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Banning Emergency Contraception in Latin America: Constitutional Courts Granting an Absolute *Right to Life* to the Zygote.

*Maria Alejandra Cardenas **

In the debate regarding conferring a *right to life* to prenatal stages of life, some States' Constitutional Courts are going as far as protecting not only the fetus, and not even the embryo, but the zygote, and – as it will be shown through this article – in some instances not even the zygote itself, but the mere possibility of one, to an extreme in which every women's right is completely nullified if it is somehow conflicting with this special protection. Just in the past four years, the Constitutional Courts of Ecuador, Chile and Peru issued decisions banning or highly restricting access to emergency contraception drugs. Before these series of cases, the battleground over the *right to life* was restricted to the field of abortion laws, and it would have been odd to think that birth control laws could replace it as it is happening now.

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This article intends nothing more than to provide the reader with a vision of how three Constitutional Courts in Latin America are interpreting their constitutions as conferring an absolute protection to life from the moment of conception.¹ To do so, I will explain and discuss the decisions handed down by the Constitutional Courts of Ecuador, Chile and Peru, exposing a legal trend that is based on a combination of fabricated reasonable doubts that are based on outdated scientific information, as well as constitutional interpretations protecting life from the moment of conception, without exceptions or room for balancing such interpretation with women's human rights.²

It is remarkable how similar the Ecuadorian, Chilean and Peruvian Constitutional Court's decisions are. They all followed the same argumentative pattern, and even the order in which such arguments were weighed. Obviously, there are some details that make the decisions different, but they are minor differences in terms of exposing the trend of extending absolute protections to the zygote. Having said this, I will divide the presentation of these three Court's decisions into three sections.

* The author is a specialist in International Human Rights Law. She holds a LL.B degree with law studies in Latin America, as well as an LL.M from Harvard Law School. Ms. Cardenas is a Legal Irvin R. Kaufman Fellow at the Center for Reproductive Rights in New York.

¹ The trend I will reveal here entails many legal issues, among which the most important one is its clash with another trend in international human rights law *vis-à-vis* its rejection to extend the *right to life* before birth, as well as the primacy of women's fundamental rights in many circumstances in which they are conflicting with a protection to prenatal life. However, due to space restrictions, I won't develop this issue in depth here.

² Throughout Latin America there are other examples of this trend, both in terms of bans to emergency contraception, as well as of bans to in vitro fertilization (such as in Costa Rica) made on behalf of the absolute protection given to the zygote. Yet, for the purpose of this article, I will exclusively refer to the cases of the three countries mentioned above, given how strikingly similar the facts, the law and the rationale of these three Constitutional Courts were.

First of all, I will cover the interpretation that these Courts gave to the scope of protection of *the right to life* enshrined in each Constitution. Then, I will explain the understanding of these three Courts in regard to the mechanism of action of emergency contraception drugs, and finally I will analyzed the consideration of international human rights law that each Court made, when deciding these cases.

Constitutional Protection of life in the Ecuadorean, Chilean and Peruvian Constitution

Ecuador has overhauled its Constitution twice in the last decade, – in 1998 and 2008. The 1998 Constitution³ enshrined the right to life within its chapter on civil rights, establishing in its article 23.1 the “inviolability of life” without mentioning the moment in which such life begins. The 2008 Constitution⁴ eliminated the chapter on civil rights, and with it, a legal bestowment of a *right to life* to all human beings. Still, both the old and the new Ecuadorean Constitution established, in the constitutional norms protecting the rights of the child, that the State would recognize and guarantee them “life, including care and protection, from the moment of conception.”⁵

Said constitutional protection of life from the moment of conception was not taken as absolute, given that while the Ecuadorean penal code criminalizes abortion, it also establishes three exceptions in which it can be legally

³ Constitución Política de la República de Ecuador. [Constitution]. (1998). (Ecuador).

⁴ Constitución de la República del Ecuador. [Constitution]. (2008). (Ecuador).

⁵ See article 45 of the current Ecuadorean Constitution: “ Art. 45.- *Las niñas, niños y adolescentes gozarán de los derechos comunes del ser humano, además de los específicos de su edad. El Estado reconocerá y garantizará la vida, incluido el cuidado y protección desde la concepción.*”

perform. This is, when the life or the health of a pregnant woman was at danger with the continuation of the pregnancy, or when the pregnancy was the result of a rape on a mentally disabled woman.⁶ Therefore, even though the Constitution manifests an interest of the State in the protection of life from the moment of conception, the legislator, weighing such protection with women's rights, determined that there would be three circumstances in which it would find exceptions.⁷

The balancing made by the State of Ecuador in regard to abortion vis-à-vis women's rights is not exactly in line with the latest standards developed in international human rights law,⁸ regarding the minimum circumstances under which abortion should be legal and available for women, but it is still a balance, and reflects a belief in that the protection of life before birth is not absolute.

However, as it will be explained, in May 2006 the Ecuadorean Constitutional Court⁹ would adopt a very extreme position regarding the protection of prenatal life when it analyzed the constitutionality of a set of norms authorizing the use and commercialization of the emergency contraception drug "Postinor 2", after an Ecuadorian citizen sued the Director of the Ecuadorian National Health Institute –in charge of drugs and sanitation– as well as the Ministry of Health, for having authorized the use of the

⁶ CÓD. PEN. Art. 447.

⁷ These exceptions are still very restrictive and certainly reflect a belief in that women's rights are *in general* less important than the interest of a State in forcing women to carry out a pregnancy, on behalf of enabling the development of a potential human being.

⁸ In the last section of this article, I will briefly comment and provide more information on what the position of international human rights law is in regard to the *right to life* and abortion.

⁹ Resolución [S.] No. 0014-2005-RA, 26 de Mayo de 2006. Tribunal Constitucional del Ecuador. [Constitutional Court].

emergency contraception drug “Postinor 2”, when, according to the plaintiff, this drug works as an abortifacient.

Article 19th of the Chilean Constitution of 1980 stipulates that every person has “the right to life” and following such statement, it establishes that “the law protects the life of whom is about to be born”.¹⁰ Following such statement, the Constitution establishes the possibility of setting up the death penalty in Chile. In effect, nothing in the language of this drafting says that the *right to life* is conferred to somebody different from a person, and nothing in the text of this drafting says that life will be protected from the moment of conception, unless a zygote or an embryo are assumed to be a person or at the very least, are assumed to be a fetus that is about to be born. Finally, the fact that the Constitution itself establishes the constitutional possibility of the death penalty makes obvious that it understands that *the right to life* is not absolute, and therefore, it admits exceptions.

Nonetheless, the legal developments of this constitutional provision regarding the reproductive decision of women to have an abortion, were of conferring one of the strictest protections to prenatal life in the world, not establishing a single exception in which abortion can be legally performed (not even therapeutic abortion), though until very recently such protections did not reach the entity to ban any form of birth control.

Regrettably, in 2008, such extreme protection to prenatal life would reach one of its peaks, after the Chilean Court decided to prohibit the free

¹⁰ Artículo 19.- *La Constitución asegura a todas las personas:*
1°.- *El derecho a la vida y a la integridad física y psíquica de la persona.*
La ley protege la vida del que está por nacer.
La pena de muerte sólo podrá establecerse por delito contemplado en ley aprobada con quórum calificado.

distribution of the emergency contraceptive drug “Plan B” through the public health system.¹¹

Article 2° of Peru’s Constitution¹² enshrines that *every person* has a right to life, and immediately afterwards, it establishes that the one “who has been conceived is a subject of rights in regard to everything that can be in its favor”.¹³ This drafting was not interpreted by the legislator as conferring an absolute *right to life* to any stage of prenatal life, given that abortion in Peru can be legally performed both to save a pregnant woman’s life, and to preserve her physical health.¹⁴ But again, just some weeks ago, the Peruvian Court decided to ban the free distribution of all forms of drugs advertised as emergency contraception, as well as to force pharmaceuticals producing or selling any form of emergency contraception drug, to label it with a warning stating that the drug could inhibit the implantation of a fertilized egg in the endometrial.¹⁵

The main legal reason the Constitutional Courts of Ecuador, Chile and Peru decided to impose bans on emergency contraception was that they all interpreted their constitutions as bestowing a *right to life* from the moment of conception, deciding to adopt a stand according to which conception happens in the moment in which an ovum has been fertilized. The three Courts in question recognized that setting the moment of conception when an ovum has

¹¹ Sentencia [S.] Rol. 740-07-CDS, 18 de Abril de 2008. Tribunal Constitucional de Chile. [Constitutional Court]. *Court decisión*.

¹² Constitución Política del Perú. [Constitution]. (1993). (Peru).
<http://www.tc.gob.pe/legconperu/constitucion.html> (last visited Nov, 1, 2009).

¹³ “Artículo 2°.” “*Toda persona tiene derecho:*

I. A la vida, a su identidad, a su integridad moral, psíquica y física y a su libre desarrollo y bienestar. El concebido es sujeto de derecho en todo cuanto le favorece”

¹⁴ CÓD. PEN. Art. 119.

¹⁵ Sentencia [S.] Exp. 02005-2009-PA/TC, 16 de Octubre de 2009. Tribunal Constitucional del Perú. [Constitutional Court]. *Court decision*.

been fertilized was a deliberate decision among other theses.¹⁶ The justification for this decision in all three cases was the Courts' assessment stating that the moment in which a spermatozoid has fertilized an ovum there is an entity that contains all the genetic information of a new human being¹⁷ and there is therefore, a person.

It is basic scientific fact that there are three different stages of prenatal development. The zygote is "*a cell formed by the union of two gametes*";¹⁸ an embryo is an organism in the "*early stages of growth and differentiation that are characterized by cleavage, the laying down of fundamental tissues, and the formation of primitive organs and organ systems; especially: the developing human individual from the time of implantation to the end of the eighth week after conception.*"¹⁹

Finally, a fetus is a "*vertebrate especially after attaining the basic structural plan of its kind; specifically: a developing human from usually two months after conception to birth.*"²⁰ Note how the Constitutional Courts' decisions in question, attribute to a cluster of human cells that has not yet become an embryo, and even less a fetus, with the full entitlement of a *right to life*.

¹⁶ Ecuador's Court in section 42th of the case's merits recognized that they could not be sure about conception starting at the moment in which the ovum has been fertilized, but nonetheless, they said that facing this doubt they were choosing to adopt this assumption. The Chilean Court went further, recognizing (in section 49th of the case's merits) that there were other positions, but choosing to adopt the thesis of the moment of fertilization, establishing that it was possible from that moment on, to ascertain the existence of a person entitled with rights (in section 50th, 2nd paragraph of the case's merits). The Peruvian Court, in its sections 4.2 and 5.1 of the case's merits recognized that there are different positions when determining the moment in which conception begins.

¹⁷ *Supra* note 9.

¹⁸ Medical Dictionary Merriam-Webster, <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=zygote>. (last visited Nov, 1, 2009).

¹⁹ *Id.* <http://www2.merriam-webster.com/cgi-bin/mwmednlm>. (last visited Nov, 1, 2009).

²⁰ *Id.* <http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=fetus>. (last visited Nov, 1, 2009).

Emergency Contraception and the Reasonable Doubt

First of all, it is important to clarify that emergency contraception is a broad term that comprehends a number of birth control methods that can be used to prevent pregnancy after unprotected sex. These methods include: a) the insertion of an intrauterine device (IUD); b) a special dose of ordinary birth control pills; and c) emergency contraceptive pills (hereinafter “ECPs”).²¹ However, the decisions examined through this article are all about ECPs, and therefore, whenever I am referring to emergency contraception, I am exclusively referring to ECPs, and more specifically, in the cases of Ecuador and Peru, to ECPs made with Levonogestrel.²²

The majority of medical literature²³, drug’s licenses²⁴ and labels²⁵, states that ECPs’ mechanism of action could be that of stopping the release of an egg from the ovary (ovulation), prevent the union of sperm and egg (fertilization), or possibly, if fertilization had already occurred, it could prevent a fertilized egg from attaching to the womb (implantation). Some scientific voices affirmed for years that ECPs’ mechanism of action like most of other hormonal contraceptives, was only that of preventing the ovum from being

²¹ International Consortium for Emergency Contraception. *What emergency contraception?*, <http://www.cecinfo.org/what/index.htm>. (last visited Nov. 1, 2009).

²² In the case of Ecuador, the drug banned was “Postinor 2”, and in the case of Chile, the drug “Plan B”. The components of these drugs can be found, respectively at: <http://ec.princeton.edu/pills/Postinor.html>, and <http://ec.princeton.edu/pills/plan-b.html>. (last visited Nov. 1, 2009).

²³ WILLIAMS OBSTETRICS 664 (19th ed. 1993).

²⁴ E.g., United States Food and Drugs Administration (FDA). *FDA’s Decision Regarding Pan B: Questions and answers* <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109795.htm> (last visited Nov. 1, 2009).

²⁵ E.g., CONSUMER INFORMATION. Next ChoiceTM (levonorgestrel) Tablets, 0.75 mg. Emergency Contraceptive. http://pi.watson.com/data_stream.asp?product_group=1648&p=ppi&language=E (last visited Nov. 1, 2009).

released, or the sperm from reaching the ovum,²⁶ and others recognized that the mechanism of action of ECPDs was actually not yet fully understood, but that it was likely that it did not work preventing implantation of a fertilized ovum.²⁷

Last year, both the International Federation of Gynecology and Obstetrics (FIGO) and the International Consortium for Emergency Contraception released a joint policy statement on Levonogestrel-only Emergency Contraceptive Pills' Mechanism of Action, excluding the third effect, this is, the prevention of implantation, after many scientific studies found no evidence supporting such possibility.²⁸ Probably this will mean that in the future, the industry, the medical literature and governmental organizations will adjust their own statements on ECPs' mechanism of action. Unfortunately, information suggesting that ECPs might prevent a fertilized egg from being implanted in the uterine wall is still circulating.

The three cases in question were substantiated by each of their plaintiffs as challenges against drugs that work as abortifacients. Although technically the plaintiffs recognized (though none of them explicitly) that ECP's were not abortifacients. This might sound contradictory, but in order to understand it, we need to have a clear idea of what an abortion is. An abortion is the termination of a pregnancy, *ergo* in order for an abortion to take place, there must have been a pregnancy. Medical science and every major health

²⁶ Mariens L, Hultenby K, Lindell I, Sun X, Stabi B, Danilsson K; *Emergency Contraception with Mifepristone and Levonogestrel: Mechanism of Action*; American College of Obstetricians and Gynecologist, 2002; 100; 1:65-71.

²⁷ International Consortium on emergency Contraception (ICEC), *Policy Statement on Emergency Contraception and Medical Abortion* (July 2003). http://www.cecinfo.org/publications/PDFs/policy/EC_MedicalAbortion_English.pdf (last visited Nov. 1, 2009).

²⁸ International Consortium for Emergency Contraception (ICEC), *How Do Emergency Contraceptive Pills Work to Prevent Pregnancy?*, http://www.cecinfo.org/PDF/ICEC_MOA_10_14.pdf (last visited Nov. 1, 2009).

organization in the world agree that pregnancy only begins at the moment in which a fertilized egg is implanted in the uterine wall.²⁹ This is why, *inter alia* the World Health Organization,³⁰ and the US Food and Drugs Administration³¹ have always asserted that ECPs' are not abortifacients.

Thus, while the plaintiffs in the Ecuadorian, Chilean and Peruvian cases claimed that ECPs were abortifacients, they were not claiming that these drugs could terminate a pregnancy. What they were claiming is that ECPs could prevent an already fertilized egg from implantation in the uterine wall, which for them, amounted to the abortion of a human being. This is how, when all three Courts arrived at a point in their respective decisions in which they had to elucidate whether or not ECPs are abortifacients, what they did instead, was to analyze whether or not ECPs could prevent a fertilized egg from being implanted in the endometrium, this is, whether ECPs could prevent a pregnancy.

All three Courts had presented before them, scientific evidence rejecting the possibility of ECPs preventing a zygote from implantation. However, given the existence of outdated scientific literature stating the opposite, all three Courts declared the existence of a reasonable doubt. And once they proclaimed the existence of such doubt, taken into account that they had determined the zygote as entitled to a *right to life*, the three of them decided

²⁹ See e.g., WILLIAMS OBSTETRICS 664 (19th ed. 1993) and *Abortion time limits: a briefing paper from the British Medical Association* (p. 5) http://www.bma.org.uk/images/Abortiontimelimits_tcm41-20443.pdf (last visited Nov. 1, 2009).

³⁰ WORLD HEALTH ORGANIZATION (WHO), *Levonorgestrel for Emergency Contraception*. Fact Sheet (March 2005). http://www.cecinfo.org/what/pdf/WHO_EC_factsheet_English.pdf (last visited Nov. 1, 2009).

³¹ US Food and Drug Administration. *FDA's Decision Regarding Plan B: Questions and Answers*. <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm109795.htm> (last visited Nov. 1, 2009).

to apply the *pro personae* principle.³² The *pro personae* principle is a human right principle mandating that, when in doubt, a judge must prefer the interpretation most favorable to the person in danger of having a right violated. Of course, a zygote, is materially not a person, and as the third section of this article will show, before international law it is certainly not legally a person either. Nonetheless, these Courts assumed otherwise, and after adding: a reasonable doubt, the establishment of the zygote as a person entitled with a *right to life*, and the *pro personae* principle, they all decided in favor of the plaintiffs, banning or highly restricting emergency contraception.³³

The Role of International Law

The main treaties applicable and binding to Ecuador, Chile and Peru, containing *right to life* provisions are the International Covenant on Civil and Political Rights (hereinafter ICCPR),³⁴ the Convention on the Rights of the Child³⁵ and the American Convention on Human Rights (hereinafter ACHR). Although all the ICCPR and the CRC expressly have the “person”, or the “human being” as the subject of the rights enshrined on them, in order to clear any doubt in regard to the possibility of these treaties extending a *right to life* to prenatal life, one only has to consult the preparatory works of each

³² See e.g., Caso Dacosta Cadogan Vs. Barbados. Corte IDH. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de Septiembre de 2009. Serie C No. 203. 49.

³³ In the cases of Ecuador, banning the distribution, sale or commercialization of a specific drug (“Postinor 2”); in the case of Peru banning the free distribution of any ECP, and mandating the pharmaceutical companies with ECPs’ drugs on Peru’s market to label their products stating that these drugs could prevent a fertilized ovum from implantation in the uterine wall; and in the case of Chile, banning the free distribution of the ECP drug “Plan B”.

³⁴ Article 6.1 of the ICCPR enshrines the right to life in the following terms: “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.”

³⁵ The CRC enshrines in its article 6 the right to life to every child, without establishing in any way that before birth, the fetus or even less, the zygote can be considered as such.

of these treaties to confirm that such possibility was expressly rejected by the vast majority of the drafters³⁶. The ACHR is not as clear, given that article 4.1 which enshrines the *right to life* establishes 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.”³⁷ However, the developments that this provision has had by the Inter American Commission on Human Rights (the main AHRC monitoring body) reveal that the article did not mean to confer the same status of a human being to prenatal life, but only to clarify that such stages of life should find *protection* and that such protection was not absolute, but just general.

In effect, the drafters of the Convention deliberately decided to introduce a language in which they would make clear that such protection, enshrined in article 4.1, should be prone to exceptions.³⁸ What’s more, the scope of such exceptions proved to be very broad, when in 1981 the Inter American Commission on Human Rights decided a case brought against the United States, claiming a violation of the American Declaration on the Rights and

³⁶ In regard to the ICCPR, *See* UN GAOR, 12th Session, Agenda Item 33, at 119 (q), UN Doc. A/3764, 1957. In regard to the CRC, *See* Convention on the Rights of the Child, *adopted* Nov. 20, 1989, GA Res. 44/25, Annex, UN GAOR 44th Session, Supp. No. 49, at 166, UN Doc. A/44/49 (1989). Some have tried to construct a right to life before birth relying on paragraph 9 of the preamble, which provides that “the child, by reason of his physical and mental maturity, needs special safeguards and care, including appropriate legal protection before as well as after birth”. Coming back again to the preparatory works of the treaty, as well as the treaty itself (which only develops rights for after birth), we see that this provision is supposed to be interpreted (as many of its advocates argued) as assuring health, nutrition, support or other measures that States considered appropriate for pregnant women. *See* UN Commission on Human Rights, Question of a Convention on the Rights of a Child: Report of the Working Group, 36th Session, UN Doc. E/CN.4/L/1542 (1980). For a more in depth discussion on the preparatory works of the treaty in this regard see PHILLIPE ALSTON *The unborn child and abortion under the Draft Convention on the Rights of the Child* Hum. Rts. Q. 1990;12(1):156-178.

³⁷ American Convention on Human Rights. OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969). Art. 4.

³⁸ CARLOS A. DUNSHEE DE ABRANCHES, “estudio comparativo entre los Pactos de las Naciones Unidas sobre derechos civiles, políticos, económicos, sociales y culturales y los proyectos de Convención Interamericana sobre Derechos Humanos”, *Inter-American Yearbook on Human Rights*— 1968, p.180.

Duties of the Men in light of article 4.1 of the ACHR, as a consequence of the Supreme Court decision in *Roe v. Wade* in which abortion was made legal in the United States. The Inter American Commission never referred to the fetus as a person, nor discussed in any way that the decision involved the conflicting rights of two human beings; solving the matter, it limited to cite the preparatory works of the ACHR, reinforcing the fact that the protection to prenatal life could find exceptions, deciding that no breach of the regional human rights norms was done by the United States.³⁹

The fact that international law does not conferred personhood to any stage of prenatal life, and that on the contrary, is preoccupied with violation of women's human rights arising from rigid protections to prenatal life, can be confirmed by the repeated times in which international human rights treaty monitoring bodies have called upon States to decriminalize or liberalize their abortion laws,⁴⁰ even to the point of listing minimum exceptions in which abortion should be legal, such as in cases in which the life of the pregnant woman's life is at danger,⁴¹ or when the pregnancy has occurred as a

³⁹ *Baby Boy case*, Resolution 23/81, 2141, March 6th, 1981, *Annual Report of the Inter American Human Rights Commission* 1980-1981; OEA/Ser.L/V/II.54. Doc. 9 rev. 1. 16 October 1981.

⁴⁰ *E.g.*, Concluding Observations of the Human Rights Committee: **Ecuador**, 11, U.N. Doc. CCPR/C/79/Add.92 (1998); **Costa Rica**, 11, U.N. Doc. CCPR/C/79/Add.107 (1999); **Chile**, 15, U.N. Doc. CCPR/C/79/Add.104 (1999); **Peru**, 22, U.N. Doc. CCPR/CO/70/PER (2000); **Guatemala**, 19, U.N. Doc. CCPR/CO/72/GTM (2001). Concluding Observations of the Committee on the Rights of the Child: **Chile**, 55, U.N. Doc. CRC/C/CHL/CO/3 (2007); **Uruguay**, 51, U.N. Doc. CRC/C/URY/CO/2 (2007). Concluding Observations of the Committee on the Elimination of Discrimination Against Women: **Bolivia**, 82, U.N. Doc. A/50/38 (1995); **Dominican Republic**, 337, U.N. Doc. A/53/38 (1998); **Chile**, 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006); **Honduras**, 24, U.N. Doc. CEDAW/C/HON/CO/6 (2007).

⁴¹ *E.g.*, Concluding Observations of the Human Rights Committee: **Chile**, 8, U.N. Doc. CCPR/C/CHL/CO /5 (2007). Concluding Observations of the Committee on the Rights of the Child: **Chile**, 56, U.N. Doc. CRC/C/CHL/CO/3 (2007). Concluding Observations of the Committee on the Elimination of Discrimination Against Women: **Paraguay**, 131, U.N. Doc. A/51/38 (1996). Concluding Observations of the Committee on Economic, Social and Cultural Rights: **Nepal**, 55, U.N. Doc. E/C.12/1/Add.66 (2001).

consequence of rape or incest.⁴² On another side of the issue, international law has declared in several opportunities that women have a right to control their own reproductive capacity⁴³ and “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.”⁴⁴ These control of women’s own reproductive capacity, and access to the means necessary to exercise such right, gives rise to an obligation for States parties “to refrain from obstructing action taken by women in pursuit of their health goals”.⁴⁵ Thus, monitory bodies have emphasized on the importance of States in providing access to birth control, including emergency contraception,⁴⁶ and the violations that otherwise would arisen from it.⁴⁷

⁴² *E.g.*, Concluding Observations of the Committee on the Rights of the Child: **Guatemala**, 40, U.N. Doc. CRC/C/15/Add.154 (2001). Concluding Observations of the Committee on the Elimination of Discrimination Against Women: **Sri Lanka**, 283, U.N. Doc. A/57/38, Part I (2002). Concluding Observations of the Committee on Economic, Social and Cultural Rights: **Costa Rica**, 25, 46, U.N. Doc. E/C/12/CRI/CO/4 (2008).

⁴³ *E.g.*, Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health., *Normative Content of Art. 12*, paragraph 8. (22nd Sess., in Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies, at 90, U.N. Doc. HR/GEN/1/Rev. 5 (2001). E/C.12/2000/4., 11 August 2000; *The Program of Action of the International Conference on Population and Development*, Cairo, Egypt, 5-13 September 1994, principle 4, U.N. Doc.A/CONF.171/13/Rev.1 (1994); *The Beijing Declaration*, Fourth World Conference on Women, Beijing, China, 4-15 September 1995, para. 17, U.N.Doc. A/CONF.177/20 (1995); Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against Women, 24(m), U.N. Doc A/47/38 (1993); Committee on the Rights of the Child, General Comment 3: HIV/AIDS and the Rights of the Child, 6, U.N. Doc. CRC/GC/2003/3 (2003).

⁴⁴ Convention on the Elimination of Discrimination Against Women. Art. 16. 1. (e).

⁴⁵ Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: women and health*, 14, U.N. Doc. A/54/38/Rev.1 (1999).

⁴⁶ *See e.g.*, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: **México**, 25/08/2006, U.N. Doc.. CEDAW/C/MEX/CO/6 (2006).

⁴⁷ *See e.g.*, Committee on the Rights of the Child, General Comment 3: HIV/AIDS and the Rights of the Child, 20, U.N. Doc. CRC/GC/2003/3 (2003); Concluding Observations of the Committee on the Elimination of Discrimination Against Women: **Ghana**, 31–32, U.N. Doc. CEDAW/C/GHA/CO/5 (2006). **Belize**, 56, U.N. Doc. A/54/38 (1999); **Burkina Faso**, 274, U.N. Doc. A/55/38, (2000); Concluding Observations of the Committee Against Torture: **Peru**, 25/07/2006, U.N. Doc. CAT/C/PER/CO/4, 23.

Summing up, international law soundly supports family planning as central to the exercise of human rights. Also, international law does not extend a *right to life* before birth, and even less, an absolute protection of it, which in consequence has translated into a rejection to absolute bans on abortion. A review of the state of evolution of international law quickly shows that reproductive rights, this is, the right to freely control one's own reproductive capacity is a human right, inexorably linked to the right to privacy, autonomy, health, and life; and thus, regardless of the protection that States decide to confer to prenatal life, such protection cannot be absolute and under no circumstance can nullify women's human rights. Acting in any other direction would entail that a State is turning women's into mere instruments of reproduction, tacitly making pregnancy or as in the decisions here examined, the encounter of two cells (the fertilized ovum) into a circumstance that invalidates women as human beings entitled to fundamental rights.

Article 163 of the Ecuadorean Constitution in force at the time of the decision stated⁴⁸ that the norms contained both in treaties and international conventions, were part of the normative system of the country, prevailing over laws and other norms of inferior hierarchy. Since in Civil Law systems, over the laws there is only the Constitution or special norms of constitutional hierarchy, it is clear that the former Constitution conferred to international law a major role within the normative order.

Article 5 of the Chilean Constitution establishes that it is a duty of the State to respect and promote human rights enshrined both in the Constitution and

⁴⁸ **Art. 163.-** *Las normas contenidas en los tratados y convenios internacionales, una vez promulgados en el Registro Oficial, formarán parte del ordenamiento jurídico de la República y prevalecerán sobre leyes y otras normas de menor jerarquía.*

international law treaties of which Chile is a party.⁴⁹ Finally, article 55 of the Peruvian Constitution establishes that international treaties of which Peru is a party are incorporated into Peru's law⁵⁰. Thus, we see that constitutionally, at the time of the decisions analyzed in this article, all Ecuador, Chile and Peru incorporate International Law within their law, but what's more, gave a special relevance. Contrary to the role of international law in the United States legal and judicial tradition, in Latin America it is very common for Constitutional Courts to cite international law, and to use the international law jurisprudence and doctrine as a source to bolster and legitimate their decisions. The Courts called on international law in the three cases examined, though sadly, they here were not an exception, though sadly, its used it erroneously.

While the Ecuadorean Constitutional Court completely ignored international law and the duties of States arising from it, the Chilean Court, wanting to prove that the protection of a Zygote's life is the single most important human right, dedicated some paragraphs to international law, but incredibly it was only to cite the articles in which international human rights treaties enshrined the right to life, as if when those norms talk about the person, they were including a fertilized ovum. Sadly, it was not Chile's Court which gave international law its worse use. It was the Peruvian Court.

⁴⁹ *El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes.*

⁵⁰ *Artículo 55: Los tratados celebrados por el Estado y en vigor forman parte del derecho nacional.*

After citing the articles in which international treaties enshrined the right to life, the Court concluded that: “it is evident that both national (in the constitution and inferior norms) and international law protect life from the moment of conception”. This assertion by the Peruvian Court, and the general misuse and ignorance of international law by the Chilean and Ecuadorean Courts is not only strange, but dangerous.

First, the treatment of international law by these three Constitutional Courts makes international treaties such as the ICCPR say something that it specifically rejected, this is, that there is a *right to life* and even less an *absolute right to life* from the moment of conception, which would make a zygote appear before the law as a human being. Second, through the ignorance and misuse of international law, women were nullified in the analysis, as human beings entitled to human rights, although they are indisputable.

In conclusion, Ecuador, Chile and Peru put themselves in a position of rupture with international law, by completely overshadowing women’s rights and making international law state that it extends *the right to life* from the moment of conception, and provides an absolute protection to prenatal life, when it does not.

Even after conferring the zygote with the *right to life* of a human being, a balance necessarily should have been made, because the existence of a fertilized egg does not nullify the status of women as subjects of human rights, but what is more, what the Justices of the Ecuadorean, Chilean and Peruvian Courts balanced, was on the one hand a clear violation of women’s human rights versus hypothetical violations (the mere probability of a

fertilized egg being prevented from implantation in the uterine wall) of an hypothetical subject of rights (the possible existence of a fertilized ovum). I wonder: when these Courts applied the pro personae principle, why they did not do it to favor women? A person that is indisputably a human being with human rights about to be violated, was sacrificed in the name of layers of assumptions that were put together to create the appearance of a person. All of these assumptions once added, were taken as superior to women's rights, turning the zygote into a "*super person*".
