly attenuated forms) and international dealings based solely on agreement between rulers.<sup>6</sup>

Consequently, the scope of this right is not exhausted in the context of decolonization, but is a right that is exercised on an ongoing basis by citizens,<sup>7</sup> in order for each people to freely make its decisions in the political, economic, social and cultural spheres. The preparatory works of the *International Covenant on Civil and Political Rights* indicate that this right was embodied in the treaty with a "very broad definition" in mind, which includes the right of peoples "to establish their own political institutions, to develop their own economic resources and to direct their own social and cultural development, without interference by other peoples or nations".<sup>8</sup>

As the International Court of Justice (ICJ)<sup>9</sup> and the African Commission on Human Rights have indicated,<sup>10</sup> the core of this right is not the ability to become independent, but rather the possibility that through "a free and genuine expression of the will of the people",<sup>11</sup> citizens can make their decisions on issues that affect their lives.

Therefore, the right to self-determination of peoples is inescapably guaranteed through the right of all Salvadoran citizens to participate in the conduct of public affairs through their representatives (art. 23.1.a *American Convention on Human Rights*). This requires that the

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<sup>6</sup> CASSESE, *Self-Determination of Peoples: A Legal Appraisal*, 315-16.

<sup>7</sup> S JAMES ANAYA, "A Contemporary Definition of the International Norm of Self-Determination," *Transnational Law & Contemporary Problems* 131, no. 3 (1993); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995). This is corroborated by the preparatory work for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: *Report of the Third Committee, Draft International Covenants on Human Rights*, tenth session, A/3077, (8 December 1955), para 39.

<sup>8</sup> MARC BOSSUYT, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987), 33.

<sup>9</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Despite Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, 52. The same position is shared by Special Rapporteur Hector Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, E/CN.4/Sub.2/405/Rev.1 (1980), 11.

<sup>10</sup> African Commission on Human Rights, *Katangese Peoples' Congress v. Zaire*, *African Commission on Human and Peoples' Rights*, Comm. No. 75/92 (1995), para 4.

<sup>11</sup> ICJ, *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, para 55.

Salvadoran government genuinely represents the interests of the population and that it acts in accordance with the agreements established in a democratic manner and respecting the rule of law.<sup>12</sup> In this way, through the principle of subsidiarity (as the central axis of international human rights law)<sup>13</sup> citizens are allowed to be actively involved in decision making, and international scrutiny is reserved for the violation of internationally recognized human rights obligations in treaties or custom.<sup>14</sup>

**Consequently, through the right to self-determination, the Salvadoran people have the freedom to decide on their political, economic, social and cultural system, which is limited by the safeguarding of all internationally recognized human rights.<sup>15</sup> However, since it was found that the category of sexual and reproductive rights does not exist (according to the sources of public international law), and that abortion is not a human right, El Salvador is free to regulate abortion according to the will of its citizens, in accordance with the agreements issued at the International Conference on Population and Development of 1994 and the International Conference on Women of 1995.**

## *2. Recognition of the right to life of the unborn person and abortion in El Salvador*

Regarding the right to life, the last reform to the Constitution of El Salvador is dated February 3, 1999. This reform is the result of a process aimed at incorporating the explicit recognition of the right to life of the unborn person; and carried out in strict compliance with the reform regulations established in Article 248<sup>16</sup>.

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<sup>12</sup> The need for a "government representing the whole people belonging to the territory, without distinction as to race, creed or color" is established in UN General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970). The same position is held by Cassese, *Self-Determination of Peoples: A Legal Appraisal*, 101.

<sup>13</sup> PAOLO G CAROZZA, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 38 (2003); SAMANTHA BESSON, "Subsidiarity in International Human Rights Law - What Is Subsidiary about Human Rights ?," *The American Journal of Jurisprudence* 61, no. 1 (2016), <https://doi.org/10.1093/ajj/auw009>.

<sup>14</sup> BESSON, "Subsidiarity in International Human Rights Law - What Is Subsidiary about Human Rights ?," 78-83; ANDREAS VON STADEN, "The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review," *International Journal of Constitutional Law* 10, no. 4 (2012): 1023-49, <https://doi.org/10.1093/icon/mos032>.

<sup>15</sup> GARCÍA ESCOBAR, G., *Cultural Diversity as the Core of Human Rights Universality: Rediscovering the Spirit of the Universal Declaration of Human Rights of 1948 through the Right to Self-Determination* (2022) PhD Thesis University of Geneva DOI:10.13097/archive-ouverte/unige:158809. Available at: <https://nbn-resolving.org/urn:nbn:ch:unige-1588095>.

<sup>16</sup> El Salvador issued its first Constitution on June 12, 1824, then in 1841, 1864, 1871, 1872, 1880, 1883, 1885, 1886, 1939, 1944, 1945, 1950, 1962 and the current one of 1983. MÉNDEZ, J. M., *Historia Constitucional*

In the previous version of 1983, the right to life was explicitly and exclusively mentioned in articles 2 and 11. Article 2 stated that the holder of this right is the individual: "*[e]very person has the right to life, (...)*". Article 11 determined the conditions for its restriction: "*[n]o person may be deprived of the right to life, (...), or of any other of his rights without first being heard and tried in accordance with the law; nor may he be tried twice for the same cause*". In the original text of the Constitution -approved in 1983- it was not explicitly established from what moment the right to life was granted.

The need and the debate to specify in the constitutional text when the ownership of the *right to life* begins arose in December 1996, with the discussion of the preliminary draft of the current Penal Code of 1998.

The previous Penal Code of 1973 prescribed in Article 169, paragraphs 3 and 4, that abortion was not punishable if the pregnancy was the result of rape or statutory rape; or if there was a malformation in the *unborn child* that made its extrauterine life unviable<sup>17</sup>.

In the absence of a proposal to reform this regulation in the initial version of the draft bill, the Minister of Health at the time, EDUARDO INTERIANO, conditioned the continuity of his position to the exclusion of abortion services in public hospitals<sup>18</sup>. This and other public pronouncements (which included a manifesto by at least fifty-five medical, legal and other experts, as well as protest actions such as the collection of signatures throughout the country, opposing the practice of abortion<sup>19</sup>) led to the inclusion in the draft bill of a reform of the criminal definition of abortion<sup>20</sup>.

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*de El Salvador, disolución de la república federal y primeras constituciones de El Salvador*, volume seven, Tecno Impresos, El Salvador, 1998, p. 66. Available at: [https://biblioteca.ugb.edu.sv/cgi-bin/koha/opac-detail.pl?biblionumber=1561&shelfbrowse\\_itemnumber=2122](https://biblioteca.ugb.edu.sv/cgi-bin/koha/opac-detail.pl?biblionumber=1561&shelfbrowse_itemnumber=2122) accessed February 23, 2023. The first Constitution that made mention of the right to life was the Constitution of 1841 in its Article 68, which prescribed: "*[a]ll inhabitants of El Salvador have incontestable rights; to preserve and defend their life, (...)*" and 76 "*[n]o person may be deprived of his life, (...)*", Constitution available at: [http://www.cervantesvirtual.com/portales/constituciones\\_hispanoamericanas/obra-visor/constitucion-politica-de-la-republica-de-el-salvador-de-1841/html/6eed6025-cfce-44e4-b9b9-171ab7fd9e8b\\_2.html#I\\_0](http://www.cervantesvirtual.com/portales/constituciones_hispanoamericanas/obra-visor/constitucion-politica-de-la-republica-de-el-salvador-de-1841/html/6eed6025-cfce-44e4-b9b9-171ab7fd9e8b_2.html#I_0), accessed on February 23, 2023. All the Constitutions of El Salvador are available at [http://www.cervantesvirtual.com/portales/constituciones\\_hispanoamericanas/el\\_salvador\\_constituciones/?autor=&paginaUsuario=2&numresult=10&vista=reducida&q=&orden=fechapublicacionoriginal&paginaNavegacion=0](http://www.cervantesvirtual.com/portales/constituciones_hispanoamericanas/el_salvador_constituciones/?autor=&paginaUsuario=2&numresult=10&vista=reducida&q=&orden=fechapublicacionoriginal&paginaNavegacion=0) accessed on February 23, 2023.

<sup>17</sup> Penal Code of 1973 of El Salvador. Available at: [https://oig.cepal.org/sites/default/files/1973\\_decreto270codigopenal\\_el\\_salvador.pdf](https://oig.cepal.org/sites/default/files/1973_decreto270codigopenal_el_salvador.pdf) accessed on February 23, 2023.

<sup>18</sup> SOLÍS JIMÉNEZ, J. G., "Derecho Fundamental a la Vida y aborto en El Salvador. Un análisis a partir del sistema constitucional, internacional y regional de Derechos Humanos", *DADUN*, Spain, 2022, p. 6. Available at <https://dadun.unav.edu/handle/10171/65233> accessed on January 18, 2023.

<sup>19</sup> SOLÍS JIMÉNEZ, J. G., "Derecho Fundamental a la Vida y aborto en El Salvador. Un análisis a partir del sistema constitucional, internacional y regional de Derechos Humanos", *DADUN*, p. 6.



In order to approve the new Penal Code, a simple majority of forty-three deputies was needed: with sixty votes -between ARENA, Christian Democracy and three votes from the FMLN- the reforms related to abortion were approved<sup>21</sup>. The same group of deputies that approved the reforms to the Penal Code later approved the *constitutional reform agreement*<sup>22</sup>, in order to add to Article 1 of the Constitution the following: "[a]ll the same [El Salvador] recognizes every human being as a human being from the moment of conception". On February 3, 1999, the *constitutional reform agreement*<sup>23</sup> was ratified and, thus, Article 1 of the Constitution was amended to protect the right to life of the person from the moment of conception.

Finally, the constitutional reform obtained the vote of all the deputies of ARENA and Christian Democracy; and several deputies of the FMLN party<sup>24</sup>, which initially opposed the constitutional reform but finally voted for the protection of the unborn person from the moment of conception "it was not a political question but a question of conscience"<sup>25</sup>.

The recitals introduced as a result of the constitutional reform were "I.- *That the most fundamental human right and most precious legal good is human life and no other right has meaning if it is not fiercely protected. The lack of due protection of human life undermines the rule of law and social peace. II.- That the Salvadoran legal order must recognize this reality, and[,]consequently, protect human life from conception, including Constitutional provisions, in accordance with the express norms of the [i]nternational Covenant on [c]ivil [d]ivil and*

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<sup>20</sup> PEÑAS DEFAGO, M. A., "El aborto en el salvador: tres décadas de disputas sobre la autonomía reproductiva de las mujeres," *Península*, volume 13, number 2, Mexico, 2018, p. 218. Available at <http://www.revistas.unam.mx/index.php/peninsula/article/view/65848/57803> accessed February 13, 2023.

<sup>21</sup> SOLÍS JIMÉNEZ, J. G., "Derecho Fundamental a la Vida y aborto en El Salvador. Un análisis a partir del sistema constitucional, internacional y regional de Derechos Humanos", *DADUN*, p. 7.

<sup>22</sup> Legislative decree of constitutional reform agreement number 1, of April 30, 1997, published in the Official Gazette number 87, volume number 335, of May 15, 1997. Available at <https://www.asamblea.gob.sv/sites/default/files/documents/acuerdos/DB8C5AA5-97A2-4761-916C-B507B0223053.pdf> accessed on February 23, 2023.

<sup>23</sup> Legislative decree ratifying the constitutional reform agreement number 541, of February 3, 1999, published in the Official Gazette number 32, volume number 342, of February 16, 1999. Available at <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/B93EEAF8-C2CE-47FD-804E-74489D7AAF1B.pdf> accessed on February 23, 2023.

<sup>24</sup> PEÑAS DEFAGO, M. A., "El aborto en el salvador: tres décadas de disputas sobre la autonomía reproductiva de las mujeres", p. 221. Although the exact number of votes is not recorded in the legislative archive, in that legislature the FMLN even increased from 27 to 31 deputies, which were indispensable for the constitutional reform that required at least 56 votes out of 84, of which the ARENA party only had 29, not counting the other political parties. See legislative composition from 1997 to 2000 [http://americano.usal.es/oir/legislatura/el\\_salvador.htm#Evoluci%C3%B3n\\_de\\_la\\_composici%C3%B3n\\_de\\_la\\_Asamblea\\_Legislativa\\_\(1982-2009\)](http://americano.usal.es/oir/legislatura/el_salvador.htm#Evoluci%C3%B3n_de_la_composici%C3%B3n_de_la_Asamblea_Legislativa_(1982-2009)) consulted on March 6, 2023.

<sup>25</sup> PEÑAS DEFAGO, M. A., "El aborto en el salvador: tres décadas de disputas sobre la autonomía reproductiva de las mujeres", p. 221.

*[p]olitical [d]ights, the [a]merican [h]uman [d]ights Convention, and the Convention on the [d]ights of the [n]ild."*<sup>26</sup> .

After the reform of the constitutional text, the Constitutional Chamber has established that the content of the right to life has a double dimension: *i.* the "(...) *right to avoid death, which implies the prohibition directed at state bodies and individuals to dispose of, hinder, violate or interrupt the vital process of people*", and *ii.* the right to live in dignity<sup>27</sup> .

Regarding the ownership of the right to life, the Court has indicated that it extends to the *unborn child*, who is considered a human person in accordance with Article 1, paragraph 2 of the Constitution.

With regard to the obligations of the State, it has stated that the State is obliged to protect the right to life of the unborn human being. *"In other words, one of the consequences of the constitutional recognition of the unborn human being as a person is the undeniable ownership of certain fundamental rights; to begin with, the right to life, with the correlative obligation of the State to guarantee its protection"*<sup>28</sup> r.a.

The Constitutional Chamber also points out that *"[t]he qualification of the unborn child as a person is a value judgment (...)"* of the constituent can and should be distinguished (although not separated) from the empirical-descriptive judgment that science may make about the different stages of development of the human being before birth<sup>29</sup> .

For the Chamber, the differences - relevant or not - between the *unborn child* and the person already born, "(...) *does not detract from the protection of prenatal human life nor does it reduce in the abstract the State's obligation in this regard (...)*"<sup>30</sup> .

**It is concluded that after a social, political and legal debate, which involved a broad spectrum of civil society and all the organs of the State (legislative, executive and judicial branches), El Salvador chose to explicitly recognize in Article 1, paragraph 2 of its**

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<sup>26</sup> Cited in unconstitutionality ruling with reference **22-2011** of the Constitutional Chamber of the Supreme Court of Justice of El Salvador, February 15, 2017, available at <https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2010-2019/2017/02/BF4C5.PDF> accessed on December 23, 2023 -hereinafter Inc. **22-2011**-.

<sup>27</sup> Pp. 12-13 of amparo judgment with reference **166-2009** of the Constitutional Chamber of the Supreme Court of El Salvador, September 21, 2011, available at <https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2010-2019/2011/09/92F11.PDF> accessed on February 23, 2023 -hereinafter Amp. **166-2009**-.

<sup>28</sup> Page 11 of Inc. **22-2011**, also page 13 of amparo judgment with reference **310-2013** (Case Beatriz).

<sup>29</sup> *"The qualification of the unborn child as a person is a value judgment, not the description of an objective fact. The definition of person in art. 1 inc. 2° Cn. is the product of a social convention or agreement, at a given historical moment; it is a cultural product, not the inevitable reflection of some immanent or transcendental essence of what is its object of regulation."* Page 12 of Inc. **22-2011**

<sup>30</sup> Page 14 of Inc. **22-2011**.

**Constitution, that the unborn is a human person from the moment of conception and, as such, is entitled to all fundamental rights, starting with the right to life recognized in Article 2 of the Constitution.**

**It is also concluded that this debate was carried out in strict compliance with the constitutional norms that regulate the processes of constitutional reform and legislative reform and that, therefore, it complied with the principles of the constitutional rule of law.**

**Finally, it is concluded that the claim that the State of El Salvador should modify its constitution and/or its legislation on abortion entails a serious violation of the right to social and cultural self-determination of peoples (art. 1.1 of the *International Covenant on Civil and Political Rights*; art. 1.1 of the *International Covenant on Economic, Social and Cultural Rights*); and the right of all Salvadoran citizens to participate in the conduct of public affairs through their representatives (art. 23.1.a *American Convention on Human Rights*).**

3. *Reasonableness of the protection of the life, health and physical integrity of the unborn person with the force of criminal law.*

Currently, Salvadoran criminal law regulates in its Art. 133 the abortion committed by the mother herself or a third party -with the mother's consent- with a penalty of 2 to 8 years of imprisonment. Article 134 establishes the crime of abortion committed by a third party -without the mother's consent- with a penalty of 4 to 10 years imprisonment. Finally, Art. 135 establishes the crime of abortion committed by a physician on a woman -with or without her consent- with a penalty of 6 to 12 years imprisonment and disqualification from the profession for the same period of time.

On the other hand, neither miscarriage nor attempted miscarriage committed by the mother herself is punishable in accordance with article 137, paragraph 2 of the Penal Code, which states that "*[t]he miscarriage caused by the pregnant woman herself, and her attempt to cause her miscarriage shall not be punishable*".

For the crime of *consensual and proper abortion*<sup>31</sup> to be committed, it is necessary that

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<sup>31</sup> Art. 133 of the Penal Code: "*[w]hoever causes an abortion with the consent of the woman or the woman who causes her own abortion or consents to another person performing it on her shall be punished with imprisonment of two to eight years*".

the conduct be carried out with knowledge and will to commit this crime, that is to say, that it be committed with *malice*<sup>32</sup>. In another point, the material object of this crime is "*the non-independent life in all its stages of development, from the moment of conception*"<sup>33</sup>. The passive subject of this crime is the unborn person. The difference in penalties according to the moment in which the abortion is committed allows inferring that -although *unborn human life* is always equally valuable- the conduct is more reproachable under the parameter of the time of pregnancy<sup>34</sup>.

In summary, of the systems of: *a. time limits* (allowing abortion within a certain period of pregnancy), *b. indications* (under certain circumstances abortion is allowed regardless of the time of gestation), *c. mixed* (certain circumstances allow abortion up to a certain period) or *d. total decriminalization* (there are no prison sentences for committing abortions)<sup>35</sup>; in El Salvador the system of criminal protection of the right to unborn life is in a system of indications.

In the first place, abortion committed culpably by the mother is not punishable (art. 137 of the Penal Code). Secondly, the exclusion of criminal liability contemplated in article 27.3 (conceptualized in jurisprudence as a ground for exculpation) applies when the abortion is performed in case of serious danger to the mother's life and, in the medical opinion, there is no less burdensome alternative for the rights of the unborn child.

The *Convention on the Rights of the Child* establishes that: art. 6 "*1. States Parties recognize that every child has the inherent right to life / 2. States Parties shall ensure to the maximum extent possible the survival and development of the child*". *States Parties shall respect and ensure the implementation of the rights set forth in the present Convention (...) without discrimination of any kind, irrespective of (...), birth or other status of the child, (...)*" r. a.

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<sup>32</sup> MORENO CARRASCO, F. and RUEDA GARCÍA, L., *Código Penal de El Salvador comentado*, tomo I, first edition, Consejo Nacional de la Judicatura de El Salvador, El Salvador, p. 526. Available at [https://www.cnj.gob.sv/images/documentos/pdf/ecj/publicaciones/codigopenal\\_tomoi.pdf](https://www.cnj.gob.sv/images/documentos/pdf/ecj/publicaciones/codigopenal_tomoi.pdf) accessed on February 23, 2023.

<sup>33</sup> MORENO CARRASCO, F. and RUEDA GARCÍA, L., *Código Penal de El Salvador comentado*, p. 529.

<sup>34</sup> MORENO CARRASCO, F. and RUEDA GARCÍA, L., *Código Penal de El Salvador comentado*, p. 530.

<sup>35</sup> GÓMEZ MONTORO, A. J., "Leading Cases from the Spanish Constitutional Court Concerning the Legal Status of Unborn Human Life" in VV.AA., *Unborn Human Life and Fundamental Rights*, 1st edition, Peter Lang, United States, 2019, pp. 93-96. Likewise, GÓMEZ MONTORO, A. J., "El estatuto constitucional del no nacido: evolución y situación actual en España", *Revista de Derecho Político*, issue 102, Spain, Spain, 2018, pp. 58-61. Available at [https://www.academia.edu/37198729/El\\_estatuto\\_constitucional\\_del\\_no\\_nacido\\_evoluci%C3%B3n\\_y\\_situaci%C3%B3n\\_actual\\_en\\_Espa%C3%B1a](https://www.academia.edu/37198729/El_estatuto_constitucional_del_no_nacido_evoluci%C3%B3n_y_situaci%C3%B3n_actual_en_Espa%C3%B1a) accessed February 23, 2023.

This last article, referring to the equality of rights without distinction on the basis of "birth", has been taken as a basis by the Constitutional Chamber in the unconstitutionality sentence with reference **22-2011**, specifically in Roman IV numeral 2, to affirm the general obligation of El Salvador to protect the right to life of the unborn<sup>36</sup>.

Likewise, the same Constitutional Chamber has said that the protection of the right to life of the *unborn child* through criminal law with the crime of *consensual and proper abortion* is an obligation of the State *"In short, the constitutional mandate delimited implies: on the one hand, the duty to criminalize the forms of abortion insofar as it involves the affectation of a legal right worthy of criminal protection"*<sup>37</sup>.

For this reason, it declared inadmissible an unconstitutionality suit in 2011<sup>38</sup> in which it was requested to declare unconstitutional Article 133 of the Penal Code that criminalizes abortion with imprisonment. It reiterated the previous decision in 2014, in this second case with more emphatic reasons: "[i]n clear terms, prenatal life is a legal right with indisputable constitutional relevance and therefore deserving of criminal protection. Therefore, we are in the presence of a sector of normative regulation in which harmful conducts deserving of punishment are embodied and in which there is a need for criminalization because it is an

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<sup>36</sup> "In order to determine what is meant by the recognition of the quality of person to every human being from the moment of conception, it is useful to note that the very argumentation of the constitutional reform made reference to international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), **the Convention on the Rights of the Child (CRC)** and the American Convention on Human Rights (ACHR). Article 6 of the ICCPR states that: "The right to life is inherent to the human person", without stating when this last condition begins. In its preamble, the CRC states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Article 1 of the CRC states that: "a child means every human being below the age of eighteen years"; **and Article 2 establishes that the rights it recognizes must be respected and ensured "without distinction of any kind, irrespective of [...] birth or other status"**.

<sup>37</sup> P. 36, Judgment of unconstitutionality with reference **18-1998** of the Constitutional Chamber of the Supreme Court of Justice of El Salvador, November 20, 2007, available at <https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2000-2009/2007/11/2EF3.PDF> accessed March 6, 2023.

<sup>38</sup> "Therefore, the argumentative incorrectness noted in this ground of unconstitutionality makes it coincide with the previously rejected; since it seeks to challenge the lack of completeness of the challenged legal provision by not satisfying the vision of each person on how it should be the most appropriate way to regulate a sector of social reality and this must necessarily be understood as a legislative omission. (...) / To which it is also added that the legislative decision for any system of criminalization in the matter of abortions is a framework that corresponds to the political-criminal and political-social valuations that prevail in a country at a certain historical moment, which cannot be substituted by this Chamber. / **Therefore, it must be declared inadmissible the claim contained in the lawsuit at hand, in relation to the violation of arts. 1, 3 and 246 Cn., since the arguments put forward are based on a petition - the omission to regulate the system of indications for abortions - which was previously resolved by this Court**". Page 7 of resolution of inadmissibility of unconstitutionality process with reference **67-2010** of the Constitutional Chamber, of April 13, 2011, available at <https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2010-2019/2011/04/8F060.PDF> consulted on January 23, 2023 -hereinafter Inc. 67-2010-.

*interest with constitutional relevance, as it happens in the same way with the protection afforded to independent human life*"<sup>39</sup> r. a.

In summary, **the Constitutional Chamber justified the obligation to protect prenatal human life with the force of the criminal sanction, based on the constitutional recognition of the human person before birth in article 1, paragraph 2 of the Constitution, and in articles 6.1 and 2.1 of the Convention on the Rights of the Child.**

**This justification was carried out in strict compliance with the constitutional norms that regulate the processes of constitutional review of the norms and, therefore, followed the principles of the constitutional rule of law.**

**This reaffirms the conclusion that the claim that the State of El Salvador should decriminalize abortion entails a serious violation of the right to social and cultural self-determination of peoples (art. 1.1 of the *International Covenant on Civil and Political Rights*; art. 1.1 of the *International Covenant on Economic, Social and Cultural Rights*); and the right of all Salvadoran citizens to participate in the conduct of public affairs through their representatives (art. 23.1.a *American Convention on Human Rights*).**

*4. Reasonableness of the criminal sanction for abortion through: 1) the non-criminalization of wrongful abortion and 2) the state of necessity as grounds for inculpability in the case of risk to the mother's life.*

In Salvadoran criminal law there is no absolute prohibition of abortion. In the first place, abortion is not punishable under Article 136, paragraph 2 of the Penal Code. Secondly, the highest court of justice of El Salvador has established that the *weighting* or *principle of proportionality* is the appropriate mechanism to resolve cases (exceptional and tragic) in which the exercise of the right to life of the *unborn child* is incompatible with the exercise of the right to life of its mother: "*Weighting* is the interpretative method that determines the right that must (...) necessarily yield to the other if it is not possible to safeguard both"<sup>40</sup>.

Since the judgment of incompatibility between the exercise of one or the other right to life is of a medical-scientific nature, and is also directly linked to the circumstances of each

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<sup>39</sup> Page 5 of resolution of inadmissibility of unconstitutionality process with reference **170-2013** of the Constitutional Chamber, dated April 23, 2014, available at <https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/1/2010-2019/2014/04/A6A34.PDF> accessed on February 23, 2023 -hereinafter Inc. **170-2013-**.

<sup>40</sup> Page 14 of Amp. **310-2013**.

case, the highest court has said that its formulation is the power and duty of the intervening physicians: "*specialists in the field of medicine are the only ones with the necessary knowledge and experience to determine, according to the circumstances of each specific case, the appropriate measure to alleviate the suffering and complications experienced by their patients*"<sup>41</sup> r. a. a.

Although in Amp. **310-2013** (28/05/2013) he cited<sup>42</sup> what was said in an autoprocedent of 2007 (Inc. **18-1998**) in which it was recognized that "*partially there is an omission by the legislator*"<sup>43</sup> because the excluders of criminal liability (art. 27 of the Criminal Code) only operate before an already consummated fact; in Inc. **170-2013** (23/04/2014) he reoriented his criterion. It pointed out that this system does not violate the rights of the mother, since it in no way hinders the power of the physician to judge and perform an abortion, in the face of a serious risk to the mother's life. Specifically he said: "*it is totally absurd; as it would be equally absurd to consider the inexistence of a legitimate defense, because the injuries have not been consummated in the illegitimately assaulted -when it is clear that the necessary defense is necessary due to the imminence of the attack that puts at serious risk the physical integrity- or because the person who endures the unlawful attack should wait for judicial authorization to defend himself*"<sup>44</sup> r. a.

However, applying the sub-principle of necessity, it warns that recourse to abortion is only justified as a last resort. That is, it is only justified in the event that there is no less burdensome way for the rights of the unborn child: the physician must perform what is necessary "(...) to guarantee the life of both the mother and the unborn child"<sup>45</sup> r. a.

Conflicts of rights between the mother and the *unborn child* are, in this way, resolved in the Salvadoran penal system through the *state of necessity* (art. 27 numeral 3 of the Penal Code ).<sup>46</sup>

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<sup>41</sup> Page 27 of Amp. **310-2013**.

<sup>42</sup> Page 32 of Amp. **310-2013**.

<sup>43</sup> Page 42 of Inc. **18-1998**. "*But it is an incomplete form, because art. 27 of the Civil Code would only operate against a consummated conduct, so that in a preventive way the possible controversy could not be subject to analysis and decision by a judge or other State entity, in order to authorize or not the proceeding of the indication of abortion. In other words, there is partially an omission on the part of the legislator in regulating that, prior to and not as a result of a criminal proceeding, the controversy between the rights of the mother and those of the unborn child can be resolved. / In order to fully comply with the aforementioned constitutional mandate, the legislator should issue the corresponding legal regulations in which it legislates on the circumstances that must be met in the indications for abortion extra criminal proceedings.*"

On page 11 of Amp. **310-2013** - the sentence where Inc. **18-1998** is cited - it is reaffirmed that the legislator "*complies incompletely with the constitutional mandate mentioned above*".

<sup>44</sup> Pages 7-8 of Inc. **170-2013**.

<sup>45</sup> Page 18 of Amp. **310-2013**.

The Salvadoran Criminal Code contains in a single article both the *causes of justification* -which are analyzed in the analysis of the *unlawfulness of the crime*- and the *causes of inculpability* -which are analyzed in the *culpability of the crime*- in a title called *exclusions of criminal liability*. The *causes of inculpability* are related to the exigibility of the conduct, based on certain qualities of the perpetrator such as age (being older than 12 years old according to art. 2 of the Juvenile Criminal Law) or the mental capacity to discern between right and wrong (art. 27 numeral 4 of the Criminal Code); and/or exceptional circumstances, such as the state of necessity (art. 27 numeral 3 of the Criminal Code).

Unlike the *causes of justification*, the application of the *causes of criminal inculpability* entails the affirmation that a situation of risk or typical affectation of a legal right has been verified. Regarding the state of necessity, SANTIAGO MIR PUIG points out that the *state of necessity* excuses the subject, if the conduct is carried out "(...) *under a situation of conflict in which it is not required to let the threatened interest be sacrificed. This is the case when life or physical integrity is at stake, even if it is saved at the cost of equal (life against life) or superior goods. It is understood that when personal assets such as these are at risk, to demand their sacrifice would be to demand heroism, and the Law is not addressed to heroes, but to the average citizen. But, since an essentially superior interest is not saved, there is no justification, but only exclusion of guilt (that is, of personal imputation): we speak here of a state of exculpatory necessity*"<sup>47</sup> .

Along the same lines, the highest Salvadoran court of justice establishes that the institution of the *state of necessity* is intended to provide "*solutions to conflicts in which [the] general interest yields to clearly exceptional particular situations, and in which interpretative principles such as the weighing of interests, proportionality and human dignity, among others, come into play*"<sup>48</sup> .

In this context, the application of article 27, n.3 of the Penal Code (state of necessity) to the case of abortion is valid in exceptional situations where the interruption of the life of the *unborn child* is presented to the medical judgment as the *only* possible way to safeguard another legal good equally in need of protection. Thus, despite constituting an indisputable

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<sup>46</sup> "(3) *Whoever acts or omits to act out of necessity to safeguard a legal asset, his own or another's, from a real, actual or imminent danger, not caused intentionally, damaging another asset of lesser or equal value than the one safeguarded, provided that the conduct is proportional to the danger and that there is no legal duty to face it*".

<sup>47</sup> MIR PUIG, S., *Derecho Penal parte general*, p. 456.

<sup>48</sup> Page 6 of Inc. 170-2013.



harm to the legal order, abortion is *excused in view of another good* -also of equal value- such as the life of the mother.

On this basis, the Chamber has held that, in the event that a criminal proceeding is initiated against the mother or doctor who performs an abortion because the mother's life was at serious risk, the proceeding must end with a *definitive dismissal* - in accordance with art. 350 numeral 3 of the Salvadoran Code of Criminal Procedure -<sup>49</sup> . The *definitive dismissal* is equivalent to an acquittal at the beginning or during the process. In a more detailed manner, the process must begin with the prosecutor's request for the *definitive dismissal* in favor of the mother, since the Attorney General's Office is obliged to request the acquittal of the defendant when the conduct is covered by an *exclusion of criminal responsibility* -such as the *state of necessity*-. This is so, according to art. 295 numeral 6 of the Code of Criminal Procedure<sup>50</sup> . Moreover, the judge can issue the definitive dismissal ex officio in the first hearing even if the prosecution does not request it (art. 350 paragraph 2 of the Code of Criminal Procedure<sup>51</sup> ). As of 2019, not a single woman has been detained serving a sentence for the crime of consensual or self-induced abortion<sup>52</sup> .

The highest court of justice also points out that the gradualness or vital development of the person may justify the difference in the reproachability of a conduct that threatens life, but in no way justifies a judgment on the lesser or greater value of human life. Specifically, it states "[t]his difference, influenced by the gradualness<sup>53</sup> or progressiveness of vital development, does not detract from the protection of prenatal human life nor does it reduce in the abstract<sup>54</sup> the State's obligation in this regard, but it can justify differentiated evaluations of protection or of the rights in conflict, if applicable, based on the phases or stages of such development"<sup>55</sup> .

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<sup>49</sup> "Article 350.- The judge may issue a definitive dismissal in the following cases: (3) When the accused is exempt from criminal liability, because any of the causes that exclude it are sufficiently proven, (...)" .

<sup>50</sup> "Article 295.- Once the initial investigation proceedings have been concluded, the prosecutor shall formulate a request within the established time limits. In it he may request: the definitive dismissal in the cases contemplated in article 350 of this Code, after hearing the victim" .

<sup>51</sup> "Art. 350.- (...) / The justice of the peace may only decree a definitive dismissal in cases of (...) certainty of the existence of an exclusion of criminal liability" .

<sup>52</sup> CASTALDI, L. DE J., "El caso Manuela y las 17+ contra El Salvador: un fraude ante la corte interamericana de derechos humanos y la comunidad internacional", *Derecho Público Iberoamericano*, 2020, p. 74. Available at <https://dialnet.unirioja.es/descarga/articulo/8039501.pdf> accessed March 6, 2023.

<sup>53</sup> The Constitutional Chamber explicitly mentions the criterion of the Inter-American Court of Human Rights when it states that *the right to life is gradual and incremental according to its development in the case of Artavia Murillo et al. v. Costa Rica*, paragraphs 258 and 264, and says "[t]his criterion is considered applicable to the present case, although the rest of the judgment refers to a different legal problem, on which this Chamber should not make an assessment at this time" Inc. **22-2011**.

<sup>54</sup> The Chamber uses the term in the abstract, since in a concrete or particular case the differences will of course be evaluated to see which right prevails over the other in case of weighing.

In summary, the Constitutional Chamber affirms that:

- (i) The State of El Salvador has an obligation to protect the right to life from conception, whose strength or weight remains the same in all stages of development of life. The gradualness or progressiveness of vital development affects the degree of *reproachability* of the conduct that threatens unborn life, but not the value of human life, which is the same from conception to death.
- (ii) The application of the state of necessity (excluding criminal culpability) to the case of abortion due to the serious risk to the mother's life is a reasonable way to resolve the factual incompatibility between the exercise of the right to life of the unborn child and the exercise of the mother's right to life.

**It is concluded that there is no absolute prohibition of abortion in El Salvador, since the system excludes criminal liability in cases of culpable abortion and abortion to save the life of the mother.**

**It is also concluded that the reasonableness of the penal regulation has been submitted to a legal-constitutional debate, which was favorably resolved by the bodies and procedures constitutionally authorized for this purpose. Therefore, the claim that the State of El Salvador should modify its criminal legislation on abortion entails a serious violation of the right to social and cultural self-determination of peoples (art. 1.1 of the *International Covenant on Civil and Political Rights*; art. 1.1 of the *International Covenant on Economic, Social and Cultural Rights*); and the right of all Salvadoran citizens to participate in the conduct of public affairs through their representatives (art. 23.1.a *American Convention on Human Rights*).**

5. *Protection of the life, health and physical integrity of the unborn child and pregnant women with sexual and reproductive health policies designed to make the exercise of both rights compatible.*

The category of "sexual and reproductive rights" is not internationally recognized by any human rights treaty, and there is no international custom in this regard, as several States have expressed their opposition to it.<sup>56</sup> The origin of this concept is to be found in the [program of](#)

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<sup>55</sup> Page 12 of Inc. 22-2011.

<sup>56</sup> GARCÍA ESCOBAR, GABRIELA, *Cultural Diversity as the Core of Human Rights Universality: Rediscovering the Spirit of the Universal Declaration of Human Rights of 1948 through the Right to Self-Determination*

[action of the 1994 Cairo Conference on Development and Population](#), which is **not a human rights treaty**, but rather a **non-binding** instrument whose purpose was to agree on strategies for population regulation<sup>57</sup>. In the event that such a concept were to be configured as a right, intergovernmental agreements on the matter have been clear in expressly stating that sexual and reproductive health **does not include access to abortion**<sup>58</sup>.

Therefore, since the so-called "*sexual and reproductive rights*" do not constitute internationally recognized human rights, and in accordance with the right to self-determination of peoples, **El Salvador has the freedom to decide in a democratic manner and respecting the rule of law, the adoption of sexual and reproductive health policies it deems appropriate**. The only limitation to this freedom would be the protection and safeguarding of human rights established in the treaties ratified by El Salvador, among which is the **protection of life from conception**, enshrined in Article 4.1 of the American Convention on Human Rights.

In this line of ideas, in El Salvador there are three laws on sexual and reproductive health. The *Law for the Integral Protection of Children and Adolescents* - in force since April 16, 2010<sup>59</sup> - in art. 32 establishes that all children and adolescents "(...) *have the right to receive information and education on sexual and reproductive health, with priority given by their mother and father*". This same article states that the State must provide children and adolescents with access to health services and programs and comprehensive sexual education for children and adolescents "*in order to strengthen their personal fulfillment (...) and prepare them for responsible motherhood and fatherhood in adulthood, healthy and safe. The services and programs implemented will guarantee and promote respect for the right to life from the moment of conception*".

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(2022), chapter 5. PhD Thesis University of Geneva DOI:10.13097/archive-ouverte/unige:158809. Available at: <https://nbn-resolving.org/urn:nbn:ch:unige-1588095>.

<sup>57</sup> See the following research: MATTHEW CONNELLY, *Fatal Misconception: The Struggle to Control World Population* (Harvard University Press, 2008); STANLEY JOHNSON, *The Politics of Population: Cairo 1994* (Eathscan, 1995); C. ALISON MCINTOSH and JASON L. FINKLE, "The Cairo Conference on Population and Development: A New Paradigm?" *Population and Development Review* 21, no. 2 (1995); SEAMUS GRIMES, "The Ideology of Population Control in the UN Draft Plan for Cairo," *Population Research and Policy Review* 13 (1994); BETSY HARTMANN, *Reproductive Rights and Wrongs: The Global Politics of Population Control*, 3rd ed (Haymarker Books, 2016).

<sup>58</sup> As agreed at the Cairo and Beijing Conferences: "Report of the International Conference on Population and Development," item 8.25; and "Report of the Fourth World Conference on Women" (Beijing, 1995), item 8.25, [https://www.un.org/womenwatch/daw/beijing/pdf/Beijing\\_full\\_report\\_E.pdf](https://www.un.org/womenwatch/daw/beijing/pdf/Beijing_full_report_E.pdf).

<sup>59</sup> Legislative Decree number 839, dated March 26, 2009, published in the Official Gazette number 68, volume 383 dated April 16, 2009, available at <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/FC3868B6-5FEA-440B-9949-414222C42FFD.pdf> accessed on March 3, 2023.

Article 24 of the same law establishes that any pregnant girl or adolescent is considered to have a high-risk obstetric pregnancy and, therefore, *must receive comprehensive medical care in public health institutions*. Art. 25 typifies the obligations of the *national health system*, including "c) *Develop comprehensive sexual and reproductive health care programs for children and adolescents*; j) *Establish guidelines and protocols for the actions of health personnel for the prevention, identification, care and treatment of mistreated or sexually abused children and adolescents, as well as for notifying or reporting them to the competent authority*; n) *Establish protocols for the care of pregnant children, adolescents and women*".

The second law is the *Law on Equality, Equity and Eradication of Discrimination against Women*, -in force since April 21, 2011<sup>60</sup> -, whose art. 26 literal *b* prescribes that the State must guarantee "[a]ccess for girls, boys, adolescents, adults and adults to scientific and updated information and education, appropriate to the life cycle, timely, truthful, sufficient and complete on the responsible exercise of sexuality, self-care and risk prevention in sexual and reproductive health, as well as access to public services of information, preventive and curative care" r. a. and in paragraph *d* it states that the State must "[g]uarantee quality health services during the fertilization, implantation, pregnancy, childbirth and puerperium stages for all women, without discrimination of any kind, including the guarantee of care for patients who come to health facilities seeking timely care for problems and situations that put the continuity of the pregnancy at risk" r. a.

The third norm is focused on the protection of the pregnant mother, the right to life of the *unborn child* and the right to life of the newborn. This is stated in the purpose of the *Law to be born with love for a respected childbirth and a loving and sensitive care for the newborn* - issued on August 17, 2021<sup>61</sup> -. Recital *v* of this law states: "*maternal and neonatal health is a priority of the State*". And, one of the objectives of the State to protect the health of all inhabitants will be achieved through an *integrated national health system*. Within this system is "*humanized care in pregnancy and childbirth*" since this is the "*important reproductive moment, both for the mother and for the newborn, as well as for her family and society*".

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<sup>60</sup> Legislative Decree number 645, dated March 17, 2011, published in the Official Gazette number 70, volume 391 dated April 8, 2011, available at [https://oig.cepal.org/sites/default/files/2011\\_d645\\_slv.pdf](https://oig.cepal.org/sites/default/files/2011_d645_slv.pdf) accessed on March 3, 2023.

<sup>61</sup> Legislative Decree number 123, dated August 17, 2021, published in the Official Gazette number 70, volume 432 dated August 23, 2021, available at <https://www.asamblea.gob.sv/sites/default/files/documents/dictamenes/89AE758D-B086-4764-B1E1-C9D0B24E0D74.pdf> accessed on March 3, 2023.

Article 1 states: "[t]he purpose of this law is to guarantee and protect the rights of women from pregnancy, childbirth and puerperium, as well as the rights of children from gestation, during birth and during the newborn stage, (...)". Likewise, Articles 4.14 and 15 prescribe "[r]ight to life: [r]ight inherent to the human being from the moment of conception, (...). / [e]mbarazo: [p]art of the process of human reproduction that begins with conception". r. a.

This law was approved with a majority of seventy-nine votes of the eighty-four deputies that make up the Legislative Assembly. Regarding the sense of the law, the comments of the deputies coincided. For example, SUECY CALLEJAS, one of the deputies of the majority party (55 deputies) *Nuevas Ideas* and vice-president of the Board of Directors of the Legislative Assembly, stated -in the plenary session where this law was approved-: "[t]he law proposes a new model of attention that takes into account the needs of each woman, from preconception to the birth of her baby"<sup>62</sup> ; likewise: "[t]his law is for us to treat mothers, their babies and their families with respect (...)[.For newborns this law offers loving and sensitive care, to be close to their mother and to promote breastfeeding]"<sup>63</sup> .

Within this normative framework are inserted - lastly - a series of protocols issued by the ministries of the Executive Branch, which regulate aspects related to the protection of unborn life, pregnancy and women's rights. For example, the *Ministry of Health* has issued a protocol concerning women's health, covering the moment prior to conception until the birth of the human person.

This protocol is entitled "*Technical guidelines for the care of women in the preconception, prenatal, delivery, puerperium and newborn period. SSR services for emergency or disaster care*", which was issued on August 19, 2021<sup>64</sup> . It establishes the indications to be given by physicians in cases where there are risk factors for the continuation of pregnancy<sup>65</sup> .

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<sup>62</sup> See press release in the official web page of the Legislative Assembly at the following link: <https://www.asamblea.gob.sv/node/11471> accessed on March 3, 2023.

<sup>63</sup> "Gobierno del presidente Nayib Bukele logra aprobación de la Ley Nacer con Cariño para saldar una deuda histórica en el trato de las madres y sus bebés," *official publication of the government of El Salvador*, August 17, 2021. Available at: <https://www.presidencia.gob.sv/gobierno-del-presidente-nayib-bukele-logra-aprobacion-de-la-ley-nacer-con-carino-para-saldar-una-deuda-historica-en-el-trato-de-las-madres-y-sus-bebes/> accessed March 2, 2023.

<sup>64</sup> Agreement number 517 of the Executive Branch in the Health Branch, available at the following link: [http://asp.salud.gob.sv/regulacion/pdf/lineamientos/lineamientos\\_atencion\\_preconcepcional\\_v2.pdf](http://asp.salud.gob.sv/regulacion/pdf/lineamientos/lineamientos_atencion_preconcepcional_v2.pdf) accessed on March 3, 2023.

<sup>65</sup> The general objective of this protocol is to establish "*comprehensive health care during the preconception, prenatal, delivery, puerperium and newborn care stages in the National Integrated Health System. These*

From the education sector, there is another protocol issued by the *Ministry of Education* that aims to ensure that pregnant minors can continue and complete their studies. That is the purpose of the "*protocol for the school permanence of girls and adolescents who are pregnant or who are already mothers*" which was issued in July 2018<sup>66</sup>. According to the protocol's rationale, its objective is to reduce school dropout of pregnant or mothering adolescents. Therefore, a medical and psychological control plan is designed to adolescents, which watches over their physical and mental health. Also, a plan for notifying the family about the pregnancy is structured. In addition to these steps, several other aspects are carried out to guarantee the health of the minor and her child, such as - for example - ensuring that pregnancy is not an insurmountable obstacle to meeting the student goals set<sup>67</sup>.

This protocol directly protects the mother's right to education, health and life. It also indirectly protects the right to life and health of the *unborn child*, since protecting the health of the mother protects the health of the unborn child. Finally, the Ministry of Health establishes guidelines for family planning and excludes the use of contraceptive methods of an abortive nature<sup>68</sup>.

In summary, the Constitutional Chamber justified the obligation to protect prenatal human life with the force of the criminal sanction, based on the constitutional recognition of the human person before birth in article 1, paragraph 2 of the Constitution, and in articles 6.1 and 2.1 of the Convention on the Rights of the Child. This justification was carried out in strict compliance with the constitutional norms that regulate the processes of constitutional review of the norms and, therefore, followed the principles of the constitutional rule of law.

In summary, the Salvadoran State has developed sexual and reproductive health policies aimed at safeguarding and harmonizing the right to life of the unborn person and the rights of pregnant women during pregnancy, childbirth and post-partum. These policies were embodied in norms that, in addition to having been approved with large legislative majorities, were

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*provisions are framed within the approach of gender, equality, human rights and social determination of health".*

<sup>66</sup> Available at <https://eurosocial.eu/wp-content/uploads/2020/02/4.-PROTOCOLO-PARA-LA-PERMANENCIA-VF021019-web.pdf> accessed March 3, 2023.

<sup>67</sup> The protocol states: "[b]ecause this is a problem with multiple causes and whose consequences must be addressed by various institutions, educational institutions should not be oblivious to it. Moreover, they are a fundamental actor in the prevention of teenage pregnancies, as well as in their care".

<sup>68</sup> This protocol is available on the official website of the *Ministry of Health* at [http://asp.salud.gob.sv/regulacion/pdf/lineamientos/Lineamientos\\_tecnicos\\_para\\_la\\_provision\\_de\\_servicios\\_de\\_anticoncepcion.pdf](http://asp.salud.gob.sv/regulacion/pdf/lineamientos/Lineamientos_tecnicos_para_la_provision_de_servicios_de_anticoncepcion.pdf) accessed on March 3, 2023.

created in strict compliance with the constitutional procedures that regulate the actions of the organs of the State.

**In view of the foregoing, the conclusion is reaffirmed that the claim that the State of El Salvador should modify its sexual and reproductive health policies entails a serious violation of the right to social and cultural self-determination of peoples (art. 1.1 of the *International Covenant on Civil and Political Rights*; art. 1.1 of the *International Covenant on Economic, Social and Cultural Rights*); and the right of all Salvadoran citizens to participate in the conduct of public affairs through their representatives (art. 23.1.a of the *American Convention on Human Rights*).**

### III. ARGUMENT NUMBER 2. FULL COHERENCE OF THE SOCIAL AND CULTURAL SELF-DETERMINATION OF EL SALVADOR WITH THE OBLIGATIONS ASSUMED IN THE INTERNATIONAL SYSTEM AND IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS.

#### *1. The non-existence of a human right to abortion, in accordance with conventional human rights law*

International Human Rights Law, as part of Public International Law, is governed by the same primary legal sources,<sup>69</sup> which are international treaties and international custom.<sup>70</sup>

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<sup>69</sup> SAMANTHA BESSON, "The Sources of International Human Rights Law: How General Is General International Law?", in *The Oxford Handbook of the Sources of International Law*, (eds. Samantha Besson and Jean D'Aspremont), Oxford University Press, 2017.

<sup>70</sup> Statute of the International Court of Justice, art. 38.

No international human rights treaty provides for access to abortion as a human right. Advocates for the legalization of abortion acknowledge that they cannot point to any treaty that sets out such an obligation.<sup>71</sup> The special rapporteur on the right to health, Anand Grover, appointed by the Human Rights Council, acknowledged before the UN General Assembly that "*there is no international law on the subject [of abortion]*".<sup>72</sup>

On the contrary, the instrument that delimits the mandate of this honorable Court, the *American Convention on Human Rights*, establishes in its article 4.1 that the right to life "*shall be protected by law and, in general, from the moment of conception*".<sup>73</sup> El Salvador has not made any reservation in this regard, so it is understood to be obliged to comply with this provision.

For its part, the 1989 *Convention on the Rights of the Child* also states in the ninth preambular paragraph that children must be legally protected "*before as well as after birth*".<sup>74</sup>

With respect to the *1948 Universal Declaration of Human Rights* (UDHR), some courts have incorrectly interpreted Article I's reference to "*all human beings are born free and equal in dignity and rights*" as legitimizing an alleged human right to abortion.<sup>75</sup>

However, such a conclusion lacks a legal analysis in light of the rules of treaty interpretation of the *Vienna Convention on the Law of Treaties*.<sup>76</sup> Following these rules, the preparatory work for the UDHR indicates that, when discussing the issue of abortion, there was no consensus among delegates. Some opted for its permissibility (e.g. China and the Soviet Union), while Latin American nations defended its protection from conception.<sup>77</sup> Due to the disagreement and stating that such a controversial issue should not be included in a universal instrument, the drafters opted to allow each State to decide its position on the matter.<sup>78</sup> The

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<sup>71</sup> CHRISTINA ZAMPAS and JAIME M. GHER, "Abortion as a Human Right-International and Regional Standards," *Human Rights Law Review* 8, no. 2, 2008. This article recognizes that the only treaty on the subject is a regional treaty in Africa (the Maputo Protocol), which has not been signed by all members of the African Union and which provides for abortion only on four grounds.

<sup>72</sup> UN, "Several Aspects of Sexual, Reproductive Health - Providing Information, Using Contraception, Abortion - Should Be 'Decriminalized,' Third Committee Told," UN Press Release GA/SHC/4018 (24 October 2011). Available at <https://press.un.org/en/2011/gashc4018.doc.htm> accessed March 6, 2023.

<sup>73</sup> American Convention on Human Rights, art. 4.1.

<sup>74</sup> Convention on the Rights of the Child (adopted in 1989, entered into force in 1990) <https://www.ohchr.org/es/instruments-mechanisms/instruments/convention-rights-child>

<sup>75</sup> Mexican Supreme Court of Justice of the Nation, *Action of Unconstitutionality 148/2017*, Plenary of the Supreme Court of Justice of the Nation (7 September 2017), para 173.

<sup>76</sup> Vienna Convention on the Law of Treaties, arts. 31-32.

<sup>77</sup> ASHILD SAMNOY, *Human Rights as International Consensus: Making the Universal Declaration of Human Rights 1945-1948*, Michelsen Institute, 1993, p. 90.

<sup>78</sup> WILLIAM A SCHABAS, *The Universal Declaration of Human Rights the Travaux Préparatoires: Volume 3*, Cambridge University Press, 2013, Pp.1266 to 1267 and 1535.



same happened with the adoption of the *International Covenant on Civil and Political Rights*.<sup>79</sup>

**Therefore, there is no obligation under international conventional law to legalize abortion. Given the controversial nature of the issue and recognizing that there is no consensus on the matter, conventional law suggests that the manner of regulating abortion should be left to the consideration of each State, respecting the right to self-determination of peoples and the principle of subsidiarity.**

#### 6. *The non-existence of a human right to abortion, under customary international law*

Customary international law is made up of a repeated practice (*inveterata consuetudo*) and the belief that such practice is legally binding (*opinio iuris*).

From a global perspective, the practice of most States is oriented towards the criminalization of abortion. Today, 117 States criminalize abortion, of which 24 extend this criminalization to any circumstance, while 93 restrict it to cases of danger to the mother's life or rape.<sup>80</sup> The first ground is legal in 98% of the States, while the second is legal in 43% of the legislations.<sup>81</sup>

With regard to *opinio iuris*, it is important to note the legal nature of these grounds for abortion in certain States. Most legislations contemplate these grounds as **grounds for inculpability in criminal matters**.<sup>82</sup> As argued in section II.5, grounds for excluding criminal culpability are cases in which the legal system declines its power to punish conduct that, from an objective point of view, represents a typical risk or harm to a legal good. For this reason, it can in no way be affirmed that the penal systems that include absolving excuses for abortion elevate this matter to the category of a legal right, much less a human right.

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<sup>79</sup> Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, p. 121.

<sup>80</sup> Angelina Theodorou and Aleksandra Sandstrom, "How Abortion Is Regulated around the World," 2015, <https://www.pewresearch.org/fact-tank/2015/10/06/how-abortion-is-regulated-around-the-world/>.

<sup>81</sup> UK All-Party Parliamentary Group (APPG) on Population, Development and Reproductive Health, "Who Decides? We trust women Abortion in the developing world and the UK", (March 2018) p. 15 < <https://static1.squarespace.com/static/5dc18cebd3c7b576d0caacf/t/6018198ac5636e4cc26f08b7/1612192166560/Abortion+hearings+report+-+March+2018.PDF> >. Consulted on February 23, 2021.

<sup>82</sup> Alejandro González-Varas Ibáñez, "Aspectos Ético-Jurídicos de La Regulación Del Aborto En España," *Revista General de Derecho Canónico y Derecho Eclesiástico Del Estado*, no. 23 (2010).

It is not valid, on this basis, to conclude from this data the existence of an *opinio iuris* favorable to the recognition of a right of freedom to abortion nor, much less, to a right to benefits.

On the other hand, only 30% of the States in the world have legalized abortion without grounds, although with certain gestational limits.<sup>83</sup> Among these States, the majority have legalized it, although the internal debate is still unresolved, since a large part of the population maintains an intermediate position.<sup>84</sup> Moreover, many of these States (including the Soviet Union, Turkey, India, Tunisia, China and Vietnam) have liberalized abortion as part of **population regulation policies, which are developed in the context of legal practices characterized by little or no consideration for the human rights** of the affected population.<sup>85</sup>

In the Latin American region, of the 24 States party to the *American Convention on Human Rights*, 5 criminalize abortion in general (Honduras, Haiti, Dominican Republic, Jamaica and El Salvador), making the general grounds for exculpation of responsibility applicable. In the rest of the cases, abortion is criminalized, with specific grounds for exculpation that are included in the system of indications. In some specific cases, such as Argentina or Uruguay, the indications system is combined with the time limit system<sup>86</sup>. The generalization of the regulation of abortion as a criminal offense shows that abortion in itself is conceived as a harm to a legal good (human life), which -with more or less reason- it is considered reasonable to exculpate in some specific situations.

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<sup>83</sup> Theodorou and Sandstrom, "How Abortion Is Regulated around the World."

<sup>84</sup> Ronald Inglehart, C. Haerpfner, and Alejandro Moreno, "World Values Survey: Round Seven - Country-Pooled Datafile Version," World Values Survey, 2020, <http://www.worldvaluessurvey.org/WVSONline.jsp>.

<sup>85</sup> See the various research that has been done on this topic: Mark Savage, "The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries," *Stanford Law Review* 40, no. 4 (1988); Donna Harsch, "Communism and Women," in *The Oxford Handbook of the History of Communism*, ed. Stephen A. Smith (Oxford University Press, 2013); Irene Maffi and Malika Affes, "The Right to Abortion in Tunisia after the Revolution of 2011: Legal, Medical, and Social Arrangements as Seen through Seven Abortion Stories," *Health and Human Rights Journal* 21, no. 2 (2019); Bussarawan Teerawichitchainan and Sajeda Amin, "The Role of Abortion in the Last Stage of Fertility Decline in Vietnam," *International Perspectives on Sexual and Reproductive Health* 36, no. 2 (2010); Sripati Chandrasekhar, *Abortion In A Crowded World: The Problem of Abortion With Special Reference to India* (University of Washington Press, 1974); Connelly, *Fatal Misconception: The Struggle to Control World Population*; Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control*.

<sup>86</sup> Argentina: Law 27,610 (January 15, 2021) art. 4; Uruguay: Law 18,987 (December 1, 2008). Article 2 states: "Voluntary termination of pregnancy shall not be penalized and in consequences Articles 325 and 325bis of the penal code shall not be applicable, in the event that the woman complies with the requirements set forth in the following articles and it is performed during the first twelve weeks of pregnancy." Available at: [https://oig.cepal.org/sites/default/files/2012\\_ley18.987\\_uruguay.pdf](https://oig.cepal.org/sites/default/files/2012_ley18.987_uruguay.pdf)

With respect to this issue, it is relevant to indicate that the decisions of the national courts of Brazil, Chile, Colombia and Costa Rica, cited by the IACHR Commission, do not constitute *per se* international custom, as the International Law Commission has indicated:

The value of such [national court] decisions varies greatly, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of the evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law. Other considerations could be, depending on the circumstances, the nature of the court, the size of the majority by which the decision was reached and the rules and procedures applied by the court.<sup>87</sup>

According to the International Law Commission, in order to constitute custom, State practice must be internally consistent,<sup>88</sup> . Therefore, discrepancies between the legislature and the judiciary demonstrate a lack of cohesion in the State's position and therefore cannot meet the necessary requirements to constitute international custom.

Even less can one speak of an internally consistent custom when the constitutional jurisprudence in question is openly contradictory with past decisions of the same jurisdiction. This is the case of Chile, whose Constitutional Court had previously stated, in 2008, in Judgment ROL-740: "*Chilean constitutional doctrine has been mostly inclined to hold, contrary to what is held by professors of other legal disciplines, that the constitutional protection of the person begins from the very moment of conception (...)*"<sup>89</sup> .

In addition to the existence of this *opinio iuris* in the prevailing doctrine of the country, the Court itself supported this opinion with the argument that: "*the uniqueness that the embryo possesses, from conception, allows it to be observed as a unique and unrepeatable being that is entitled, from that very moment, to the protection of the law and that could not simply be subsumed into another entity, much less manipulated, without affecting the substantial dignity it already enjoys as a person*"<sup>90</sup> .

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<sup>87</sup> International Law Commission, *Draft conclusions on identification of customary international law with commentaries of 2018*, Yearbook of the International Law Commission, 2018, vol. II, Part Two, pp. 28-29.

<sup>88</sup> International Law Commission, *Draft conclusions on identification of customary international law with commentaries of 2018*, Yearbook of the International Law Commission, 2018, vol. II, Part Two, pp. 8-9.

<sup>89</sup> Judgment ROL 740: Argument 49.

<sup>90</sup> Judgment ROL 740: Argument 51.

In the same sense, the Constitutional Court of Costa Rica expressed its *opinio iuris* in relation to the right to unborn life and abortion, in Resolution 02792/2004, stating: "*Article 4.1 of the American Convention on Human Rights, the Preamble and Article 6.1 of the Convention on the Rights of the Child, as well as Articles 12 and 13 of the Code of Childhood and Adolescence, Law number 7739 of January 6, 1998. From the conjunction and systematization of all of them it is concluded ... that our legal system does not differentiate between born and unborn for the purpose of giving them the status of human being, equivalent to that of a person, for the purpose of recognizing the protection of their right to life*".

For its part, the Supreme Court of the Argentine Nation stated in 2002: "*That this Court has declared that the right to life is the first natural right of the human person pre-existent to all positive legislation which is guaranteed by the National Constitution (Judgments: 302:1284; 310:112; 323: 1339)(...).It has also said that man is the axis and center of the entire legal system and as an end in himself beyond his transcendent nature, his person is inviolable and constitutes a fundamental value with respect to which the remaining values always have an instrumental character (Judgments: 316:479, concurring votes)*".

This interpretative judgment was justified in this same decision, it should be added, in light of the international commitments assumed by Argentina: "*That based on the provisions of the international treaties that have constitutional hierarchy (Article 75, paragraph 22, of the Supreme Law), this Court has reaffirmed (...) that the aforementioned international covenants contain specific clauses that protect the life of the human person from the moment of conception. Indeed, Article 4.1 of the Pact of San José, Costa Rica establishes: "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". Furthermore, every human being from the moment of conception is considered a child and has the intrinsic right to life (arts. 6.1 of the Convention on the Rights of the Child, 2 of Law 23.849 and 75, inc. 22 of the National Constitution) (considering 14"*. In exactly the same line, the Peruvian Constitutional Court expressed itself in STC N° 02005-2009-PA/TC.

For all these reasons, the judicial decisions adopted by the courts of 5 of the 24 States parties to the *American Convention on Human Rights* do not constitute a widespread and consistent practice that would justify the existence of an international obligation to decriminalize abortion on any grounds. First, some of these decisions are not even consistent with previous decisions of these same courts. Second, there is a discrepancy between these decisions and the current legislation adopted by the legislature.

It is also essential to point out that the IACHR failed to note that there is evidence of state practice that rejects the configuration of abortion as an international obligation. *Jackson Women's Health Organization* (2022) of the U.S. Supreme Court rejected the proposition that abortion is a fundamental right.<sup>91</sup> In 2020, the Constitutional Court of Poland ruled that abortion for fetal malformations is unconstitutional.<sup>92</sup> In 2015, the Constitutional Court of the Dominican Republic declared unconstitutional the reforms to the penal code decriminalizing abortion under certain grounds.<sup>93</sup>

In addition, in 2020, a coalition of 34 States presented the *Geneva Consensus Statement on Promoting Women's Health and Strengthening the Family*, which reaffirms that.

**There is no international right to abortion, nor is there any international obligation on the part of States to fund or facilitate abortion,** in accordance with the long-standing international consensus that each nation has the sovereign right to implement programs and activities consistent with its laws and policies.<sup>94</sup>

Likewise, in his dissenting opinion in the case of *Manuela v. El Salvador*, IACHR Court Judge EDUARDO VIO GROSSI was direct in emphasizing that

*It must be affirmed that the jurisdiction of the Court is exercised, within the framework of international law, on the basis of the objective nature of the international responsibility of the State for an internationally wrongful act, that is, that the State incurs it if an act is internationally attributable to it and if it constitutes a violation of one of its international obligations. And in this regard it is indisputable that, as was pointed out in an individual opinion of the undersigned, there is no inter-American or international legal norm, whether conventional, international custom or general principle of law, that recognizes abortion as a right. There are only resolutions of international bodies, most of which are made up of international*

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<sup>91</sup> U.S. Supreme Court, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. \_\_\_\_ (2022).

<sup>92</sup> "Poland Abortion: Top Court Bans Almost All Terminations," *BBC News*, 2020, <https://www.bbc.com/news/world-europe-54642108>.

<sup>93</sup> Center for Reproductive Rights, "Dominican Republic Constitutional Court Repeals Abortion Law" (12 April 2015). <https://reproductiverights.org/dominican-republic-constitutional-court-repeals-abortion-law/>.

<sup>94</sup> Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/344/30/PDF/N2034430.pdf?OpenElement>

officials and not representatives of States, decisions that, in addition to not being binding, are not interpretative of current international law, but rather reflect aspirations to change it in the direction they suggest.<sup>95</sup>

**Commissioner CARLOS BERNAL PULIDO** has also expressed himself in the same sense, in response to the press releases of the IACHR Commission that support the legalization of abortion, despite the fact that it is a practice that is absolutely contrary to its mandate under Article 4 of the *American Convention on Human Rights*. BERNAL PULIDO insisted that "the IACHR Commission has the obligation to promote the guarantee of the rights contained in the ACHR. Among which is the right to life from conception" and reaffirming that "there is no binding international instrument, nor is there any jurisprudence of the IACHR Court that foresees the existence of a right to abortion, or that establishes an international obligation for the States to decriminalize this conduct".<sup>96</sup>

**In conclusion, according to the evidenced state practice and the lack of *opinio iuris*, there cannot be a right to abortion or an obligation to legalize it under customary international law.**

7. *The non-existence of a right to abortion under "Soft Law": The non-binding instruments and the jurisprudence of the European Court of Human Rights, cited by the IACHR Commission, cannot be interpreted as recognizing a human right to abortion.*

As the International Law Commission has stated, the use of subsidiary means as sources of international law plays an "*auxiliary role*" for "*the elucidation of law, rather than being in itself a source of law*".<sup>97</sup> Therefore, so-called *soft law* instruments, in addition to being non-binding, cannot replace or contradict international custom or treaties, and their "*normative value*" may diminish or increase according to various parameters.<sup>98</sup>

The ICJ has indicated that the "*normative value*" of non-binding instruments requires "*examining the content and conditions of their adoption*", as well as "*whether there is an opinio*

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<sup>95</sup>Recital 13 of the dissenting opinion of Judge VIO GROSSI in the *Case of Manuela et al. v. El Salvador*. Available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_441\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_441_esp.pdf) accessed on March 9, 2023.

<sup>96</sup> See his comments expressed through his Twitter account: <https://twitter.com/carloslbernal/status/1532857383793397763>.

<sup>97</sup> International Law Commission, *Draft conclusions on identification of customary international law with commentaries*, Yearbook of the International Law Commission, 2018, vol. II, Part Two, p. 149.

<sup>98</sup> Kenneth W Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," 2000, 421-56.

juris as to *their normative character*".<sup>99</sup> The International Law Commission has reached the same conclusion, emphasizing that the "*normative value*" of a non-binding instrument depends on the degree of agreement or disagreement reflected in the negotiations and the positions of the States.<sup>100</sup>

**Therefore, this honorable Court cannot use *soft law* instruments arbitrarily and without paying attention to their normative value, according to the circumstances of their adoption, the lack of consensus on abortion, and the non-binding nature of this type of documents.**

3.1 The International Conference on Population and Development in Cairo (1994) and the International Conference on Women in Beijing (1995) have no binding force and, moreover, do not recognize a right to abortion.

The IACHR Commission cites the programs of action emanating from the 1994 Cairo and 1995 Beijing Conferences to support its argument. However, it fails to point out that the "*normative value*" of these instruments is minuscule for two reasons. First, because of their non-binding legal nature as *soft law* instruments. Second, because the process of drafting and adoption of the texts reveals deep discrepancies between States,<sup>101</sup> which is confirmed by the large number of reservations incorporated into the document.<sup>102</sup> In this regard, it is important to point out that El Salvador formulated the following reservation at the Cairo Conference:

*The Latin American countries are signatories to the American Convention on Human Rights (Pact of San José). Its Article 4 clearly establishes that life must be protected from the moment of conception (...) For this reason, (...) we consider that life must be protected from the moment of conception.*<sup>103</sup>

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<sup>99</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, paras 70-71.

<sup>100</sup> International Law Commission, *Draft conclusions on identification of customary international law with commentaries of 2018*, Yearbook of the International Law Commission, 2018, vol. II, Part Two, p. 27.

<sup>101</sup> McIntosh and Finkle, "The Cairo Conference on Population and Development: A New Paradigm?"; Mary Ann Glendon, "What Happened at Beijing," *First Things*, 2019, <https://www.firstthings.com/article/1996/01/005-what-happened-at-beijing>.

<sup>102</sup> "Report of the International Conference on Population and Development" (Cairo, 1995), 189 to 280, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/231/26/IMG/N9523126.pdf?OpenElement>.

<sup>103</sup> "Report of the International Conference on Population and Development," p. 133.

On the other hand, both programs of action reached the agreement enshrined in **common point 8.25 that** "governments should take appropriate measures to help women avoid abortion, which under no circumstances should be promoted as a method of family planning" and that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process".<sup>104</sup>

In addition, both instruments state that the agreements established therein must be implemented "with full respect for the diverse religious and ethical values and cultural backgrounds of its people, and in accordance with universally recognized international human rights".<sup>105</sup>

### 3.2 The jurisprudence of the European Court of Human Rights (ECtHR) has not recognized a right to abortion.

The IACHR Commission cites three ECtHR cases to support an alleged right to abortion. However, **there are no ECtHR precedents that establish such an obligation; on the contrary, this Court has expressly indicated that there is no right to have access to abortion.**<sup>106</sup>

In *A, B, C v. Ireland* the ECtHR recognized that the right to privacy "cannot be interpreted (...) as conferring a right to abortion".<sup>107</sup> The ECtHR did not condemn Ireland to legalize abortion on any grounds. On the contrary, the ECtHR "does not consider that Ireland's prohibition of abortion on grounds of health and welfare, based as it is on the deep moral convictions of the Irish people on the nature of life (...) and on the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation recognized in this respect to the Irish State".<sup>108</sup>

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<sup>104</sup> "Report of the International Conference on Population and Development," item 8.25; and "Report of the Fourth World Conference on Women" (Beijing, 1995), item 8.25, [https://www.un.org/womenwatch/daw/beijing/pdf/Beijing\\_full\\_report\\_E.pdf](https://www.un.org/womenwatch/daw/beijing/pdf/Beijing_full_report_E.pdf).

<sup>105</sup> "Report of the International Conference on Population and Development," 11; "Report of the Fourth World Conference on Women," 8.

<sup>106</sup> See ECtHR case, *Silva Monteiro Martins Ribeiro v. Portugal*, para 2. A detailed analysis of the ECtHR case law on the subject can be found in. GRÉGOR PUPPINCK, "Abortion on Demand and the European Convention on Human Rights," *EJIL: Talk!*, 2013, <https://www.ejiltalk.org/abortion-on-demand-and-the-european-convention-on-human-rights/>.

<sup>107</sup> ECtHR, *A, B, C v. Ireland*, para 214. The same statement was reiterated by the ECtHR in *P. and S. v. Poland*, para 96.



The ECtHR stated that "*the prohibition challenged in Ireland strikes a fair balance between the right of the first and second applicants to respect for their private life and the rights invoked in favor of the unborn child*".<sup>109</sup> Thus, **according to the case law of the ECtHR, the criminalization of abortion does not constitute a violation of the European Convention on Human Rights.**

Accordingly, the ECtHR has identified different legitimate interests that justify restrictions on abortion, including the interest of society in limiting the number of abortions<sup>110</sup> and the protection of public morals<sup>111</sup>.

The other two cases cited by the IACHR (*Tysiac v. Poland* and *R.R. v. Poland*) refer to a very different situation from that of Ireland, since in the Polish cases the issue was whether the circumstances for accessing an abortion, under the grounds legally permitted under Polish law, entailed the international responsibility of the Polish State. **As the dissenting opinions in both cases confirm, in neither case was Poland condemned to legalize abortion on any grounds.**

**Therefore, none of the cases cited by the IACHR serves as a legal source to support the existence of a human right to abortion, nor of an international obligation to legalize it.**

### 3.3 The pronouncements of treaty bodies do not constitute a sufficient legal basis to justify a right to abortion.

In view of the agreements signed by States and the current state of customary international law, the **non-binding** pronouncements of 3 of the 9 treaty bodies<sup>112</sup> cannot be considered a sufficient legal basis to justify a right to abortion. As auxiliary means to elucidate the content of treaties and custom, these pronouncements cannot contravene international treaty agreements.

For these reasons, the legal value of such pronouncements is quite limited. The ICJ itself has stated in this regard that, although it "*attaches great weight*" to the pronouncements of treaty bodies, it is "*in no way bound, in the exercise of its judicial functions*" to adopt the interpretations issued by such bodies.<sup>113</sup>

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<sup>108</sup> ECtHR, *A, B, C v. Ireland*, para 241.

<sup>109</sup> *Idem*.

<sup>110</sup> ECtHR, *Odièvre v. France*, para 45.

<sup>111</sup> ECtHR, *A, B, C v. Ireland*, paras 222-227.

<sup>112</sup> The IACHR mentions 2 petitions from the Human Rights Committee (*K.L. vs. Peru* and *L.R.M. vs. Argentina*) and one from the Committee on the Elimination of Discrimination against Women (*L.C. vs. Peru*).

The International Law Commission has also determined that pronouncements of treaty bodies do not *per se* constitute "*subsequent practice*" by which "*the agreement of the parties regarding the interpretation of the treaty is established*" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties,<sup>114</sup> since such a proposal has been expressly rejected by a majority of the States.<sup>115</sup> Also, this Commission has emphasized that such pronouncements cannot constitute a single interpretation of the treaty when there is rejection or lack of consensus by the States.<sup>116</sup>

**Therefore, in view of the lack of consensus on the legal status of abortion and the rejection of its legalization by the majority of States, the pronouncements of the treaty bodies lack interpretative authority in relation to custom and the abstract meaning of treaty terms and, a fortiori, lack the competence to create an international obligation to legalize abortion.**

8. *International human rights system: the right to life of the unborn person as a result of the ordinary meaning of the terms (art. 31.1 Vienna Convention on the Law of Treaties) and as an effect of the teleological-systematic interpretation (object and purpose of the treaty).*

The following table graphically represents the international treaties of the international human rights system that are in force in El Salvador<sup>117</sup>, subsequently each of the international treaties will be developed, identifying the articles that: *i.* explicitly mention human life as an

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<sup>113</sup> International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021, para 101; and International Court of Justice, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment on the Merits, I.C.J. Reports 2010 (II), para 66.

<sup>114</sup> Vienna Convention on the Law of Treaties, art. 31(3)(b).

<sup>115</sup> International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, with commentaries 2018, Yearbook of the International Law Commission, vol. II, Part Two, 2018, P. 110.

<sup>116</sup> International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, p. 110.

<sup>117</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, UNITED NATIONS SYSTEM EL SALVADOR and PROCURADURÍA PARA LA DEFENSA DE LOS DERECHOS HUMANOS DE EL SALVADOR, *Compilación de recomendaciones de Derechos Humanos emitidas a El Salvador por los mecanismos de Naciones Unidas (2006-2014)*, first edition, official printing of the institutions, El Salvador, 2014, pp. 301-302.

Available at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=166&Lang=SP](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=166&Lang=SP) accessed February 23, 2023.

object of legal protection, *ii.* those that mention legal personality as an object of protection, and *iii.* those that regulate actions that impact on conception, birth and pregnancy.

<i>UNIVERSAL HUMAN RIGHTS TREATIES</i>	<i>DATE</i>	<i>OF STATEMENTS/RESERVATIONS</i>
	<i>RATIFICATION,</i>	
	<i>ACCESSION</i>	<i>OR</i>
	<i>SUCCESSION</i>	

<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>	1979	No
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<i>International Covenant on Economic, Social and Cultural Rights</i>	1979	No
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<i>Optional Protocol to the International Covenant on Economic, Social and Cultural Rights</i>	2011	No <sup>118</sup>
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<i>International Covenant on Civil and Political Rights</i>	1979	No
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<i>Optional Protocol to the International Covenant on Civil and Political Rights</i>	1995	Yes <sup>119</sup>
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<i>Second Optional Protocol to the</i>	2014	Yes, in article 2 <sup>120</sup>
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*International Covenant on Civil and Political Rights*

The original table does not state whether or not it has a reservation, but according to legislative decree number 721, of May 18, 2011, the international instrument was ratified without any type of reservation. Available at <https://www.jurisprudencia.gob.sv> in the international instruments section. Accessed on February 23, 2023.

<sup>119</sup> It is not specified in which article, nor is the original document of the legislative decree that ratified it available.

<sup>120</sup> "Art. 1.- *The Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty, which consists of a preamble and eleven articles; approved and proclaimed at the Forty-Fourth Session of the General Assembly of the United Nations, by resolution 44/128 of December 15, 1989, adopted by the Executive Organ, by means of Agreement No. 1917/2012 of December 5, 2012, with express reservation in accordance with the power granted to the States in Art. 2 of the Protocol, which consists in applying the death penalty, as established in Art. 27 of the Protocol, in accordance with the provisions of Art. 2 of the Protocol. 1917/2012 of December 5, 2012, with express reservation in accordance with the power granted to the States in Art. 2 of the Protocol, which consists of applying the death penalty, as*

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established in Art. 27 of the Constitution of the Republic of El Salvador" legislative decree 601 year 2014 available at <https://www.jurisprudencia.gob.sv> accessed on January 23, 2023. Yes. In article 29 paragraph 1<sup>121</sup>

<sup>121</sup> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration.

**Forms of Discrimination against Women (CEDAW)**  
If within six months from the date of the request for arbitration the parties are unable to agree on the form of arbitration, any one of the parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court."

<sup>122</sup> According to the official United Nations website it has not been signed, available at: <https://www.un.org/en/development/desa/population/datastore/a5845367.html> Not ratified, signed in CountryID=166&Lang=SP accessed on February 23, 2023.

**the Elimination of All Forms of** 2011.

**Discrimination against Women (OP-**

**CEDAW)**

<b><i>Convention on the Rights of Persons with Disabilities</i></b>	2007	No
<b><i>Optional Protocol to the Convention on the Rights of Persons with Disabilities</i></b>	2007	No <sup>123</sup>

Under an interpretation of each international treaty "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" (Art. 31.1 *Vienna Convention on the Law of Treaties*) it is possible to interpret the following:

Individually, the *International Covenant on Civil and Political Rights* refers to the right to life in Art. 6, stating: "The right to life is inherent to the human person. This right shall be protected by law. No one shall be arbitrarily deprived of his life" r. a. With regard to juridical personality, Art. 16 states that "[e]very human being has the right to recognition everywhere as a person before the law". r. a. The text makes no direct mention of unborn human life. However, interpreting Articles 6 and 16 together, it can be concluded that the Convention protects the unborn by extending legal personality to every human being.

**Option 1:** *States Parties recognize that every child has the inherent right to life / 2. States Parties shall ensure to the maximum extent possible the survival and development of the child*" r.a. And, more importantly, in relation to unborn life it states: art. 1 "[f]or the purposes of the present Convention, a child means every human being (...)" r. a., *States Parties shall respect and ensure the rights set forth in the present Convention (...) without discrimination of any kind, irrespective of (...), birth or other status of the child, (...)*" r. a. Once again, the unborn is recognized under the figure of every human being, and the differentiation of the enjoyment of rights based on birth is prohibited. The latter is an aspect that the Constitutional Chamber took up again, as mentioned in the previous section of this *amicus curiae*.

<sup>123</sup> According to the original table, it is stated that it has "General Res" or reservations. However, according to Legislative Decree 420 of October 4, 2007, there is no record of any reservation to the convention or its protocol. Available at <https://www.jurisprudencia.gob.sv> section of international instruments, accessed on February 23, 2023.

The *Convention on the Elimination of All Forms of Discrimination* establishes that women who are pregnant must be protected by the State: "*[a]rticle 12 / 2. (...), States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, providing free services where necessary, and shall ensure adequate nutrition during pregnancy and lactation*". r. a. In this way, the mother and her unborn child are protected simultaneously.

Likewise, the *International Convention on the Elimination of All Forms of Racial Discrimination* prescribes in its Article 5, paragraph b: "*[i]n accordance with the fundamental obligations stipulated in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, (...): (b) The right to security of person and protection by the State against any act of violence or bodily harm, whether committed by public officials or by any individual, group or institution. (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by public officials or by any individual, group or institution.*" a. Likewise, the first lines of its recital state "*[c]onsidering that the Charter of the United Nations is based on the principles of the inherent dignity and equality of all human beings*" r. a. Again, the right to physical integrity and the right to life are recognized, as a manifestation of the right to avoid death for *all human beings*, without distinguishing between born and unborn human beings.

Article 11 of the *International Covenant on Economic, Social and Cultural Rights* establishes the right of everyone to an adequate standard of living and the right to the continuous improvement of living conditions. *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*" r.a. In another line, paragraph 2 of the preamble of the international treaty states: "*(...) these rights derive from the inherent dignity of the human person*". Once again, it is noted that the expression *human person* is used in its full extension -every member of the human species-; and, at the same time, the right to life is recognized in its manifestation of the right to a "continuous improvement of the conditions of existence". This international treaty *i.* explicitly mentions human life as an object of legal protection and *iii.* regulates actions that have an impact on the conception, birth and pregnancy of women.

Finally, the *Convention on the Rights of Persons with Disabilities* prescribes the right to life in Article 12: "*[t]he States Parties reaffirm the inherent right to life of every human being*"

*and shall take all necessary measures to ensure the effective enjoyment of this right by persons with disabilities on an equal basis with others.* Once again, the subject of the right to life is every human being, thus the concept of person and human being are again identified in extension.

In synthesis, the cited texts equate the extension or field of application of the concepts of "humanity", "member of the human family", on the one hand; and "person", "juridical personality" and "human life", on the other. Although these concepts are not used as synonyms (as could not be otherwise), their fields of reference or application are identified. Thus, they recognize that the holder of the right to life is every human being, without distinction of vital circumstances<sup>124</sup>.

Following the guideline established in Article 34.1 of the Vienna Convention on Treaties, it is concluded that El Salvador's decision to recognize the right to life from the moment of conception is fully consistent with the ordinary meaning of the terms used in the instruments belonging to the international human rights system, to which El Salvador is a party.

This conclusion is consolidated in the light of a systematic-teleological interpretation of the system. The overall and ultimate purpose of the system is expressed in the preamble of the Universal Declaration of Human Rights, and consists in guaranteeing recognition of the "inherent dignity" and the "equal and inalienable rights of all members of the human family".

At this stage it is worth noting an obvious fact, but one that goes unnoticed precisely because of its obviousness: the assertion that dignity is *inherent* to all individuals belonging to the human family presupposes two premises, one epistemic and the other existential.

From the epistemic point of view, inherence entails the idea that both the belonging of an individual to the class "human family" and its absolute value (dignity) are self-evident data. Data that are recognized as given by human reason and not, on the other hand, as the fruit of some kind of consensus or agreement. This epistemic sense of the concept of inherence also extends to the object of the rights included in the catalog of the system, which are thus conceived as inherently intelligible human goods and not, on the other hand, as the fruit of some kind of agreement.

From the existential point of view, the notion of inherence is directly linked to the "equality" and "inalienability" of rights. If rights are equal, it is because every member of the

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<sup>124</sup> Cf. Zambrano, P., "Del ciudadano pasivo-defensivo al ciudadano pasivo, colaborador y sospechoso. Apuntes para un debate racional cerca de la legitimidad jurídica del model penal de ciudadano", in Sánchez-Ostiz, P., *Medio Siglo de derecho penal en España*, Comares, 2020, p. 2018 ff.

family is equally worthy. And if they are inalienable, it is because what has not been freely granted cannot legitimately be denied"<sup>125</sup> .

From this perspective, it can be said that the system was conceived from its very beginnings as an institutional order aimed at recognizing and preserving the absolute and inherent value of every member of the human species without distinction and not, on the other hand, as an institutional order aimed at building consensus that self-attribute the authority to distinguish between more and less valuable human beings, based on contingent data, such as birth, greater or lesser physical capacity to exercise typically human powers, or even the moral integrity of the subject<sup>126</sup> .

The validity of the interpretation according to which every human being without distinction is equally worthy and entitled to all the rights recognized in the system is also supported by its claim to universality, which should not be confused with uniformity. As far as the construction and interpretative dynamics of the system are concerned, the confusion between universality and uniformity takes the form of the pretension of universalizing interpretations based on more or less generalized states of opinion, but which in any case disregard the nature of the object of inalienable rights and which, moreover, self-attribute to themselves the power to create their meaning. For the same reasons, the pretension of incorporating new rights into the existing catalog of the international system will only be legitimate to the extent that they constitute authentic conditions of integral human realization; and not, on the other hand, forms of freedom valued by a part or a moment of a particular culture<sup>127</sup> .

In synthesis, **the choices of the State of El Salvador to extend the recognition of legal personality and the ownership of the right to life to every human being from the very**

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<sup>125</sup> *Ibid.*

<sup>126</sup> Cf. ZAMBRANO, P., "La dignidad como concepto hinge entre el discurso moral y el discurso jurídico. Apuntes para el uso válido, conveniente y transparente para el uso del concepto de dignidad en la argumentación judicial", *Prudentia Iuris*, 94 (2022), 309-324: 332; CHÁVEZ, J. (2012). Dignity as the foundation of human rights in the judgments of the Peruvian Constitutional Court. The tension between mere autonomy and ontological freedom. Lima. Palestra, 99ff; SERNA, P. (1995). "La dignidad de la persona como principio de derecho público". In *Derechos y Libertades*, 4, 287-306: 291; SPAEMANN, R. (1998). "On the concept of human dignity". In MASSINI, C. I.; Serna, P. (eds.). *El derecho a la vida*. Pamplona. Eunsa, 94 ff. All these authors agree in linking dignity to man as man, and distinguish it, among others, from "moral" dignity, which is predicated of a special form of behavior. On the use of this same distinction at the judicial level, one can see RAO, N. (2013). "Three Concepts of Dignity in Constitutional Law." In *Notre Dame Law Review*, 86, 183-272: 187; CAROZZA, P. (2013). "Human Rights, Human Dignity and Human Experience." In MCCRUDDEN. *Ob. cit.*, 615-629: 616.

<sup>127</sup> ZAMBRANO, P., "Dignity as a hinge concept between moral discourse and legal discourse. Apuntes para el uso válido, conveniente y transparente para el uso del concepto de dignidad en la argumentación judicial", *Prudentia Iuris*, 94 (2022), 309-324: 339.



**moment of conception; to protect his or her life with the force of criminal sanction; and to develop sexual and reproductive health policies that make it possible to reconcile the right to life of the unborn child with the rights of the mother, are fully consistent both with the ordinary meaning of the terms of the treaties that make up the international system, as well as (and especially) with the systematic purpose of respecting and protecting the inherent dignity of every human being.**

9. *Regional human rights system: the right to life of the unborn person as a result of the ordinary meaning of the terms (Art. 31.1 Vienna Convention on the Law of Treaties) and of the teleological-systematic interpretation (object and purpose of the treaty).*

The American Convention on Human Rights begins by extending juridical personality to every human being without distinction, stating in Article 1 "2. *For the purposes of this Convention, a person is every human being*" r. a. It then defines in the same provision the juridical status of the right to life in general and the right to unborn life in Article 4: "*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*" r.a.; and, art. 5 prescribes "*Everyone has the right to respect for his physical, mental and moral integrity*" r. a.

Like the instruments belonging to the international system, analyzed in the previous section, the Convention equates the extension of the terms "human being" and "person". In any case, in case there should be any doubt about the full extension of the recognition of all rights to every human being, the text of the Convention explicitly identifies the emergence of legal personality with conception, and connects the birth of the state obligation to protect life (and the rest of the rights) with the moment of conception.

The ultimate purpose of the system is described in the preamble in the following terms: "*the purpose of consolidating on this continent, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man (...) [which] do not derive from the fact of being a national of a given State, but are based on the attributes of the human person.*

All the reasons developed in the previous section also apply to the interpretation of the text of this Convention, even more strongly, in view of the explicit mention of conception as

the moment of the appearance of legal personality and of the obligation to protect life, in Article 4.1.

*10. Principle of reasonableness: protection of the right to life of the unborn person from the very moment of conception prescribed in the Artavia Murillo Case ("In vitro fertilization").*

In the precedent *Artavia Murillo et al. v. Costa Rica (In vitro fertilization)*, dated 11/28/2021, the Inter-American Court of Human Rights established an interpretation of Article 4.1 of the American Convention on Human Rights, according to which the concept of "conception" must be understood as "implantation"; and the expression "in general" must be interpreted as a sort of authorization to the States to dilute the obligation to protect unborn human life (&& 186-190).

Both interpretations were and continue to be the subject of considerable doctrinal criticism<sup>128</sup>. As far as this report is concerned, we reiterate the reasons outlined in the previous section, in favor of the conclusion that both the ordinary meaning of the terms and the object and purpose of the Convention lead to the conclusion that this instrument recognizes every human being without distinction as the holder of the right to life; and that the state obligation to protect this right has the same weight at all stages of development of human life -before and after implantation-.

While both lines of criticism are valid, it should be noted at the same time that (as with all rights) States are obliged to *reasonably* balance their obligation to protect unborn life with the obligation to protect the rights of the mother. In fact, this requirement of reasonableness in weighing is the only acceptable reading of the expression "in general" contained in Article 4.1, once it is noted that the same article establishes that "no one shall be arbitrarily deprived of his life". In this order of ideas, it can be concluded that any legal weighing between the rights of the unborn child and the rights of the mother must be subject to the **principle of reasonableness and its three sub-principles of adequacy, necessity and proportionality in the strict sense**<sup>129</sup>.

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<sup>128</sup> Cf., among others, CIANCIARDO, J., "The Specification of the Right to Life of the Unborn in the Inter-american Human Rights System: A Study of the *Artavia Murillo* Case", in ZAMBRANO, P., SAUNDERS, W. (eds.), *Unborn Human Life and Fundamental Rights*, Peter Lang, 2019, 163 ss.; DE CASTALDI, L., OVIEDO, J., TOZZI, P., "The *Artavia Murillo et al. v. Costa Rica* (in vitro fertilization) case: the redefinition of the right to life from conception, recognized in the American Convention, 75 *PRUDENTIA IURIS*, 135-164 (Arg.) (2013).

By virtue of the principle of adequacy, the legal weighting will be reasonable when it proposes to achieve a legal end, and the end will be legal when it shows equal respect and consideration for all fundamental rights recognized both in the international system and in the Inter-American system of human rights. In the case of the legal regulation of abortion, the balancing will be valid, from this point of view, if it assumes the following abstract normative premises<sup>130</sup> : (i) the unborn human being is equally worthy as the human being already born and, as such, holder of the same rights; (ii) the obligation of the States to protect his life has the same weight as the obligation to protect the life and rights of any born person.

In application of the principle of necessity, the legal regulation of abortion must opt for the least burdensome solution for the rights involved in each case. From this perspective, weighting will be unreasonable when it entails the abstract and *a priori* denial of the rights of either of the two parties (the fetus or the mother)<sup>131</sup> . In application of the principle of proportionality in the strict sense, weighing will be unreasonable if, all things considered, it ends in a solution whose costs for the rights of either party are absolutely disproportionate to the benefits for *that same party*; and/or when its essential content is affected<sup>132</sup> .

Based on these criteria, the IACHR's request that El Salvador establish the possibility of abortion "*in situations of non-viability or incompatibility of the fetus with extrauterine life*," or risk to life and serious risk to the health and personal integrity of the mother, does not satisfy the principle of reasonableness.

The legal possibility of abortion on the grounds of "*incompatibility with extrauterine life*" and "*risk to the personal integrity of the mother*" entails an abstract hierarchy of the rights of the unborn child, in a lower rank than those of the mother, which is an open violation of the right to equality of the unborn child and, in this way, of the sub-principle of adequacy.

With regard to the ground of "*incompatibility with extra-uterine life*", the purpose of the norm is, plain and simple, to avoid the inconveniences of pregnancy in the face of the prospect of a life with a limited prognosis. This purpose entails the assertion that the life of unborn children with a limited prognosis of extra-uterine life is less valuable than that of other unborn

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<sup>129</sup> CIANCIARDO, J., *El principio de razonabilidad*, Ábaco Depalma, Buenos Aires, 2009, 2nd Edition, pp. 54 ss.

<sup>130</sup> ALEXY, R., "Derechos fundamentales, ponderación y racionalidad", *Revista Iberoamericana de Derecho Procesal Constitucional*, No. 11, Mexico, 2009, pp. 8 to 13 available at <https://www.corteidh.or.cr/tablas/r25294.pdf> accessed on March 8, 2023. Or, also, BERNAL PULIDO, C., "Tribunal Constitucional, Legislador y Principio de Proporcionalidad", *Revista Española de Derecho Constitucional*, Madrid, 2005, pp. 424 to 443. Available at <https://dialnet.unirioja.es/descarga/articulo/1993791.pdf> accessed on March 8, 2023.

<sup>131</sup> Cf. *idem*, p. 83.

<sup>132</sup> Cf. *Idem*, pp. 107 ff.

children, not to mention those already born. All this, it should be recalled, in the context of a legal system that obliges States to protect the life of every person from the very moment of conception. Thus, there is an obvious violation of the principle of equality and, in this way, of the principle of reasonableness (in the sub-principle of adequacy).

If this conclusion is not in itself sufficient to justify the reasonableness of El Salvador's opposition to legalizing abortion in this type of case, it is appropriate for the Court to weigh the logical implications that follow from the adoption of this axiological and normative premise for the guarantee of the right to equality of any person, born or unborn, who has a limited prognosis of life.

As far as the "*personal integrity*" of the mother is concerned, it is not clear how the continuity of the pregnancy can affect its essential content. The claim that the personal integrity of the mother can and should justify abortion entails an abstract and *a priori* hierarchy, in which more weight is given to the alleged rights of the mother than to the right to life of the unborn child. In this way, there is once again an obvious violation of the principle of equality and, in this way, of the principle of reasonableness (sub-principle of adequacy).

**The sub-principle of necessity requires, for its part, that in tragic cases in which the continuation of the pregnancy puts the life or health of the mother at risk, an attempt should always be made to safeguard both lives. On this basis, the path of abortion and the death of the fetus should always be the last *ratio*, not the first.** For this reason, the IACHR's claim that El Salvador should facilitate access to abortion in a general and abstract manner, for all cases of risk to the life or health of the mother, does not satisfy this sub-principle nor, therefore, the principle of reasonableness<sup>133</sup> .

Moreover, given their powerlessness to make their voices heard in the political process and the denial of their right to live in various legislations around the world, it can be said that "criteria suspicious of discrimination" apply to the unborn child, obliging courts to apply strict scrutiny to all abortion legislation<sup>134</sup> .

**In conclusion, while we disagree with the interpretation of the concept of "*conception*" established in the *Artavia* precedent<sup>135</sup> , and complementing its interpretation of the**

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<sup>133</sup> "(...) any standard or hierarchy would be "thoughtlessly" applied in weighting if this application were not introduced in argumentation, because arguments are the manifest expression of reflection" ALEXY, R., "Derechos fundamentales, ponderación y racionalidad", Pp. 12 and 13.

<sup>134</sup> The IACHR has considered categories expressly prohibited in other international human rights treaties other than the American Convention on Human Rights, such as the Convention on the Rights of the Child, to be suspect criteria for discrimination (see "Norín Catrimán et al. v. Chile", judgment of May 29, 2014, paragraphs 202 and 203).

concept "*in general*"<sup>136</sup> with the requirement that the weighing be subject to the principle of reasonableness, it should be noted that the decision reaffirmed (as it could not be otherwise, by virtue of the letter of the Treaty) **the existence of legal personality and the right to life from the very moment of conception**; as well as the appearance of the corresponding state obligation to protect it, also from the very moment of conception.

**In this context, the IACHR's claim that El Salvador should legalize the interruption of abortion in the aforementioned cases is unreasonable and, to this same extent, completely inconsistent with the obligations assumed upon ratifying the American Convention on Human Rights, as interpreted in the *Artavia Murillo* precedent.**

**On the contrary, both El Salvador's choice to recognize the right to life from conception in the constitutional text, and the way in which its legislation balances this right with the rights of the mother, are fully reasonable and, to this same extent, consistent with the obligations assumed upon ratifying the American Convention on Human Rights, as interpreted in the *Artavia Murillo* precedent.**

11. *Principle of vulnerability and reasonableness of the criminal sanction of abortion: the dependence of the life of the unborn person as a circumstance of vulnerability.*

Professor MARICANTERINA's research starts from the almost unanimous acceptance that "(...) *human rights are based on the consideration of human beings as fragile, interdependent subjects in need of protection both from other individuals and from the State. Human rights are, above all, the rights of human frailty and finitude*"<sup>137</sup>. Or, what amounts to the same thing,

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<sup>135</sup> Paragraph 189 "*the Court understands the term "conception" from the moment in which the implantation occurs, for which reason it considers that before this event it is not appropriate to apply Article 4 of the American Convention*" *Artavia Murillo* case.

<sup>136</sup> Paragraph 264 "*The Court has used various methods of interpretation, which have led to coinciding results in the sense that the embryo cannot be understood as a person for the purposes of Article 4(1) of the American Convention. Likewise, after an analysis of the available scientific bases, the Court concluded that "conception" in the sense of Article 4(1) takes place from the moment the embryo is implanted in the uterus, reason for which prior to this event there would be no place for the application of Article 4 of the Convention. Furthermore, it is possible to conclude from the words "in general" that the protection of the right to life under this provision is not absolute, but is gradual and incremental according to its development, because it does not constitute an absolute and unconditional duty, but implies understanding the applicability of exceptions to the general rule*" r. a. *Artavia Murillo* case.

<sup>137</sup> LA BARBERA, M., "*La vulnerabilidad como categoría en construcción en la jurisprudencia del Tribunal Europeo de Derechos Humanos: límites y potencialidad*", *Revista de Derecho Comunitario Europeo*, Spain, 2019, P. 238. Available at <https://dialnet.unirioja.es/servlet/articulo?codigo=6888199> accessed on January 27, 2023.

in accordance with the *law of the weakest* - as opposed to the *law of the strongest* (CHARLES DARWIN's evolutionary theory).

To fit into a vulnerability concept, people must be in at least one of two fragility scenarios: a) physical fragility or b) social fragility. Physical fragility includes, among others, children, older adults, people with disabilities and people with chronic disabling diseases. Their physical fragility lies in their inability to resist any harm or threat inflicted on them. Social fragility refers to circumstantial aspects, which make harm or threats to certain social sectors, such as the poor, opposition political leaders, or others, more serious and more probable<sup>138</sup>.

Taking up these criteria, the IACHR Court has defined vulnerability as the situation in which "(...) *there is a certain risk that other rights will be violated, such as the right to physical integrity and the right to be treated with dignity*"<sup>139</sup>. When this situation arises "[f]rom *general obligations derive special duties, determinable according to the particular protection needs of the subject of rights, either because of his personal condition or because of the specific situation in which he finds himself*"<sup>140</sup>.

In this particular case, the life of the unborn child is at one of the points of maximum physical fragility, due to its absolute incapacity to resist by itself any attack on its person, since it is a life totally dependent on the life and health of its mother. For this reason, and in application of the principle of vulnerability, the unborn child is entitled to a reinforced protection that, among other possible measures, it is reasonable to specify through the criminalization of abortion.

**In conclusion: the total or partial decriminalization of abortion is unreasonable by affecting the sub-principles of necessity and reasonableness in the strict sense, when it completely disregards the situation of vulnerability of the unborn child, in which case the principle of prohibition of deficient protection will be violated. For this reason, El Salvador's choice to recognize the right to life from conception in the constitutional text, and to protect this right with the force of the criminal sanction is a reasonable response to the situation of special vulnerability of the unborn child.**

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<sup>138</sup> ESTUPIÑAN-SILV, R., "La vulnerabilidad en la jurisprudencia de la corte interamericana de derechos humanos: esbozo de una tipología", *Derechos Humanos y políticas públicas*, Barcelona, 2014, P. 210 a 213, available at <https://www.corteidh.or.cr/tablas/r39780.pdf> accessed March 6, 2023.

<sup>139</sup> Paragraph 162 *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_63\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_63_esp.pdf) accessed on March 8, 2023.

<sup>140</sup> Paragraph 111 of *Case of the Pueblo Bello Massacre v. Colombia*, available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_140\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_140_esp.pdf) accessed on March 8, 2023.

*1. Principle of prohibition of regression of fundamental rights: regressing fundamental rights not only violates the American Convention on Human Rights but also a peremptory clause of the Constitution of El Salvador.*

The Constitutional Chamber has been emphatic in denying the validity of the claim to create a *right to abortion*, based on the constitutional recognition of the right to life from conception. In this sense, it affirmed that the explicit mention of conception in the constitution "*intends to prevent the disposition of and attempt against human life in gestation, alleging a "right to one's own body" or any other cause*"<sup>141</sup> r.a. In the same sense, the chamber established that there is no "*right to one's own body or womb*", "*right to the interruption of pregnancy*" or "*right to abort*"<sup>142</sup> .

These considerations are more fully understood and justified in light of two principles inherent to El Salvador's constitutional practice: the *principle of progressivity of fundamental rights* and the *principle of prohibition of regression of fundamental rights*. The Constitutional Chamber of El Salvador has determined, in relation to the *principle of progressivity of rights*, that it consists of the obligation to develop rights "(...) *over time and [...] to do so gradually, in accordance with historical, cultural and legal contexts*"<sup>143</sup> .

For its part, regarding the *principle of prohibition of regression of rights*, it has pointed out that it consists of "(...) *the prohibition of adopting political measures and, consequently, of sanctioning legal provisions that disproportionately worsen the current situation of fundamental rights*"<sup>144</sup> . It also pointed out that both principles are linked to a *political system* that is "*republican, democratic and representative*"<sup>145</sup> r. a. Therefore, the highest court of justice in El Salvador prescribed that regressing fundamental rights goes against the *political system* (which is democratic) and, consequently, "(...) *if the legislative assembly suppresses or weakens a fundamental right (...) it would be transgressing the political system (...), therefore, modifying a peremptory clause, which would entail the violation of art. 248 inc. 4° cn*"<sup>146</sup> <sup>147</sup> .

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<sup>141</sup> Page 13 of Amp. **310-2013**.

<sup>142</sup> Page 11 of Amp. **310-2013**.

<sup>143</sup> Judgment of unconstitutionality with reference **53-2005/55-2005** of the Constitutional Chamber of the Supreme Court of Justice of El Salvador, February 1, 2013, available at <https://www.jurisprudencia.gob.sv/visormlx/pdf/53-2005-55-2005.pdf> accessed on February 23, 2023 - hereinafter Inc. **53/55-2005-**.

<sup>144</sup> Inc. **7-2012**

<sup>145</sup> Art. 85: "[t]he Government is republican, democratic and representative".

The *principle of prohibition of regression of fundamental rights* is a principle also recognized in the Inter-American human rights system. The IACHR refers to this principle in different decisions. For example, in merits report number 38/09 case 12.670 *Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social y otras Vs. Perú*<sup>148</sup> (March 27, 2009) paragraphs 139 and 140. Likewise, the IACHR Court mentions this principle in the judgment in the case of *Cuscul Pivaral et al. vs. Guatemala* (August 23, 2018)<sup>149</sup> paragraphs 141 to 149. "*This principle is closely related to the prohibition of unjustified regressions or backward steps to the levels of compliance achieved, the "non-regressivity" in the protection and guarantee of human rights*"<sup>150</sup> r. a.

At this point, it should be noted that the two principles find both their justification and their limit in the ultimate goal common to the Universal System and the Inter-American System, which is to respect and guarantee the inherent dignity and inalienable rights of every human being. As far as the principle of progressivity is concerned, this criterion serves to identify that which can never, under any circumstances, be conceived of as an authentic right. Namely, any form of freedom that is oriented, like abortion, towards the denial of the inalienable rights of the human person. Conversely, this same criterion guides and limits the scope of the principle of the prohibition of regressivity, in the sense of *permitting* the regressivity of normative changes that, under the guise of rights, constitute authentic violations of those rights.

Safeguarding this clear limit, the right to cultural self-determination of peoples, and the right of citizens to participate in the management of public affairs, demand maximum caution on the part of international and regional control bodies in interfering with public decisions that were taken in accordance with the formal and substantive procedures of the rule of law. In this sense, it is worth reiterating the serious danger for these two rights, the attempt to universalize interpretations of fundamental rights that, with greater or lesser consensual support, are mere expressions of a particular culture, or worse, of a moment and a sector of a particular culture.<sup>151</sup>

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<sup>146</sup> "The articles of this Constitution that refer to the form and system of Government may not be amended in any case, (...)" r. a.

<sup>147</sup> Inc. 7-2012.

<sup>148</sup> Available <https://www.cidh.oas.org/annualrep/2009sp/Peru12670.sp.htm> accessed February 23, 2023.

<sup>149</sup> Available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_359\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_359_esp.pdf) accessed February 23, 2023.

<sup>150</sup> CNDH, *Los principios de universalidad, interdependencia, indivisibilidad y progresividad de los derechos humanos*, first edition, Comisión Nacional de los Derechos Humanos, Mexico, 2016, p. 12. Official document at <https://www.corteidh.or.cr/tablas/r37023.pdf> accessed February 23, 2023.



**Within this conceptual framework, it can be concluded that forcing El Salvador to withdraw the constitutional protection of the right to unborn human life from the moment of conception, and to modify its infra-constitutional legislation on abortion, would be a clear violation of the principle of non-regressivity, in relation to the right to life of the unborn person.**

*Without further ado, we sign María del Pilar Zambrano and José Gilberto Solís Jiménez in Pamplona, Spain; and Gabriela García Escobar in Guadalajara, Mexico, on the twelfth day of March of the year two thousand twenty-three.*

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<sup>151</sup> Zambrano, P., "Fundamental principles and intelligibility of law. Between semantic realism and an objective theory of good and action, in *Dikaion*, 23-2 (2014), pp. 423-445. DOI: 10.5294/dika.2014.23.2.8.

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Judge of First Instance in small claims of San Salvador.  
Worked as a judge in criminal matters for 11 years and Assistant Prosecutor of the Attorney General's Office in criminal matters for 5 years.

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