Acción de inconstitucionalidad, expediente 146/2007-00 y su acumulado 147/2000-00, de la Suprema Corte de Justicia de la Nación (México).

Promoventes: Comisión Nacional de Derechos Humanos y Procurador General de la República, respectivamente.

INTERES EN LA PRESENTACION DE INFORME *AMICUS CURIAE* POR PARTE DE INTERNATIONAL ORGANIZATIONS LAW GROUP

International Organizations Law Group wishes to address the National Supreme Court of Justice (Mexico) to highlight some fundamental principles of international human rights law which protect the unborn and to take issue with the assertions made by *amici curiae* the Center for Reproductive Rights (CRR) and the International Commission of Jurists (ICJ) in their third party intervention, as well as in the legal memorandum which Amnesty International (Amnesty) addressed to this court. In addition we wish to join our voice to the complainants in their prayer for relief.

ARGUMENT

The negotiated text of international human rights treaties establish no "right to abortion" and *in no way require states to decriminalize abortion.* Indeed, the "plain language" of international human rights treaties is consistent with the protection of unborn life. Furthermore, when sovereign states first negotiated and then freely consented to enter into these human rights treaties, it was their intention to leave domestic laws protecting the unborn unchanged. Therefore, under these treaties, Mexico is not obligated to recognize any international "right to abortion" or to decriminalize abortion.

I. No International Human Rights Treaty Can be Interpreted to Include a "Right to Abortion"

1. According to well established norms of treaty interpretation, the text of the treaty is where one should first look to determine its meaning. None of the international human rights treaties Mexico is currently party to raised in connection with this case – namely the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the American Convention on Human Rights (ACHR) – include the "right to abortion" or even mention the word abortion in their text.

2. Under the principles of *free consent* and *sovereign equality*, Mexico is only bound to recognize the rights and obligations to which it – in its capacity as a sovereign state – has freely consented. Therefore, *external bodies* like the treaty committees which CRR and ICJ

have extensively cited *cannot alter the sovereign will of the Mexican State* by demanding that Mexico is obligated to recognize a "right to abortion" against its will.

A. Under the Principle of Free Consent, Mexico Never Agreed to Recognize a "Right to Abortion" When it Negotiated, Signed, and Ratified the Treaties at Issue

3. It is a fundamental principle of treaty formation that a sovereign state will be bound to provisions explicitly or implicitly found in the text of an international treaty only when it has given its *free consent* to the contractual terms it negotiated in good faith, such that the agreement they enter into becomes binding under the principle of *pacta sunt servanda.*[1]

4. International human rights treaties are negotiated instruments of a contractual nature. Their formation, construction, and application are governed by universally recognized principles of the Law of Treaties, including the *free consent* rule, which states that a treaty is only binding on sovereign states once they have had the opportunity to freely consent to the treaty's text.[2]

5. The Vienna Convention on the Law of Treaties (Vienna Convention) states: "A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and in light of its object and purpose."[3]

6. As further explained below in our discussion of the texts of the various treaties, applying the norms of treaty interpretation codified in the Vienna Convention, the treaties at issue make no explicit or implicit mention of abortion and consequently contain no "right to abortion." CRR and ICJ as well as Amnesty point to no treaty provision to contradict this proposition, nor can they, because the treaties are silent to abortion.[4]

7. Moreover, it is incontrovertible that when sovereign states freely choose to enter into treaties, they agree to change only those aspects of their internal legislation that are the subject of the treaty but otherwise leave other laws unaffected.[5]

8. Thus, under the principle of *free consent*, none of the international human rights treaties which Mexico is party to obligate the court to recognize a "right to abortion" or permit the decriminalization of abortion.

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[1] *See* Vienna Convention on the Law of Treaties [hereinafter Vienna Convention], preambular para. 3 *and* art. 34. *Cf.* U.N. Charter art. 2(1), 2(2), 2(4) (reflecting, by implication, the principle that sovereign states must be free from coercion in order to give free consent).

[2] Vienna Convention, preambular para. 3.

[3] Vienna Convention, art. 31(1) (emphasis added).

[4] *See* "Postura de Amnistia Internacional sobre la Accion de Inconstitucionalidad 146/2007, y su Acumulada 147/2007, ante la Suprema Corte de Justicia de la Nacion" [hereinafter "Postura de Amnistia"], *available at* http://rights.amnesty.org/es/library/asset/AMR41/009/2008/en/gYK1xIXr4BgJ, and "Third Party Intervention prepared by The Center for Reproductive Rights and the International Commission of Jurists before the Supreme Court of Mexico" [hereinafter "CRR/ICJ Intervention"], *available at* http://generomexico.colmex.mx/textos/Intevencion%20de%203ros._CENAPRED_08.pdf

[5] *Cf.* Charter of the United Nations, art. 2(1) ("The Organization is based on the principle of the sovereign equality of all its Members.") *and* art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.").

B. The Sovereign States That Negotiated, Signed, And Ratified These Treaties Deliberately Chose Not To Include A "Right To Abortion"

9. The texts of international human rights treaties are extensively negotiated documents and express the will of the sovereign states that negotiated, signed, and ratified them. They include negotiated definitions of individual human rights and impose obligations to protect and promote these rights.

10. When the treaties at issue were negotiated, many nations had legislation outlawing abortion and they intended to leave those laws unaffected. Laws in countries like Mexico continued to protect the unborn or criminalize abortion long after the treaties at issue were ratified, and until recently, no one dared suggest that countries had somehow agreed (unbeknownst to their negotiators when the treaties were crafted and unbeknownst to the policy makers who ratified the documents) to alter core domestic legislation.

11. Indeed, according to information available on CRR's own webpage, as of last year 69 countries around the world either prohibit abortion outright or allow it only to save a mother's life, and another 34 countries only allow it to preserve the physical health of the mother.[6]

C. Imposing Non-Binding Recommendations of Unelected and Unaccountable Treaty Monitoring Committees Would Undermine Mexico's Sovereignty

12. The major international human rights treaties include provisions for "treaty monitoring bodies," also known as "compliance committees." By becoming parties to the treaty, States agree to submit periodic reports on their compliance, receive recommendations on improvements, and allow the committee to monitor their overall progress.[7] States do *not*, however, in any way agree to allow committee members to rewrite their domestic legislation.

13. The treaty monitoring bodies are made up of "experts" with *no legislative or interpretive authority*. Indeed, the treaty body members are unelected by any popular vote. They are merely appointed to their position and ultimately are unaccountable to any electoral constituency.[8]

14. Committee recommendations and general comments, while instructive in reference to inherent human rights recognized in a treaty, are not part of the negotiated treaty and are not

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[6] *See* http://www.reproductiverights.org/pdf/pub_fac_abortionlaws_spanish.pdf.

[7] *See, e.g.*, International Covenant on Civil and Political Rights [hereinafter ICCPR], art. 40(1) ("State Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein."); art. 40(4) ("The Committee shall study the reports...[and in turn] shall transmit its reports, and such general comments as it may consider appropriate, to the State Parties."); art. 40(5) ("States Parties...may submit to the Committee observations on any [general] comments..."), *available at* http://www2.ohchr.org/english/bodies/ratification/8.htm#declarations.

[8] *See* Douglas Sylva & Susan Yoshihara, "Rights by Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion," Catholic Family & Human Rights Institute, White Paper No.8 at 5, *available at* http://www.c-fam.org/docLib/20080425_Number_8_Rights_By_Stealth.pdf.

binding on States Parties. Any recommendation which goes beyond what is contained in the treaty itself must be considered *ultra vires*.

15. Consequently, when it comes to abortion, treaty monitoring bodies cannot create a right or obligation which the State parties to the Covenant did not freely agree to include in the negotiated treaty without doing violence to the principles of state sovereignty and free consent.

16. Thus for example, when Amnesty in its recent memorandum addressed to this Court cites the compliance committee for the ICESCR as expressing "concern about human rights violations relating to abortion," and asking the Mexican government to "address these serious issues,"[9] this assertion by the compliance committee has no substantive effect and is simply an expression of committee members' predilections, because unelected committees cannot bind or compel sovereign states to change their internal laws, and when they make such recommendations they are exceeding their authority and acting illegitimately.

17. In fact, in making the claim in its memorandum that "repealing the legal reforms of the...Federal District Penal Code...will, in fact, result in violations of Mexico's international human rights obligations,"[10] Amnesty *directly contradicts* a position it had publicly espoused a mere three years ago, when it acknowledged that "there is no generally accepted right to abortion in international human rights law." [11]

18. Simply stated, there is no "right to abortion" anywhere in the negotiated text of international human rights treaties and unaccountable treaty compliance committees do not have the right to read new rights or obligations into these documents and cannot impose such rights or obligations upon sovereign states.

II. The "Plain Language" of the International Human Rights Treaties Which the Sovereign State of Mexico has Negotiated, Signed, and Ratified, is Consistent With the Protection of Unborn Life

19. As noted above, the Vienna Convention favors a plain reading of a treaty's text in accordance with the "ordinary meaning" of the textual language,[12] and sovereign states retain the right to interpret treaty obligations as they see fit, so long as their interpretations do not violate the purpose of the treaty.

20. A brief review of a few of the treaties at issue reveals that a "plain reading" of their text is consistent with the protection of unborn life and that there is no basis for finding a "right to abortion" within the text.

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[9] Postura de Amnistia at para. 5.
[10] Postura de Amnistia at para. 4.
[11] Amnesty International, "Women, Violence and Health," *available at* http://www.amnesty.org/en/library/asset/ACT77/001/2005/en/dom-ACT770012005en.html.
[12] Vienna Convention, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and in light of its object and purpose.") (emphasis added).

A. The International Covenant on Civil and Political Rights (ICCPR)

21. Contrary to what has been suggested by CRR and ICJ in their third party intervention, the text of the ICCPR is consistent with the protection of unborn life.[13]

22. Article 6(1) of the ICCPR establishes that "every *human being* has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[14]

23. Mexico can (and should) interpret this as protecting the developing life of the unborn, and reject a so-called "right to abortion" as inconsistent with this article.

24. Indeed, the only argument that *amici* are able to make is that the article does not define when life begins. This essentially is a concession that defining the beginning of life is an open question which should be left to the discretion of the States Parties, and in no way does it follow from this that a right to abortion should be inferred.[15]

25. Moreover, if it is an open issue, the Court should err on the side of protecting life in the womb. This is consistent with the longstanding legal principle articulated in the *Corpus Juris Civilis* and elsewhere to "harm nobody" ("alterum non laedere").[16]

26. Since the meaning and application of the individual articles is limited to that which the contracting States Parties negotiated, a right to abortion cannot be subsequently imported into the meaning of any article of the ICCPR by Committee *fiat*, as CRR and ICJ argue.[17] To do so would do violence to the principles of national sovereignty and free consent as set forth in the Vienna Convention, as argued above.

B. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

27. Nor can any "right to abortion" be found in the relevant portions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as CRR and ICJ claim.[18]

28. Article 12 of the ICESCR states that:

> 1. The States Parties to the present Covenant recognize *the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

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[13] CRR/ICJ Intervention at 11-13 (arguing that the criminalization of abortion may violate the rights established in the ICCPR).
[14] ICCPR, art. 6(1).
[15] *See* CRR/ICJ Intervention at 11. In fact, CRR and ICJ go on to state that the decision was made not to define the moment when life begins precisely to avoid conflict. If it was a question at all this means there was no consensus. They simply agreed to disagree.
[16] Justinian, *Institutes* 36-37 (Peter Birks & Grant McLeod trans., Cornell University Press 1987).
[17] *See* 74 AM. JUR. 2d *Treaties* § 21 ("Courts are bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared, and not otherwise").
[18] *See* CRR/ICJ Intervention at19-21.

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The protection of the developing life of the unborn child is consistent with the ordinary meaning of this article.[19]

29. CRR and ICJ claim that the right to health enshrined in article 12 of the ICESCR includes the right to control one's body and the right to sexual and reproductive freedom. For this they cite the compliance committee for the ICESCR which has suggested that a State cannot prohibit or limit abortion in any way without violating these rights.[20]

30. As noted above, the compliance committee does not have the right to redefine terms in the treaty, nor impose its own interpretation of the treaty. The text of article 12 simply *does not recognize a "right to abortion"* (nor any "right to control one's body" or a right to "sexual and reproductive freedom").

31. Rather, the text speaks of the right of "*everyone* to the enjoyment of the highest attainable standard of physical and mental health" – a term that can encompass unborn life. Such a reading would be consistent with the language article 12(2)(a), which is explicitly concerned with protection of life in the womb, *i.e.*, "the reduction of the stillbirth-rate."[21]

C. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

32. Nothing in the text of the CEDAW treaty requires the States Parties to recognize abortion or decriminalize it in any way.

33. The portion of the treaty most relevant to marriage and family is Article 16(1)(e), which states that men and women shall both share equally "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights,"[22] and article 12, which simply states that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning."[23]

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[19] International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR], art. 12.
[20] CRR/ICJ Intervention at19-20.
[21] ICESCR art. 12(2)(a).
[22] The Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW], art. 16(1)(e).
[23] CEDAW art. 12(1). *See also* CEDAW art. 12(2) ("Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.").

34. CRR and ICJ do not cite to any language in these articles – nor any other article of the CEDAW treaty – in support of a "right to abortion." Nor can they since *the word "abortion" cannot be found anywhere in the text.*[24]

35. Instead, CRR and ICJ cite the compliance committee's general recommendations as their *sole* support.[25] In particular, they cite to General Recommendation 24, which interprets article 12. For the reasons set forth earlier, their argument is without merit since the only evidence offered in favor of a "right to abortion" comes from the non-binding recommendations of the committee, and there is nothing in the (negotiated) text of article 12 that mentions abortion.

D. The Convention on the Rights of the Child (CRC)

36. Mexico may also interpret the CRC as consistent with protecting the life of the unborn child.

37. Article 1 defines a child as "every human being below the age of eighteen years." It thus defines a ceiling, but not a floor as to who is a child – in other words, it pointedly does *not* say that the status of a child begins at the time of birth.

38. Article 6 says that: "every child has the *inherent* right to life," and furthermore that "States Parties shall ensure…the survival and *development* of the child."

39. *Moreover, the CRC explicitly recognizes the child before birth as a rights bearing person entitled to special need and juridical protection.* The Preamble quotes the Declaration on the Rights of the Child and recognizes 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."[26]

40. A plain reading of the text so favors the protection of unborn life that CRR and ICJ cannot cite to any language in the CRC in support of a "right to abortion," instead relying on non-binding treaty recommendations and an interpretation proffered in a publication by the UN agency UNICEF, which likewise has no juridical force.[27]

41. It would be proper for the Court to conclude, therefore, that internal legislation protecting the life of the unborn is consistent – and legislation denying protection to unborn life inconsistent – with the text of the CRC.

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[24] *See* CRR/ICJ Intervention at16-18.
[25] *Id.*
[26] The Convention on the Rights of the Child [hereinafter CRC], art. 1 and 6, and the Preamble (emphasis added). The Vienna Convention states the rule of interpretation that, "The context…shall comprise…the text, including the preamble and annexes." Vienna Convention art. 31(2).
[27] *See* CRR/ICJ Intervention at13-16. Instead *CRR and ICJ* quote extensively from the general observations of the compliance committee for the CRC which, as stated earlier, are not part of the negotiated rights and obligations of the treaty text and are not binding on Mexico in any way.

E. The American Convention on Human Rights (ACHR)

42. Just as the Court may interpret the strong pro-natal language in the CRC in favor of the right to life of the unborn human being, it may do so with respect to the ACHR. This Convention explicitly makes reference to the protection of human life from the moment of conception.

43. Article 4(1) says in part that "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.*"[28]

44. In their intervention, CRR and ICJ concede that this article requires states to protect life from the moment of conception, though they argue that the right to life is qualified.[29]

45. In fact, and despite their efforts to persuade the court, CRR and ICJ once more cannot cite to any treaty language establishing a "right to abortion." Instead, they rely on the non-binding statements of the Inter-American Commission on Human Rights, a treaty monitoring body with no legislative or interpretive authority.[30]

46. The American Convention on Human Rights Sections 2, 3, and 4 lay out the Functions, Competence, and Procedures of the Commission. Nowhere is the Commission given the power to create new rights and obligations or compel States Parties to accept its novel interpretations of the treaty's existing provisions.

47. Ultimately, protection of life from the "moment of conception" is consistent with the clear, direct language of the ACHR, which does not grant any "right to abortion." Indeed, finding any such right in the text would appear to violate the Vienna Convention's rule that "A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty *in their context* and in light of its object and purpose."

CONCLUSION

In sum, the "plain language" of the international human rights treaties at issue – namely the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the American Convention on Human Rights – is consistent with the protection of unborn life in the Federal District. When sovereign states gave their free consent to enter into these human rights treaties it was their intention to be free to retain legislation protecting unborn life.

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[28] American Convention on Human Rights [hereinafter ACHR], art. 4(1)(emphasis added).
[29] CRR/ICJ Intervention at 22.
[30] ACHR, Sections 2, 3, and 4.

Thus, the negotiated texts of these treaties reflect the will of the sovereign states and establish no "right to abortion" and *in no way require Mexico to decriminalize abortion.* For this reason, International Organization Law Group joins with the Complainants in their prayer for relief.

Respectfully submitted,

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