RESOLUTION 23/81

Case 2141 (UNITED STATES)

March 6, 1981

SUMMARY OF THE CASE

1. On January 19, 1977, Christian B. White and Gary K. Potter, filed with the Inter-American Commlssion on Human Rights a petition against the United States of America and the Commonwealth of Massachusetts for the purposes established in the Statute and Regulations of the Commission. The petition is accompanied by a cover letter of the Catholics for Christian Political Action, signed by Gary Potter, President.
2. The pertinent parts of the petition are the following:

   Name of the person whose human rights have been violated; "Baby Boy" (See Exhibit, p.ll, line 7 from top, and Amplificatory Document p. 1) Address: Boston City Hospital, Boston Massachusetts.Description of the violation: Victim was killed by abortion process (hysterotomy), by Dr. Kenneth Edelin, M.D., in violation of the right to life granted by the American Declaration of the Rights and Duties of Man, as clarified by the definition and description of the American Convention on Human Rights (See Amplificatory Document p.1).

   Place and date of the violation: Boston City Hospital, Boston, Massachusetts, October 3, 1973, U.S. Supreme Court Building, Washington, D.C. January 22, 1973.

   Local authority who took cognizance of the act and the date on which this occurred: District Atrorney's Office, Boston, Massachusetts.

   Judge or court which took cognizance of the act and the date on which this occurred: Superior Court of Boston, Massachusetts, Judge McGuire sitting, April 5-11, 1976.

   Final decision of the authority (if any) that acted in the matter; The Supreme Judicial Court of Massachusetts, Boston, Massachusetts, acquitted Edelin on appeal, on December 17, 1976.

   In the case of it not being possible to have recourse to a local authority, judge or court, explain the reasons for such impossibility:

On a related point, no appeal to the Supreme Court of the United States is possible. (See Amplificatory Document, p.6).

List the names and addresses of witnesses to the act (if any) or enclose the corresponding documents: Exhibit A: Official copy of the decision of the Supreme Judicial Court of Massachusetts in the case of Commonwealth vs. Edelin; Exhibit B: "Working and Waitinz,"The Washington Post, Sunday, August 1, 1976.

The undersigned should indicate whether they wish their identity to be withheld: No withholding is necessary.

3. In the "Amplificatory Document" attached to the petition, the petitioners add, inter alia, the following information and arguments:

a) The victim in this case, a male child not yet come to the normal term of pregnancy, has from the beginning been identified by the Massachusetts authorities only as "Baby Boy", Exhibit A, p.ll, line 7 of Case S-393 SJC, Commonwealth/of massachusetts/vs. Kenneth Edelin.

b) This violation of the following rights granted by the American Declaration of the Rights and Duties of Man, Chapter 1, Article I ("... right to life...", Article II ("All persons are equal before the law... without distinction as to race, sex, language, creed, or any other factor," here, age), Article VII ("All children have the right to special protection, care, and aid") and Article XI ("Every person has the right to the preservation of his health...") began on January 22, 1973, when the Supreme Court of the United States handed down its decisions in the cases of Roe vs. Wade, 410 U.S. 113[1] and Doe vs. Bolton, 410 U.S. 179.

c) The effect of the Wade and Bolton decisions, supra, in ending the legal protection of urborn children set the stage for the deprivation of "Baby Boy's right to life. These decisions in and of themselves constitute a violation of his right to life, and the United States of America therefore stands accused of a violation of Chapter 1, Article I of the American Declaration of the Rights and Duties of Man.

The United States Government, through its Supreme Court, is guilty of that violation.

d) At trial, the jury found Dr. Edelin guilty of manslaughter, necessarily finding as fact that the child was such as to fit within a "protectable exception" (over six months past conception and/or alive outside the

womb) to the Supreme Court of the United States' rubric in the Wade and Bolton cases. On appeal, the Supreme Judicial Court of Massachusetts reversed, on these grounds;

1) Insufficient evidence of "recklessness" and "belief in" [or concern about] "the viability of the fetus" (paraphrased). Exhibit A, p.l90, line 17 to p.l9, line 6.

2) Insufficient evidence of life outside the womb. Exhibit A, p.22, line 5, to p.25, line 1.

3) Procedural error. Exhibit A, p.25, line 2 to p29, line 7.

e) This decision came down on December 17, 1976, and, by preventing Dr. Edelin from being punished for his acts, put the State of Massachusetts in the posture of violating "Baby Boy's" right to life under the Declaration.

f) The Supreme Court of the United States has no jurisdiction in this matter, since the grounds for reversal given in the opinion of the Supreme Judicial Court's opinion is based on points of law that are purely state matters, and Edelin's rights were not violated by his being held harmless.

Evidentiary sufficiency on the elements of a crime and matters of state court procedure may be addressed by the Supreme Court of the United States, or any other U.S. Federal Court, only where the state has not considered the matter.

4. Exhibit A, attached to the petition, is a xerox copy of the full text of the decision of the Massachusetts Supreme Judicial Court in the case of Commonwealth vs. Kenneth Edelin
5. On April 1, 1977, Mary Ann Kreitzer (4011 Franconia Rd. Alexandria, Va. 22310) wrote a letter to the Commission, on behalf of herself and six other persons, asking "to be considered as complainants in the communications brought before the Commission by Mssrs. Potter and White and Catholics for Christian Political Action concerning the Edelin case...".
6. Later, a similar request was made by Reverend Thomas Y. Welsh, Bishop of Arlington (200 North Glebe Rd. Arlington, Va.), Frederick C. Greenhalge Jr. (Box 1114, Los Gatos, Santa Clara County, California 95030) and Lawyers for Life, represented by Joseph P. Meissner (Room 203 3441 Lee Road, Shaker Heights, Ohio 44120).

7. By a letter of May 5, 1977, the petitioners submitted to the consideration of the Commission four questions on what reservations are acceptable to the American Convention on Human Rights.
8. The Commission, at its 41st Session (May, 1977) decided to name a rapporteur to prepare a note to the Government concerned, but at its 42nd Session, adopting a recommendation made by its Ad Hoc Committee, the Commission directed the Secretariat to forward to the Government of the state in question the pertinent parts of the petition and to request the usual information.
9. By a note of July 20, 1978, the Chairman of the Commission requested the Secretary of State of the United States to supply the information deemed appropriate, in accordance with articles 42 and 54 of its Regulations.
10. On January 26, 1979 the Commission received a letter from the petitioner stating:
    The United States having failed to reply to your Commission's letter of inquiry of July 20, 1978, within the 180 days permitted by your Commission's regulations (article 51), the regulations now require you to regard the allegations of fact as proven (article 51).
11. On February 22, 1979, Ambassador Gale McGee, Permanent Representative of United States to the Organization of American States submitted to the Commission's "a memorandum prepared within the Department of State replying to the principal points raised by the complainants."
12. A preliminary question was raised in the United States response;

    With respect to the exhaustion of legal remedies in the Edelin case, decisions of state supreme courts are appealable to the U.S. Supreme Court. However, no appeal was taken in this case and the time for appeal has now lapsed.
13. On the facts referred to by the petition, the memorandum states:

    The specific case brought to the attention of the Commission is that of "Baby Boy", the name given to the fetus removed by Dr. Kenneth Edelin in performing an abortion in Boston on October 3, 1973. Dr. Eldelin was indicted for manslaughter on the basis of that abortion and convicted after trial. The Supreme Judicial Court of Massachusetts reversed the conviction and directed the entry of a judgment of acquittal on December 17, 1976. The Court found that there was insufficient evidence to go to a jury on the overarching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the "wanton" or "reckless" conduct resulting in a death required for a conviction, and that motions for a direct verdict of acquittal should have been granted.

14. The U.S. Government response, on the substantive questions raised by the complainant, is developed in a three part argument that the right-to-life provisions of the American Declaration on the Rights and Duties of Man was not violated, even in the hypothesis that the American Convention on Human Rights could be used as a means of interpretation in this case:

a) With regard to the right to life recognized by the Declaration, it is important to note that the conferees in Bogotá in 1948 rejected language which would have extended that right to the unborn. The draft placed before them had been prepared by the Inter-American Juridical Committee.

Article 1 of that draft provided:

Toda persona tiene derecho a la vida, inclusive los que están por nacer así como también los incurables, dementes y débiles mentales. (Every person has the right to life, including those who are not yet born as well as the incurable, the insane, and the mentally retarded.) Novena Conferencia Internacional Americana, Actas y Documentos, vol V, at 449 (1948).

The Conference, however, adopted a simple statement of the right to life, without reference to the unborn, and linked it to the liberty and security of the person. Thus it would appear incorrect to read the Declaration as incorporating the notion that the right to life exists from the moment of conception. The conferees faced this question and chose not to adopt language which would clearly have stated that principle.

b) While the American Convention on Human Rights clearly was intended to complement the Declaration, these two documents exist on different legal planes and must be analyzed separately. The Declaration, adopted as a resolution at the Ninth International Conference of American States in Bogotá in 1948, provides a statement of basic human rights. It was adopted by unanimous vote, the United States participating. When the Commission was created in 1959, the Declaration gave form to its charge to protect the observance of human rights in the Americas. The Convention, however, is a treaty which has only recently entered into force among 13 states, not including the United States. It defines in detail the human rights which its parties undertake to observe. The specificity of those rights, in comparison with the ones enumerated in the Declaration, suggests the need for their being undertaken by treaty.

While the vagueness of the rights described in the Declaration may leave substantial room for interpretation by the Commission, that interpretation must be consistent with the intentions of those who adopted the Declaration. In particular cases, the Convention may or may not provide accurate guidelines for defining the terms of the Declaration.

c) Although the scope of the right to life recognized by the Convention is not directly in issue here, the complainants' analysis of that point warrants some comment. Paragraph 1 of Article 4 of the Convention describes the right to life in the following terms:

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.

At the second plenary session of the San José conference, the U.S. and Brazilian delegations placed the ollowing statement on the record:

The United States and Brazil interpret the language of paragraph 1 of Article 4 as preserving to State Parties discretion with respect to the content of legislation in the light of their own social development, experience and similar factors. (Conferencia Especializada Interamericana sobre Derechos Humanos, Acta de la segunda sesión plenaria, OEA/Ser.K/XVI/1.2, at 6).

When dealing with the issue of abortion, there are two aspects of the Convention's elaboration of the right to life which stand out. First, the phrase "in general". It was recognized in the drafting sessions in San José that this phrase left open the possibility that states parties to a future Convention could include in their domestic legislation "the most diverse cases of abortion." (Conferencia Especializada Interamericana sobre Derechos Humanos, OEA/Ser.K/XVI/1.2, at 159.)

Second, the last sentence focuses on arbitrary teprivations of life. in evaluating whether the performance of an abortion violates the standard of Article 4, one must thus consider the circumstances under which it was performed. Was it an "arbitrary" act? An abortion which was performed without substantial cause based upon the law could be inconsistent with Article 4.

15. The State Department memorandum responded also the petitioners' allegations related to the opinionof U.S. Supreme Court and the Supreme Judicial Court of Massachusetts on abortion:

Complainants allege that the decisions of the U.S. Supreme Court in Wade and Bolton (Attachments A and B) imported "absolute arbitrariness" into the decision whether an abortion shall be performed in a particular case. In fact, what the Supreme Court did in these cases was to establish Constitutional guidelines for state law regulating abortions. These guidelines were not developed in an arbitrary fashion.

The issue before the Court in Roe v. Wade was whether a state criminal abortion statute that excepted from criminality only a life-saving procedure on behalf of the mother was Constitutional.[2] The Court found that it limited the exercise of a "fundamental right" --the right to privacy[3] --in a manner inconsistent with the compelling state interests" which could justify regulation of that right. It is a basic tenet of U.S. Constitutional law that States may limit the exercise of fundamental rights only when they can show a compelling state interest in doing so, and legislative enactments toward that end must be narrowly drawn to express only the legitimate state interests at stake. The Court identified two interests which could form the basis for legitimate state regulation of abortions during certain stages of pregnancy--the mother's health (as distinguished from her life) for the stage subsequent to approximately the end of the first trimester and the potential life of the fetus for the stage subsequent to viability. For the first trimester, the Court has left the abortion decision and its effectuation to the medical judgment of the pregnant woman's attending physician, 410 U.S. 113, 164.

Complainants allege that, by this decision, the U.S. Supreme Court has sanctioned the arbitrary killing of human fetuses during the first six months of development. In fact the Court expressly rejected the contention "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone choses." The Court declared that the right to privacy was not absolute and that its exercise could be limited by valid state regulations drafted in conformity with the guidelines described above. Each state statute must be weighed against the basic Constitutional criteria established by the Court.

In Commonwealth v. Edelin, the abortion was performed in the interim between the announcement of the Wade decision, which rendered inoperative the Massachusetts criminal abortion statute, and the enactment of new state legislation on abortions. From January 1973 until August 1974, there were no legal restrictions on the performance of abortions per se in Massachusetts, and Dr. Edelin was prosecuted under a manslaughter statute. He was acquitted; the record amply

demonstrates the difficulty of bringing the facts of a legal abortion within the terms of a manslaughter statute. It does not establish, however, that the abortion was performed "arbitrarily." Complainants note that the Edelin opinion does not explain the factors which went into the decision to perform the abortion; the court makes only passing reference to the pregnant girl's and her mother's "having requested an abortion." Had the case been tried under the 1974 Massachesetts legislation on abortions (Attachment C), this aspect would have been fully explored. However, it was not a central issue under the theory of manslaughter advanced by the Commonwealth. Thus, the record is silent as to the pregnant girl's motivation or medical need in seeking an abortion, and the Edelin case cannot legitimately be seen a sanctioning a "mother's desire to kill (unborn children) for improper reasons or no reason at all." Complainant's Amplificatory (sic) Document, at 3. It seems worth noting, however, that, at the time of the abortion, Dr. Edelin estimated the gestational period as twenty to twenty-two weeks- under the time generally believed required to produce a viable fetus" and he did not believe the fetus was viable. The Court found nothing to impeach his good faith judgment in this regard.

16. Attached to the V.S. response are copies of the full texts of the opinions in Roe v. Wade and Doe v. Bolton, ant Sections 12K - 12Y Chapters 112 of the Annotated Laws of Massachusetts.

17. On June 12, 1979, the petitioners' reply to the U.S. Government response stated in summary that:

a) The State Department memorandum [implies] near-confession its guilt in this case.

b) The U.S. Government has made no reply to the allegations of Messrs. Potter and White as to the large numbers of abortions and the high proportion of unjustified abortions performed merely for the sake of convenience, and has not denied that U.S. Supreme Court has forbidden protection of the lives of the unborn for the first 24 weeks of prenatal existence.

c) The Government is incorrect in sustaining that, in the Edelin case the internal legal remedies have not been exhausted because the appellate jurisdiction of the U.S. Supreme Court is strictly limited, both as to appeals of right and as to the writ of certiorari.

d) The history of the development of the American Declaration demonstrates that the U.S. argument is incorrect, because the change

in working was made simply and solely for purposes of simplification and not in order to alter the content of the document.

e) The Wade and Bolton opinions, as the U.S. Government admits, rendered the Massachusetts criminal abortion statute inoperative and had the same effect, generally, on other State abortion statutes. This destroyed the legal protection of the lives of the unborn.

f) The term "in general" cannot be viewed as applying only to the prenatal period, by reason of the logical structure and wording of tne statement of the right to life, and the other life-affecting aspects, of the Declaration and the Convention. These aspects of these two documents, such as limitations upon executions for capital crimes, must be "read into" the phrase "in general".

g) History clearly demonstrates that numerous human rights violations have been based upon orderly processes for creating law, as in the Wade and Bolton cases.

18. In their reply to the response of the U.S. Government, the petitioners make frequent reference to the Annex to Amplificatory Document, filed by Messrs. Potter and White on June 8, 1978. This document is the result, in the opinion of the petitioners, of research based on the Records of the Ninth International Conference of American States and other related publications done to prove that the term "life" inarticle 1 of the Declarationof Bogotá of 1948 on human rights ant duties was, in fact, defined by the drafters and promulgators of that Declaration so as to protect the indivitual's right tolife "from the moment of conception."

19. On July 27, 1979, Messrs. Thomas Y. Yank, Henry Y. Hyde, Charles F. Dougherty and Daniel E. Lungren, Members of the U.S. Congress, House of Representatives, requested that the Commission inform them with regard to case 2141:

Assuming that plenary Commission handling of this complaint is impending, we would like to know whether, if the United States loses, it would be subject to trade and diplomatic sanctions similar to those imposed upon Cuba by the O.A.S. following, and partially on account of, the human rights violations of the Castro regime?

Can the Commission suggest to the undersigned Members of Congress how legislation might be shaped inorder to eliminate any doubts as to U.S. compliance with IACHR standards in this regard?

We naturally sympathize with the Commission's aims and purposes, and send these questions in a spirit of cooperation and with the intent of furthering the work of the Commission.

20. Considering the case ready for decision, the Commission, in its 50 Session (September-October 1980), appointed Professor Carlos A. Dunshee de Abranches as rapporteur to prepare the appropriate draft report, in accordance with article 24 of its present Statute and article 49 of its previous Regulations.

WHEREAS:

1. The basic facts described in the petition as alleged violations of articles I, II, VII and IX of the American Declaration occurred on January 22, 1973 (date of the decisions of cases Roe v. Wade and Doe v.Bolton by U.S. Supreme Court), October 3, 1973 (date of abortion of Baby

Boy performed at the Boston City Hospital) and December 17, 1976 (date of final decision of the Supreme Judicial Court of Massachusetts that acquitted Dr. Edelin, the performer of the abortion.) The defendant, the U.S. Government is not a state party to the American Convention on Human

Rights. The petition was been filed on January 19, 1977, before the Convention entered into force on July 18, 1978.

2. Consequently, the procedure applicable to this case is that established in articles 53 to 57 of Regulations of the Commission, approved in 1960 as amended, in accordance with article 24 of the present Statute and article 49 of the new Regulations.

3. Communications that denounce the violation of the humanrights set forth in Article 53 must be addressed to the Commission within six months following the date on which, as the case may be, the final domestic decision has been handed down..." (article 55 of the 1960 Regulations). However, the 1980 Regulations, maintaining the same rule, clarifies that the initial term of the six months shall be the date on which the party has been notified of the final ruling in cases in which the remedies under domestic law have been exhausted (article 35.1 applicable to States that are not Parties to the Convention as provided in article 49).

4. The petitioners were not parties in the case Commonwealth of Massachusetts vs. Kenneth Edelin, in which the final ruling by the Supreme Judicial Court of Massachusetts was delivered on December 17, 1976 (Exhibit A attached to the petition.) So they have not been notified of this

said opinion, but in this case the point is irrelevant because the petition was filed with the Commission on January 19, 1977, only 32 days after the final ruling of State Court.

5. The Commission shall verify, as a condition precedent to exercising its jurisdiction, whether the internal legal procedures and remedies have been duly applied and exhausted (article 9 bis d of the Statute and article 54 of the Regulations both of 1980 as amended.)

6. The defendant sustains that decisions of state courts are appealable to the U.S. Supreme Court decision, but that no appeal was taken in this case. Conversely, the complainants replied that the jurisdiction of the U.S. Supreme Court to review state court decisions by appeal or by writ of certiorari is limited to specific situations, none of which are applicable in this case. (See the reasoning transcribed in N. 3, g, of this Report.)

7. The facts of the case are not in controversy. The text of the decision of the Supreme Judicial Court of Massachusetts, produced by petitioners, was accepted as authentic. Only the merits are under scrutiny. The consideration of those facts and the terms of such decision and the analysis of rules and precedents of U.S. Supreme Court, applicable to this case, indicate that there was no internal remedy to be exhausted by the petitioners before applying to the international jurisdiction.

8. The factual bases for this conclusion are the following:

a) On October 3, 1973, the defendant Dr. Renneth Edelin, Chief Resident in obstetrics and gynecology at Boston City Hospital, performed an abortion by hysterotomy on a seventeen year old, unmarried woman, she and her mother having requested an abortion and consented to the operation. For his conduct in connection with the operation, Dr. Edelin was indicted for manslaughter, and convicted after trial. He appeals from the judgment of conviction and from the trial judge's refusal of a new trial.

b) In Massachesetts, for many years a criminal abortion statute (G. L. c. 272, S 19) had had the effect in the Commonwealth of punishing as a crime the performance of any abortion except when carried out by a physician "in good faith and in an honest belief that it (was) necessary for the preservation of the life or health of a woman."

c) On January 22, 1973, the Supreme Court of the United States decided the cases of Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179. These decisions not only "rendered inoperative" the Massachusetts criminal abortion statute, as the State Court had occasion to say in Doe v. Doe, (365

Mass. 556, 560 (1974), but introduced a new regime affording Constitutional protections as follows (quoting from Wade, 410 U.S. at 164-165):

"a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

d) All six Justices of Supreme Judicial Court of Massachusetts who heard the appeal, holding that there was error in the proceedings at trial, vote to reverse the conviction. Five Justices also vote to direct the entry of a judgment of acquittal; the Chief Justice, dissenting in part in a separate opinion, would order a new trial. The five Justices are agreed that there was insufficient evidence to go to a jury on the overarching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the "wanton" or "reckless" conduct resulting in a death required for a conviction herein, and that motions for a directed verdict of acquittal should have been granted accordingly. "The judgment is reversed and the verdict set aside.Judgment of acquittal is to be entered. So ordered."

e) The highest Court, in the conclusion of its opinion, states: This opinion does not seek an answer to the question when abortions are morally justifiable and when not. That question is wholly beyond our province. Rather we have dealt with a question of guilt or innocence under a particular state of facts. We are conscious that the significance of our decision as precedent is still further reduced by the fact that the case arose in an interegnum between the Supreme Court's abortion decisions of 1973 ant the adoption of legislation intended to conform to those decision--a kind of internal circumstance not likely to be repeated. (See Exhibit A pages 1, 2, 3 and 29.)

9. The jurisdiction of the Supreme Court to review decisions of the state courts is based upon 28 U.S.C. S 1257, which reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title,

right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States." (United States Code-1976 Edition - U.S. Government Printing Office.)

10. There is no ground in this case for applying the sanction established in article 51 of the 1960 Regulation as amended: -the presumption of truth of the alleged facts. The petitioners affirmation is correct in noting that the State Department response was received in the Commission 32 days after the expiry of the time limit of 180 days, but this rule is flexible. That term may be extended in cases in which the Commission deems justifiable (article 51.2.) The nature, complexity and importance of the many legal, moral and scientific issues disputed in this case justify the reasonable delay in the Government's response.

11. Furthermore, there is no reason to declare as presumed the truth of facts described in the petition if both parties in this case agree, as it is evident from the examination of the file, that such facts are not in controversy. However, it is opportune to clarify that in this case there is no logical or legal relation between the presumption of the truth of the facts, described by the petitioners and the request involving legal issues, as set forth in the petition of January 22, 1979 (see n. 12 of this report.)

12. The last preliminary question to be resolved is the admissibility of the request made to this Commission by four honorable Members of the Congress of the United States of an advisory opinion related to the consequences of an eventual decision of the Commission adverse to the United States.

13. Since its creation, the Commission has competence to serve the Organization of American States as an advisory body in respect of human rights (Statute 1960 article 9c). This function has been confirmed by article 112 of the Charter of the OAS (as amended by the Protocolo of Buenos aires, 1967), ratified by the United States of America on April 23, 1968. The new Statute of the Commission, approved by the General Assembly in October, 1979, provides that the Commission shall have power with respect to the member states of the Organization "to respond to inquiries made by any member state through the General Secretariat of the Organization on matters related to human rights in that state and, within its possibilities, to provide those states with the advisory services they request." (article 18 c).

14. This article shows clearly that inquiries by members of the congress or any other power or authority of a Member State, to be considered by the Commission, must be officially forwarded through the international representative of such State in the Organization. Without prejudging the substance of the opinion requested, the Commission shall comply, at any time, with the duty to respond such an inquiry if it is properly submitted to this advisory body.

15. The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights (IACHR) is governed by the Charter of OAS (Bogotá, 1948) as amended by the Protocol of Buenos Aires on February 27, 1967, ratified by United States on April 23, 1968.

16. As a consequence of articles 3 i, 16, 51 e, 112 and 150 of this Treaty, the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force. Those instruments and resolutions approved with the vote of U.S. Government, are the following:

- American Declaration of the Rights and Duties of Man (Bogotá, 1948)

- Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965)

- Statute and Regulations of IACHR of 1979-1980.

17. Both Statutes provide that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance and respect of human rights. For the purpose of the Statutes, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American

Convention on Human Rights (San José, 1969). (Articles 1 and 2 of 1960 Statute and article 1 of 1979 Statute).

18. The first violation denounced in the petition concerns article I of the American Declaration of Rights and Duties of Man: "Every human being has the right to life...". The petitioners admitted that the Declaration does not respond "when life begins," "when a pregnancy product becomes a human being" or other such questions. However, they try to answer these fundamental questions with two different arguments:

a) The travaux preparatoires, the discussion of the draft Declaration during the IX International Conference of American States at Bogotá in 1948 and the final vote, demonstrate that the intention of the Conference was to protect the right to life "from the moment of conception."

b) The American Convention on Human Rights, promulgated to advance the Declaration's high purposes and to be read as a corollary document, gives a definition of the right to life in article 4.1: "This right shall be protected by law from the moment of conception."

A brief legislative history of the Declaration does not support the petitioner's argument, as may be concluded from the following information and documents:

a) Pursuant to Resolution XL of the Inter-American Conference on Problems of War and Peace (Mexico, 1945), the Inter-American Juridical Committee of Río de Janeiro, formulated a preliminary draft of an International Declaration of the Rights and Duties of Man to be considered by the Ninth International Conference of American States (Bogotá, 1948). This preliminary draft was used by the Conference as a basis of discussion in conjuction with the draft of a similar Declaration prepared by the United Nations in December, 1947.

b) Article 1 - Right to Life - of the draft submitted by the Juridical Committee reads: "Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." (Novena Conferencia International Americana - Actas y Documentos Vol.V Pág. 449).

c) A Working Group was organized to consider the observations and amendments introduced by the Delegates and to prepare an acceptable document. As a result of its work, the Group submitted to the Sixth Committee a new draft entitle American Declaration of the Fundamental

Rights and Duties of Man, article I of which reads: "Every human being has the right to life, liberty, security and integrity of this person."

d) This completely new article I and some substantial changes introduced by the Working Group in other articles has been explained, 0in its Report of the Working Group to the Committee, as a compromise to resolve the problems raised by the Delegations of Argentina,

Brazil, Cuba, United States of America, Mexico, Peru, Uruguay and Venezuela, mainly as consequence of the conflict existing between the laws of those States and the draft of the Juridical Committee. (Actas y Documentos Vol. 5 pages 474-484, 495-504, 513-51S.

e) In connection with the right to life, the definition given in the Juridical Committee'a draft was incompatible with the laws governing the death penalty and abortion in the majority of the American States. In effect, the acceptance of this absolute concepto--the right to life from the moment of conception--would imply the obligation to derogate the articles of the Penal Codes in force in 1948 in many countries because such articles excluded the penal sanction for the crime of abortion if performed in one or more of the following cases: A-when necessary to save the life of the modern; B-to interrupt the pregnancy of the victim of a rape; C-to protect the honor of an honest woman; D-to prevent the transmission to the fetus of a hereditary on contagious disease; E-for economic reasons (angustia económica).

f) In 1948, the American States that permitted abortion in one of such cases and, consequently, would be affected by the adoption of article I of the Juridical Committee, were; Argentina - article 86 n.1 , 2 (cases A and B); Brasil - article n.I, II (A and B); Costa Rica - article 199 (A); Cuba - article 443 (A, B and D); Ecuador -article 423 n.l, 2 (A and B); Mexico (Distrito y Territorios Federales) - articles 333e 334 (A and B); Nicaragua - article 399 (frustrated attempt) (C); Paraguay - article 352 (A); Peru - article 163 (A-to save the life or health of the mother); Uruguay - article 328 n. 1-5 (A, B, C. and F - the abortion must be performed in the three first months from conception); Venezuela - article 435 (A); United States of America - see the State laws and precedents [4]; Puerto Rico S S 266, 267 (A) (Códigos Penales Iberoamericanos - Luis Jiménez de Asua - Editorial Andrés Bello - Caracas, 1946 - volúmenes I y II).

g) On April 22, 1948, the new article I of the Declaration prepared by the Working Group was approve by the Sixth Committee with a slight change in the wording of the Spanish text (there was no official English text at that stage) (Actas y Documentos) vol.V pages 510-516 and 578). Finally, the definitive text of the Declaration in Spanish, English, Portuguese and French

was approved by the 7th plenary Session of the Conference on April 30, 1948, and the Final Act was signed May 2nd. The only difference in the final text is the elimination of the word "integrity" (Actas y Documentos vol. VI pages 297-298; vol.I pages 231, 234, 236, 260, 261).

h) Consequently, the defendant is correct in challenging the petitionners' assumption that article 1 of the Declaration has incorporated the notion that the right of life exists from the moment of conception. Indeed, the conference faced this question but chose not to adopt language which would clearly have stated that principle.

20. The second argument of the petitioners, related to the possible use of the Convention as an element for the interpretation of the Declaration requires also a study of the motives that prevailed at the San José Diplomatic Conference with the adoption ot the definition of the right to life.

21. The Fifth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, held at Santiago, Chile in 1959, entrusted the Inter-American Council of Jurists with the preparation of a draft of the Convention on Human Rights contemplated by the American States since the Mexico Conference in 1945.

22. The draft, concluded by the Commission in about two weeks, developed the American Declaration of Bogotá, but has been influenced also by other sources, including the work in course at the United Nations. It consists of 88 articles, begin with a definition of the right to life (article 2), which reintroduced the concept that "This right shall be protected by law from the moment of conception." (Inter-American Year-book, 1968 - Organization of American States, Washington, 1973 - pages 67, 237.)

23. The Second Special Conference of nter-American States (Rio de Janeiro, 1965) considered the draft of the Council with two other drafts presented by the Governments of Chile and Uruguay, respectively, and asked the Council of the OAS, in cooperation with the IACHR, to prepare the draft of the Convention to be submitted to the diplomatic conference to be called for this purpose.

24. The Council of the OAS, considering the Opinion enacted by the IACHR on the draft convention prepared by the Council of Jurists, give a mandate to Convention to be submitted as working document to the San José conference (Yearbook, 1968, pages 73-93.)

25. To accommodate the views that insisted on the concept "from the moment of conception," with the objection raised, since the Bogota Conference, based on the legislation of American States that permitted

abortion, inter alia, to save the mother's life, and in case of rape, the IACHR, redrafting article 2 (Right to life), decided, by majority vote, to introduce the words "in general." This compromise was the origin of the new text of article 2 "1. Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception." (Yearbook, 1968, page 321.)

26. The rapporteur of the Opinion proposed, at this second opportunity for discussion of the definition of the right of life, to delete the entire final phrase "...in general, from the moment of conception." He repeated the reasoning of his dissenting opinion in the Commission; based on the abortion laws in force in the majority of the American States, with an addition: "to avoid any possibility of conflict with article 6, paragraph 1, of the United Nations Covenant on Civil and Political Rights, which states this right in a general way only." (Yearbook, 1968 - page 97).

27. However, the majority of the Commission believed that, for reasons of principle, it was fundamental to state the provision on the protection of the right to life in the form recommended to the Council of the OAS in its Opinion (Part One). It was accordingly decided to keep the text of paragraph 1 without change. (Yearbook, 1968, page 97).

28. In the Diplomatic Conference that approved the American Convention, the Delegations of Brazil and the Dominican Republic introduced separate amendments to delete the final phrase of paragraph 1 of article 3 (Right to life) "in general, from the moment of conception". The United States delegation supported the Brazilian position. (Conferencia Especializada Interamericana sobre Derechos Humanos - ACTAS Y DOCUMENTOS - Washington 1978 (reprinted) - pages 57, 121 y 160.)

29. Conversely, the Delegation of Ecuador supported the deletion of the words "and in general". Finally, by majority vote, the Conference adopted the text of the draft submitted by the IACHR and approved by the Council of the OAS, which became the present text of article 4, paragraph 1, of the American Convention (ACTAS Y DOCUMENTOS - pages 160 and 481.)

30. In the light of this history, it is clear that the petitioners' interpretation of the definition given by the American Convention on the right of life is incorrect. The addition of the phrase "in general, from the moment of conception" does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogota, when they approved the American Declaration. The legal implications of the clause "in general, from the moment of conception" are substantially different from the

shorter clause "from the moment of conception" as appears repeatedly in the petitioners' briefs.

31. However, accepting gratia argumentandi, that the American Convention had established the absolute concept of the right to life from the moment of conception - it would be impossible to impose upon the United States Government or that of any other State Member of the OAS, by means of "interpretation," an international obligation based upon a treaty that such State has not duly accepted or ratified.

32. The question of what reservation to article I of the Convention should be admissible, as suggested by President Jimmy Carter in his Letter of Transmittal to the Senate on February 23, 1978, has no direct link with the objective of the petition. This is not the appropriate place or opportunity for the consideration of this matter.

33. The other rights which the petitioners contend were violated --Articles II, VII and XI of the American Declaration--have no direct relation to the facts set forth in the petition, including the decision of the U.S. Supreme Court and the Supreme Judicial Court of Massachusetts which were challenged in this case.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLVES:

1. The decision of the U.S. Supreme Court and the Supreme Judicial Court of Massachusetts and other facts stated in the petition do not constitute a violation of articles I, II, VII and XI of the American Declaration of Rights and Duties of Man.

2. This decision must be transmitted to the petitioners and the U.S. Government.

3. To include this resolution in the Commission's Annual Report.

Chairman Tom J. Farer, Second Vice Chairman Francisco Bertrand Galindo, and Doctors Carlos A. Dunshee de Abranches, Andrés Aguilar, and César Sepúlveda concurred in approving this resolution. Dr. Aguilar presented a concurring explanation of his vote. Doctors Marco Gerard Monroy Cabra and Luis Demetrio Tinoco Castro presented separate, dissenting, explanation of their votes. Those explanations of votes are included as appendices to this resolution.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLUTION N 23/81

CASE 2141 (UNITED STATES)

CONCURRING DECISION OF DR. ANDRES AGUILAR M.

1. I concur with the decision of the majority of the members of the Inter-American Commission on Human Rights in this case, because, from a legal point of view I find no reasons which would allow the Commission to hold that the facts alleged by the petitioners constitute a violation, by the United States of America, of the rights set forth in Article I, II, VI and XI of the American Declaration on the Rights and Duties of Man.

2. The Inter-American Commission on Human Rights, irrespective of the individual or collective opinions of its members on specific questions, must determine, in each case, whether or not acts, imputed to the Member States of the Organization of American States, constitute a violation of one or more of the rights set forth in the American Convention on Human Rights, if a State Party to this international instrument is involved, or if the case concerns a State which is not a party to said Convention, of the rights set forth in the American Declaration of the Rights and Duties of Man. What must be determined in the one case, as in the other, is whether the charges presented against a Member State of the Organization constitute a violation of the international obligations which that State has contracted in the field of human rights and in the region.

3. Consequently, the Commission must examine with the greatest care the meaning and the scope of the norms aplicable to each case, bearing in mind among other things the travaux preparatoires of the pertinent international documents to assure a correct interpretation.

4. The United States of America is not a party to the American Convention on Human Rights, the Pact of San José, so that the primary task of the Commission is to determine whether or not in this case any of the rights set forth in the American Declaration of the Rights and Duties of

Man had been violated.

5. In my view, the opinion of the majority, comes to the correct conclusion, that none of the rights set forth in said Declaration had been violated. In effect, it is clear from the travaux preparatoires that Article I of the Declaration, which is the fundamental legal provision in this case, sidesteps

the very controversial question of determining at what moment human life begins.

The legislative history of this article permits one to conclude that the draft which was finally approved is a compromise formula, which even if it obviously protects life from the moment of birth, leaves to each State the power to determine, in its domestic law, whether life begins and warrants protection from the moment of conception or at any other point in time prior to birth.

6. This being the case, the Inter-American Commission on Human Rights, which is an international regional body for the promotion and protection of human rights, with a precise legal mandate--could not,--without transgressing the limits of that mandate, issue a value judgment on the domestic law of the United States of America or of any other State in this matter.

7. The decision of the majority does not begin, ant could not begin, to judge whether abortion is reprehensible from a religious, ethical or scientific point of view, and it correctly limits itself to deciding that the United States of America has not assumed the international obligation to protect the right to life from conception or from some other moment prior to birth and that, consequently, it could not be correctly affirmed that it had violated the right to life set forth in Article I of the American Declaration of the Rights and Duties of Man.

8. For the reasons expressed, I dissent on this point, from the opinion of my distinguished colleagues Dr. Luis Demetrio Tinoco and Dr. Marco Gerardo Monroy Cabra. On the other hand, I completely share their judgment, based in the opinions of well-known men of science, that human life begins at the very moment of conception and ought to warrant complete protection from that moment, both in domestic law as well as international law.

INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

RESOLUTION N 23/81

CASE 2141 (UNITED STATES)

DISSENT OF DR. MARCO GERARDO MONROY CABRA

I dissent from the majority opinion of the Inter-American Commission on Human Rights in Case 2141 for the following reasons:

1. Article I of the American Declaration of the Rights ant Duties of Man reads: "Every human being has the right to life, liberty, and the security of his person." Since the text is not explicit, I think that the interpretation most in accord with the genuine protection of the right to life is that this protection begins at conception rather than at birth.

2. The historical argument, upon which the majority opinion of the Commission is based, is unclear. Indeed, a review of the report and the minutes of the Working Group of the Sixth Committee shows that no conclusion was reached to permit the unequivocal inference that the intention of the drafters of the Declaration was to protect the right to life from the time of birth--much less to allow abortion, since this topic was not approached.

3. In its resolution, the Commission states that Article 1 of the Inter-American Juridical Committee traft was incompatible with the laws of some of the American States, which in certain cases permitted abortion, and this is true. This incompatibility, however, does not feat to the conclusion that the IX International Conference of American States in Bogotá intended to take the position that life shoult be protectet only from birth and not from conception, since this conclusion is not evident from the Minutes of the Sixth Committee. The Commission's position implies that a conflict between domestic ant international law is possible, which in each case woult be resolved according to the principles of international doctrine, international jurisprudence, and the constitutional laws of each State. Needless to say, the now-prevalent concept is the monist position held by Kelsen, that in case of conflict international law takes procedence over domestic law, a principle adopted as a general rule in Articles 27 and 46 of the Vienna Convention on the Law of Treaties. This would imply that if the Declaration ran counter to the laws of some American States, international law would prevail.

4. In its opinion, tne Commission argues that the sentence "This right extends to the right to life from the moment of conception" was eliminated from the Inter-American Juridical Committee draft and such is the case. However, one cannot thereby conclude that life should not be protected from conception, inasmuch as the statement "to the right to life of incurables, imbeciles, and the insane" was also eliminated, and no one could reasonably say that the life of incurables, imbeciles, or the insane should not be protected.

5. Since Article 1 does not define when life begins, one can resort to medical science which has concluded that life has its beginning in the union of two series of chromosomes. Most scientists agree that the fetus is a human being and is genetically complete.

6. If international agreements are to be faithfully and literally interpreted, in keeping with the meaning that should be attributed to the terms of a treaty and read in-context, taking into account the objective and purpose of that treaty, there is no doubt that the protection of the right to life should begin at the moment of conception. Since Article 1is general, the protection should begin when life begins, and we have already seen that life begins at the time fertilization is completed in the union of two series of chromosomes.

7. Even Roman law recognized that rights could be granted to an infant who had been conceived although was not yet born, provided that enjoyment of these rights be subject to the actual fact of birth which constituted the beginning of the existence of the person (infans conceptus pro nato habetur, quoties de commodis eyus agitur). This principle, which protects the life of the unborn, is set forth in many civil codes (e.g. Articles 91 ant 93 of the Colombian Civil Code.)

8. The intentional and illegal interruption of the physiological process of pregnancy, resulting in the destruction of the embroy or death of the fetus, is unquestionably an offense against life and, consequently, a violation of Article 1 of the American Declaration of the Rights and Duties of Man. The maternal womb in which the flame of life is lighted is sacred and may not be profane to extinguish what God has created in his image and in his likeness. It has been said repeatedly, that, from the biological standpoint, human life exists from the moment that the ovum is fertilized by the sperm and, more specifically, from the time the egg travels to the uterus. The scientific process is the following: when in a fertile state, the sex cells (ova and spermatozoids) undergo a special process of chromosome division called myosis, in which the 46 chromosomes of each cell are reduced to 23, in such a way as to distinguish the sperm and the ovum, with each containing only one half the number of chromosomes present in the nucleus of the majority of human cells. After a process of search and rejection on the part of these fertile cells, comes what is known as activation, which occurs when a sperm cell succeeds in penetrating the interior of the ovum. This produces fertilization, the process whereby two sex cells (ovum and sperm) unite to form the first cell of an individual. This first stage, called activation, is followed by another, when the genetic messages carried by the sperm and those already possessed by the egg are attracted to each other and unite. Added together, the 23 chromosomes of the mother and the 23 of the father total the 46 chromosomes of the sister cell.

This union of male and female elements produces the zygote, which is simply the fertilized egg. We now have fertilization in the true sense of the word. It can then be said that conception has taken place and that a human being exists, since through the union that has occurred, we have a human

cell containing its intrinsic 46 chromosomes. This new being, which scientists call a zygote, differs from the father and the mother, in that it has only one half of him and one half of her. What we have is a fertilized egg, representing a life--a life that contains the genes to make way for the appearance of new cells that will form the different parts of the human body. Thus fertilized, the egg begins its journey toward the uterus, which it will reach in a few days, and the embryo will then continue developing in stages. These stages have now been distinguished from each other by scientists, who are able to tell us the precise age of any of them.

Jerome Lejeune, professor of fundamental genetics of the University of Paris, member of the Academy of Sciences of that city and of the Royal Society of Medicine of London, was asked whether the first cell, from the moment of conception, might be considered already a human being with its own personality, independent of the mother. His reply was "Of course. It has been demonstrated that all the genetic features of the individual are found in that first cell, which will develop progressively, and if all these features were not there at the outset, the individual would never develop."

9. Life is the primary right of every individual. It is the fundamental right and the condition for the existence of all other rights. If human existence is not recognized, there is no subject upon which to predicate the ocher rights. It is a right that antecedes other rights and exists by the mere fact of being, with no need for the state to recognize it as such. It is not up to the state to decide whether that right shall be recognized in one case and not in another, since that would mean discrimination. The life of the unborn child, the infant, the young, the old, the mentally ill, the handicapped, and that of all human beings in general, must be recognized.

The foregoing means that if conception produces a human life, and this right is the primary and fundamental one, abortion is an attack on the right to life and, therefore, runs counter to Article 1 of the American Declaration of the Rights and Duties of Man.

CONCLUSIONS:

1. Article 1 of the American Declaration of the Rights and Duties of Man protects human life from conception.

2. The travaux preparatoires of the Declaration and the discussion of Article 1 in the Sixth Committee and in the Working Group do not lead to the conclusion that the drafters of the Declaration intended to restrict the protection of the right to life to the period following birth.

3. Abortion laws violate Article 1 of the aforemention Declaration.

4. In terminating legal protection unborn children, the judicial decision of the United States constitutes a violation of Article 1 of the American Declaration of the Rights and Duties of Man.

5. It is not appropriate here to analyze Article 4 of the American Convention on Human Rights, since the United States has not ratified this treaty. The foregoing explains my reasons for dissenting from the majority opinion of the Commission.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLUTION N 23/81

CASE 2141 (UNITED STATES)

DISSENT OF DR. LUIS DEMETRIO TINOCO CASTRO

I dissent from the majority opinion and from the Resolution adopted in Case 2141, in its Operative Part and in paragraphs 19, 30, and 31 of the Preamble, for the reasons I shall go on to state, but not without first congratulating the Rapporteur for his praiseworthy effort of summarizing in the form in which they appear in the other paragraphs, the facts and the auguments of the Parties, and the background material, both from the American Declaration of the Rights and Duties of Man and from the American Convention on Human Rights or Pact of San José, Costa Rica, which allows me in this dissenting vote to omit the restrictive listing of the facts and of the arguments presented by the parties.

I depart from the opinion of the majority when it affirms, in paragraph 19 of the Preamble of the Resolution, that "a brief legislative history of the Declaration does not support the petitioners' argument" and that may be concluded from the report presented by the Working Group that studied the draft wording of Article I of the Declaration, as well as from the fact that in that Group the concept contained in the draft of the Inter-American Juridical Committee had been eliminated, where it said, after stating every person has the right to life, "This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles, and the insane." (Verbatim report of the Rapporteur, paragraph l9.b.)

Study of the Minutes and Documents of the Working Group concerned, and of the Sixth Committee, which was responsible for consideration of these articles of the Draft Declaration, leads me to conclusions contrary to those established in the vote of the majority. In fact, I do not find, either in the Report of the Working Group (Document CB-310/CIN-31), signed by its Rapporteur Dr. Guy Pérez Cisneros, or in the Report of the Sixth Committee (Document CB-445/C.VI-36), presented by its Rapporteur Luis Lopez de Mesa, as they appear on pages 472 to 478 and 510 to 516 of Volume V of Actas y Documentos of the Ninth International Conference of American States, published by the Ministry of Foreign Affairs of Colombia, any specific explanation of the reasons that motivated the elimination of tne supplementary phrase contained in the Draft Declaration of the International Rights and Duties of Man presented by the Inter-American Juridical Committee (Document CB-7), which recognized "the right to life for all persons, including (a) the unborn, as well as (a) "incurables, imbeciles, and the insane." For which reason I must deduce that the reason for that elimination was none other than that expressed by the Rapporteur, Mr. Lopez de Mesa, in these terms: "likewise, it was decided to draft them (the rights and duties) in their mere essence, without exemplary or restrictive listings, which carry with them the risk of useless diffusion and of the dangerous confusion of their limits." And the reason cannot be other, because there would not be another for explaining the elimination of the phrase that recognizes the right to life for "incurables, imbeciles, and the insane." Now: if the elimination of the phrase that concerns those persons has no other moral, logical, and legal justification than the purpose of the Sixth Committee--and later of the plenary session of the Conference--to avoid "exemplary or restrictive listings," for the same reason it is necessary to admit that it was the purpose of avoiding its "listing"--and no other--that led the Committee and the Conference also to eliminate the unnecessarily explanatory expression "the right to life from the moment of conception."

I cannot, therefore, share the view that the elimination of the concept that explicitly recognizes the right to life of unborn human beings, in accordance with the draft prepared by the Inter-American Juridical Committee, resulted from "a compromise to resolve the problems raised by the Delegations of Argentina, Brazil, Cuba, the United States of America, Mexico, Peru, Uruguay, and Venezuela, mainly as a consequence of the conflict existing between the laws of those states and the draft of the Juridical Committee," of which compromise or of which problems or objections I find no mention whatever in the minutes of the Working Group, of the Sixth Committee, or of the plenary session of the Conference that met in Bogotá. On the contrary, the fact that there does not appear in the volumes of Actas y Documentos any specific motion of a written draft by any delegation that expressly requests the elimination of the phrase of the Juridical Committee's draft that

was prepared by the eminent jurists Dr. Francisco Campos, Dr. José Joaquin Caicedo Castilla, Dr. E. Arroyo Lameda, and Dr. Charles G. Fenwick, in my opinion indicates that the supplementary phrase was eliminated because it was considered unnecessary, and that the concept--not discussed or put in doubt by anyone--that every person has the right to life, including those yet unborn, as well as incurables, imbeciles, and the insane, was implicitly maintained. -

That principle, recognized by the Inter-American Juridical Committee and not discussed at the Bogotá Conference, moreover, was not one exclusively of the internationalists of the Inter-American world, but the predominant one on the matter in the broader circles of the United Nations, as is shown by considerandum III of the Declaration of the Rights of the Child proclaimed on November 20, 1959, by the XIV Session of the General Assembly of that Organization as Resolution 1386 (XIV), which says, in pertinent part; "Whereas: 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."

The draft prepared by the Inter-American Juridical Committee, as well as the United Nations Declaration of the Rights of the Child (Resolution 1386/XIV), as we have seen, expressly recognized that the human being exists, and has rights, and needs protection, including legal protection, in the period preceding his birth.

The American Declaration of the Rights and Duties of Man, for its part, plainly and clearly states: "Every human being has the right to life."

Leaving aside the legal background that led to this simple wording of Article I of the Declaration, to decide this Case it is necessary first to answer the transcendental question of the nature of the unborn, the topic of most significant legal and moral consequences of stipulating whether what has been formed in the womb of a woman and is still therein is a "human being" with the right to life. Or whether it should be understood that the "right to life" that every human being has in accordance with the already living their own lives, outside the womb. In other words: at what moment in his long process of formation, development, decadence, and death is it considered that there exists a "human being" with the "right to life" and to the protection given him by the basic legal instruments of the new discipline of Human Rights? More specifically, as it affects the problem raised by Case 2141, to which I refer: when the woman's ovum is fertilized by action of the man, has a human being been constituted and does it have the right to life?

The question was put barely three years ago to the eminent Dean of the Teaching and Research Unit of the University of Paris, holder of the Chair of Fundamental Genetics, there, Professor Jerome Lejeune, a distinguished member of the Academy of Moral and Political Sciences of Paris, of the Royal Society of Medicine of London, and of the American Academy of Arts and Sciences of Boston, awarded the Gold medal for Scientific Research and the Jean Toy and Kennedy Prizes, and the Science Prize of the City of Paris. "Professor," he was asked, "may the first cell formed at the moment of conception be considered already to be a human being, with his own personality, independent of that of his mother?" "Of course," he replied, adding, "It has been shown that all the genetic qualities of the individual are already present in that first cell, that the embryo, seven days after fertilization... emits a chemical message that stops the menstruation of his mother... that at twenty days after fertilization...his heart (as large as a grain of wheat) begins to beat...at two months...he already has human form completely; he has a head, he has arms, he has his fingers and toes...and even the lines on his hands drawn...and between the second and third months...the finger-prints are already indicated...and will not change to the end of his life...at three months he is already able to close his eyes, to clench his fists, and if at that moment his upper lip were caressed with a thread, he would made a face... A human being exists...there is no doubt about that." And the same Professor, in a magazine article, stated: "The fetus is a human being. Genetically he is complete. This is not an appearance; it is a fact."

The opinion of the vast majority of scientists, not to say all of them, is the same as that of Professor Lejeune. "The unborn child is a person whom no one knows. He is living being from the moment of conception," say Dr. Ingelman-Sundberg and Dr. Cears Wirsen in their work "The Drama of Life before Birth," published in 1965. Dr. Bart Hefferman, in a book entitled "The Early Biography of Every Man," published in 1972, said that from the time of conception the child is a complex, dynamic individual, who grows rapidly, and that at the moment of fertilization a new and unique individual is created, who, although he receives half his chromosomes from each parent, is really distinct from each of them. Moreover, the scientists Treslar, Behu, and Cowan, in analyzing what they called the "gestational interval," in a work they published in 1967, stated in terms that leave no room for doubt that the beginning of a new life occurs at the moment in which the fertilization is completed by the fusion of two series of chromosomes. Taking up that criterion, the International Code of Medical Morality declared that the doctor should always bear in mind the importance of preserving human life from the time of conception; and the so-called Declaration of Geneva mades the physician promise to maintain the greatest respect for human life from the time of conception.

Those scientific principles and principles of professional ethics have also found implicit welcome, as was to be expected, in the legislation of the immense majority of the countries of the western world, in which, almost without exception, the rule is in force that a woman sentenced to death may not be executed if she is pregnant, a benefit that is not limited to women who have reached the state of "advanced pregnancy" but extends also to those at any other stage of the process of gestation of the child. Now such an exceptional provision, which is also found in the International Covenant on Civil and Political Rights approved by Resolution 2200 A (Article 6.5) of the United Nations General Assembly, can only be explained if one starts from the legal assumption that a human being is living in the womb of the woman who would have to be executed, and since this small and unseen human being had not been covered by the sentence, neither morally nor legally could it be made to suffer the death penalty that would fatally be derived from the execution of the mother. This is an evident recognition by the United Nations and by the law in force in many countries that a human being has existence, life, during the entire period of pregnancy of the women.

The reasons stated leave no doubt in my mind that the American Declaration of the Rights and Duties of Man refers to the complete period of human life--from conception to death--when it states that "every human being has the right to life"; that, for that valuable instrument of international law, life does not begin at birth--the final phase of the process of gestation--but at the moment of conception, which is the moment at which a new human being, distinct from the father and from the mother, is formed; and that, in recognizing the right of the unborn to life, the Declaration rejects the legitimacy of any act that authorizes or considers acceptable acts or practices that will lead to its death.

A new problem, of an International legal order, arises. Up to what point are the declarations, made by consensus or by majority vote, by the international organizations or their competent organs, binding on the states? I am not going to enter into the speculative terrain in which the debates revolve about the legal value of the Universal Declaration of Human Rights--a general expression of the thinking of mankind represented by the United Nations, according to some; and a simple expression of ideals without force of jus cogens according to others. I shall restrict myself to pointing out the singularity achieved in this respect by the American Declaration of the Rights and Duties of Man, when the Council of the Organization of American States approved, without a dissenting vote, at its meetings on May 25 and June 8, 1960, Article 2 of the Statute of the Inter-American Commission on Human Rights, which stated: "For the purpose of the present Statute, human rights are understood to be the rights set forth in the American Declaration of the

Rights and Duties of Man." This singularity of the Declaration--implicitly endowed ever since then with the force of the instruments that are jus cogens among the states--has been strengthened with the approval that the General Assembly of the OAS has given during the last twenty years to the

Commission's Annual Reports and reports on certain states, all of which concern the observance or nonobservance by the member states of the OAS of the rights set forth in the Declaration of Bogotá. Therecan be no doubt, in my opinion, that for those states the Declaration is much more than a simple expression of ideals for realization in a distant future; it is a code of conduct, agreed on by all, so that in the Americas the basic principle of the dignity of the human being and due respect for those rights that are essential to man and the attributes of the human individual may maintain full value and effectiveness. A code of conduct that is both "the principal guide of an evolving American Law" and the "initial system of protection considered by the American States and being suited to the present social and juridical conditions," to quote from the preamble to that same Declaration.

From the foregoing it is logical that it not be a valid reason, for me, that the existence, in the legislation of many American countries--in 1948--of legal standards that recognized the legality, in certain conditions, of induced abortion, should constitute an insurmountable obstacle for recognition to be given, in the Declaration, to the right of the human being to existence, to life, in the prenatal period. I consider at the international community, or the American community, may, and on certain occasions should, revise the rules of international law in force at the moment, including the recent ones for the international protection of human rights, for the purpose of establishing new precepts that will correspond to the advances of science, to the teaching of experience, to the changing realities of social and international life, to the needs determined by the inevitable changes that the new epochs create in the course of the years, and the aspirations that arise as generation follows generation. The international community, the American community, court not refuse to accept innovations that have a logical and just basis, because doing so would imply stopping the progress of the law and repudiating the principle contained in the Declaration that the system of protection of the rights of man should be strengthened more and more in the international field as social and legal circumstances become more propitious.

On the basis of all that has been said, and analyzing the facts that serve as a basis of the complaint that originated this Case 2141, as explained in the Report of the Rapporteur, and the arguments presented by the complainants and the representatives of the Government of the United States, it is my opinion that in the case Commonwealth v. Dr. Kenneth Edelin (Case of Baby Boy) the Supreme Judicial Court of Massachusetts, in reversing the verdict of

the jury that convicted the defendant and absolving him of all penalty because it considered that sufficient evidence had not been presented in the trial to show that he had acted "recklessly" or to demonstrate the possibility of life outside the womb of the unborn child identified only as Baby Boy, disregarded, disrespected, and violated Article I of the American Declaration of the Rights and Duties of Man, which recognized that "every human being has the right to life."

Therefore, I vote against the draft resolution that declares that the aforementioned decision of the Supreme Judicial Court of Massachusetts does not constitute a violation of that article; and I state for the record that I am not considering the complaint made against the United States

Supreme Court in relation to its decisions in the cases Roe v. Wade (410 U.S. 113) and Doe v. Bolton (410 U.S. 179), because the passage of time since 1973 when those decisions were handed down prevents the Inter-American Commission on Human Rights from taking cognizance of them, despite the relationship or influence they may have had in the case Baby Boy (Commonwealth v. Dr. Kenneth Edelin).

I request that this dissenting explanation of vote be placed as indicated in Article 18 of the Regulations of the Commission, and that it be given any other usual processing.

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[1] 410 U.S. 113" means United States Reports, vol. 410, p.ll3. This explanation is offered for the benefit of persons unfamiliar with United States systems of legal reporting and case citation.

[2] The object of scrutiny in Doe v. Bolton was a more sophisticated modern statute regulating the performance of abortions. The opinion applies the principles developed in Wade and thus does not warrant further discussion here.

[3] It should be noted that the right to privacy is an extension of the right to personal liberty guaranteed by the Fourteenth Amendment to the U.S. Constitution. Article I of the American Declaration on the Rights and Duties of Man joins the rights of life and liberty as basic rights.

[4] Daniel Callahan - Abortion: Law, Choice and Morality. William A.Nolen - The Baby in the Bottle - Cowarn, McCann & Geoghengan, Inc. -New York, 1978; 410 U.S. 113 provites a list of the articles of State's Penal Codes and

similar statutes on abortion in existence in a majority of states in 1973 (pages 118-119).