INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF ARTAVIA MURILLO *ET AL.* ("*IN VITRO FERTILIZATION*") *v.* COSTA RICA

JUDGMENT OF NOVEMBER 28, 2012
(Preliminary objections, merits, reparations and costs)

In the case of *Artavia Murillo et al. ("In vitro fertilization")*,

the Inter-American Court of Human Rights (hereinafter the "Inter-American Court" or the "Court") composed of the following judges:[1]

Diego García-Sayán, President
Leonardo A. Franco, Judge
Margarette May Macaulay, Judge
Rhadys Abreu Blondet, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Vio Grossi, Judge;

also present:

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention") and Articles 31, 32, 42, 65 and 67 of the Court's Rules of Procedure[2] (hereinafter, the "Rules of Procedure") delivers this Judgment, which is structured in the following manner:

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[1] The Vice President of the Court, Judge Manuel E. Ventura Robles, a Costa Rican national, did not participate in the processing of this case or in the deliberation and signing of this Judgment, pursuant to Article 19(1) of the Court's Rules of Procedure, applicable to this case (*infra* note 3) which states that "[i]n the cases referred to in Article 44 of the Convention, a Judge who is a national of the respondent State shall not be able to participate in the hearing and deliberation of the case."

[2] The Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009 which, pursuant to Article 78, entered into force on January 1, 2010.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On July 29, 2011, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission" or "the Commission") submitted a brief to the jurisdiction of the Inter-American Court (hereinafter "brief submitting the case"), under the provisions of Articles 51 and 61 of the Convention, against the State of Costa Rica (hereinafter "the State" or "Costa Rica") in relation to case 12,361. The initial petition was submitted to the Commission on January 19, 2001, by Gerardo Trejos Salas. On March 11, 2004 the Inter-American Commission approved Admissibility Report No 25/04.[3] On July 14, 2010, the Commission approved Report on Merits No. 85/10,[4] under the terms of Article 50 of the American Convention (hereinafter also "the Merits Report" or "Report No. 85/10"), in which it made a number of recommendations to the State. Having granted the State three extensions to allow it to comply with the said recommendations, the Commission decided to submit the case to the Court. The Commission designated Rodrigo Escobar Gil, Commissioner, and Santiago A. Canton, then Executive Secretary, as delegates and appointed Elizabeth Abi-Mershed, Deputy Executive Secretary, and the lawyers Silvia Serrano Guzmán, Isabel Madariaga, Fiorella Melzi and Rosa Velorio as legal advisers.

2. The Commission indicated that this case concerned alleged human rights violations resulting from the presumed general prohibition of the practice of *in vitro* fertilization (hereinafter "IVF"), which had been in effect in Costa Rica since 2000, following a ruling of the Constitutional Chamber of the Costa Rican Supreme Court of Justice (hereinafter "Constitutional Chamber"). Among other aspects, the Commission alleged that this absolute prohibition constituted arbitrary interference in the right to private life and the right to found a family. It further alleged that the prohibition violated the right to equality of the victims, inasmuch as the State had denied them access to a treatment that would have enabled them to overcome their disadvantage with regard to the possibility of having biological children. It also argued that this ban had a disproportionate impact on women.

3. The Commission asked the Court to declare the international responsibility of the Costa Rican State for the violation of Articles 11(2), 17(2) and 24 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Gretel Artavia Murillo, Miguel Mejías Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchoz Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, Maria del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

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[3] In this Report the Inter-American Commission declared admissible the petition regarding the alleged violation of Articles 11, 17 and 24 of the American Convention, in relation to Articles 1(1) and 2 thereof. *Cf.* Admissibility Report No. 25/04, Case 12,361, Ana Victoria Sánchez Villalobos *et al.,* Costa Rica, March 11, 2004 (file of attachments to the pleadings and motions brief of the representative Gerardo Trejos, tome I, annex 2, folios 3900 to 3914). In this report, the Commission declared that the "complaint was inadmissible with regard to the firms "*Costa Rica Ultrasonografía S.A*. and the *Instituto Costarricense de Fertilidad.*"

[4] Merits Report No. 85/10, Case No. 12,361, Gretel Artavia Murillo *et al. v.* Costa Rica, July 14, 2010 (merits file, folios 7 to 37).

II
PROCEEDINGS BEFORE THE COURT

4. On August 29 and September 14, 2011, Boris Molina Acevedo forwarded to the Court the powers of attorney to represent 12 of the presumed victims.[5]

5. On August 31, 2011, Gerardo Trejos Salas forwarded to the Court the powers of attorney to represent 6 of the presumed victims.[6]

6. The submission of the case was notified to the State and to the representatives on October 18, 2011. In view of the fact that the representatives of the presumed victims did not reach agreement on the appointment of a common intervener, the President of the Court, in application of Article 25(2) of the Court's Rules of Procedure, ordered the appointment of Mr. Molina Acevedo and Mr. Trejos Salas as common interveners with autonomous participation.

7. On December 19, 2011, the common interveners submitted to the Court their respective briefs with pleadings, motions and evidence (hereinafter "pleadings and motions brief"), under Article 40 of the Court's Rules of Procedure. The common interveners agreed, in general terms, with the arguments of the Commission. Representative Molina alleged the violation of Articles 17(2), 11(2) and 24 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the presumed victims that he represents. Representative Trejos Salas alleged the violation of Articles 4(1), 5(1), 7, 11(2), 17(2) and 24 of the Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the presumed victims he represents.

8. On April 30, 2012, Costa Rica submitted to the Court its brief with preliminary objections, in answer to the brief submitting the case, and with observations on the pleadings and motions brief (hereinafter "answering brief"). In this brief, the State filed two preliminary objections and denied that any human rights had been violated in the instant case. The State appointed Ana Lorena Brenes Esquivel, Attorney General, as its Agent and Magda Inés Rojas Chaves, Deputy Attorney General, as co-agent.

9. On May 8, 2012, Huberth May Cantillano advised that the presumed victims represented by Gerardo Trejos had appointed him as their new representative owing to the death of Mr. Trejos. He presented the respective powers of attorney.

10. On June 21 and 22, 2012, respectively, the Inter-American Commission and the common interveners submitted their observations on the preliminary objections filed by the State (*supra* para. 8).

11. In an Order of August 6, 2012,[7] the President of the Court required that the statements of two deponents for informative purposes, four presumed victims, and seven

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[5] Presumed victims: Ileana Henchoz Bolaños, Joaquinita Arroyo Fonseca, Julieta González Ledezma, Karen Espinoza Vindas, Enrique Acuña Cartín, Carlos E. Vargas Solórzano, Miguel Antonio Yamuni Zeledón, Giovanni Antonio Vega Cordero, Oriéster Rojas Carranza, Héctor Jiménez Acuña, Victor Hugo Sanabria León and María del Socorro Calderón Porras.

[6] Presumed victims: Germán Alberto Moreno Valencia, Miguel Gerardo Mejías Carballo, Grettel Artavia Murillo, Ana Cristina Castillo León, Claudia Carro Maklouf and Andrea Bianchi Bruna.

[7] *Cf. Case of Artavia et al. (In vitro fertilization) v. Costa Rica*. Order of the President of the Inter-American Court of Human Rights of August 6, 2012. Available at: http://www.corteidh.or.cr/docs/asuntos/artavia_06_08_12.pdf

expert witnesses be received by affidavit, and these were duly presented on August 24, 2012. In the Order the President also summoned the parties to a public hearing (*infra* para. 12).

12. The public hearing took place on September 5 and 6, 2012, during the ninety-sixth regular session of the Court held at its seat.[8] During the hearing, the statements of two presumed victims and four expert witnesses were received, together with the final oral observations and arguments of the Inter-American Commission, the representatives and the State, respectively. During this hearing, the Court required the parties and the Commission to submit certain helpful documentation and evidence.

13. In addition, the Court received 46 *amicus curiae* briefs submitted by: (1) Mónica Arango Olaya, Regional Director for Latin America and the Caribbean of the Center for Reproductive Rights, and María Alejandra Cárdenas Cerón, the Center's Legal Adviser; (2) Marcela Leandro Ulloa of the Group in Favor of IVF; (3) Filomena Gallo, Nicolò Paoletti and Claudia Sartori, representatives of the Association "*Luca Coscioni per la libertà di ricerca scientifica y del Partito Radicale Nonviolento Transnazionale e Transpartito*"; (4) Natalia Lopez Moratalla, President of the Spanish Association of Bioethics and Medical Ethics; (5) Lilian Sepúlveda, Mónica Arango, Rebecca J. Cook and Bernard M. Dickens;[9] (6) Equal Rights Trust and the Human Rights Clinic of the University of Texas Law School;[10] (7) International Human Rights Clinic of Santa Clara University Law School;[11] (8) Viviana Bohórquez Monsalve, Beatriz Galli, Alma Beltrán y Puga, Álvaro Herrero, Gastón Chillier, Lourdes Bascary and Agustina Ramón Michel;[12] (9) Ricardo Tapia, Rodolfo Vásquez and Pedro Morales;[13] (10) Alejandro Leal Esquivel, Coordinator of the Department of Genetics and Biotechnology of the School of Biology of the *Universidad de Costa Rica*; (11) Rita Gabriela Cháves Casanova, Member of the Legislative Assembly of Costa Rica; (12) Alexandra Loría Beeche; (13) Claudio Grossman, Dean of the American University Washington College of Law, and Macarena Sáez Torres, Director of the Impact Litigation Project of the American University Washington College of Law; (14) John O'Brien, President

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[8] The following persons appeared at the hearing: (a) for the Inter-American Commission: Tracy Robinson, Commissioner, Emilio Álvarez-Icaza, Executive Secretary, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Legal Adviser; (b) for the representative Huberth May Cantillano: Huberth May Cantillano, representative of the presumed victims, and Antonio Trejos Mazariegos, lawyer; (c) for the representative Boris Molina Acevedo: Boris Molina Acevedo, representative of the presumed victims, William Vega Murillo, lawyer, Alicia Neuburger, Maria Lorna Ballestero Muñóz, Alejandro Villalobos Castro, Alejandra Cárdenas Cerón, Carlos Valerio Monge, Boris Molina Mathiew, Mauricio Hernández Pacheco and Ángela Rebeca Martínez Ortiz, and (d) for the State of Costa Rica: Ana Lorena Brenes Esquivel, Attorney General, Agent of the State of Costa Rica, Magda Inés Rojas Chaves, Agent of the State of Costa Rica, and Alonso Ernesto Moya, Silvia Patiño Cruz, Ana Gabriela Richmond Solís, Grettel Rodríguez Fernández and Jorge Oviedo Álvarez, officials of the Attorney General's Office.

[9] Lilian Sepúlveda is the Director of the Center for Reproductive Rights, Mónica Arango Olaya is the Regional Director for Latin America and the Caribbean of the Center. Rebecca J. Cook and Bernard M. Dickens are co-Directors of the International Reproductive and Sexual Health Law Programme of the Faculty of Law of the University of Toronto.

[10] The brief was signed by Ariel E. Dulitzky, Professor of the University of Texas Law School and Director of the School's Human Rights Clinic.

[11] The brief was submitted by Francisco J. Rivera Juaristi, Director and Supervising Attorney of the International Human Rights Clinic of Santa Clara University Law School; Britton Schwartz, Supervising Attorney of the Clinic and Amanda Snyder, Bernadette Valdellon and Sophia Areias, interns at said clinic.

[12] Viviana Bohórquez Monsalve, member of the *Mesa por la Vida and la Salud de las Mujeres*; Beatriz Galli, member of IPAS, Alma Beltrán and Puga, Legal Coordinator of the *Grupo de Información de Reproducción Elegida (GIRA);* Álvaro Herrero, Executive Director of the *Asociación por los Derechos Civiles*; Gastón Chillier, Executive Director of the Center for Legal and Social Studies (CELS); Lourdes Bascary, member of the Center for Legal and Social Studies, and Agustina Ramón Michel, intern attached to the Health Area of CEDES.

[13] Ricardo Tapia is the President of the *Colegio de Bioética A.C.* (Mexico). Rodolfo Vásquez is the Vice President of this group and Pedro Morales is its Executive Secretary.

of Catholics for Choice and Sara Morello, Executive Vice President of that organization; (15) Carlos Polo Samaniego, Director of the Latin American Office of the Population Research Institute; (16) Reynaldo Bustamante Alarcón, President of the *Instituto Solidaridad y Derechos Humanos*; (17) Hernán Collado Martínez; (18) Carmen Muñoz Quesada, Rita Maxera Herrera, Cristian Gómez, Seidy Salas and Ivania Solano;[14] (19) Enrique Pedro Haba, Professor at the Universidad de Costa Rica; (20) *Organización de Litigio Estratégico de Derechos Humanos (Litiga OLE)*;[15] (21) Susie Talbot, Lawyer of the Center for the Legal Protection of Human Rights (INTERIGHTS) and Helen Duffy, Head Counsel of INTERIGHTS; (22) Andrea Acosta Gamboa; (23) Andrea Parra, Natalia Acevedo Guerrero, Matías González Gil and Sebastián Rodríguez Alarcón;[16] (24) Leah Hoctor, Legal Adviser of the International Commission of Jurists; (25) Margarita Salas Guzmán, President, and Larissa Arroyo Navarrete, Lawyer, of the *Colectiva por el Derecho a Decidir*; (26) Fabio Varela, Marcelo Ernesto Ferreyra, Rosa Posa, Bruna Andrade Irineu and Mario Pecheny;[17] (27) María del Pilar Vásquez Calva, Coordinator of *Enlace Gubernamental Vida y Familia A.C.*, Mexico; (28) Latin American Network for Assisted Reproduction and Ian Cooke, Emeritus Professor of the University of Sheffield; (29) Priscilla Smith, Senior Fellow of the Program for the Study of Reproductive Justice of the Information Society Project (ISP) of the University of Yale and Genevieve E. Scott, Visiting Professor of the ISP; (30) Latin American Network for Assisted Reproduction and Santiago Munné, President of Reprogenetics; (31) *Centro de Estudios of Derecho, Justicia y Sociedad (DEJUSTICIA);*[18] (32) José Tomás Guevara Calderón; (33) Carlos Santamaría Quesada, Head of the Molecular Diagnosis Division of the Clinical Laboratory of the *Hospital Nacional de Niños*; (34) Cesare P.R. Romano, Law Professor and Joseph W. Ford Fellow at Loyola Law School, Los Angeles;[19] (35) the Ombudsman's Office;[20]

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[14] Carmen Muñoz Quesada is a Deputy of the Legislative Assembly of Costa Rica. Rita Maxera Herrera and Ivania Solano are both lawyers. Cristian Gómez is a member of the Costa Rican Demographic Association. Seidy Salas is a member of the *Colectiva por el Derecho a Decidir*.

[15] The brief was submitted by Graciela Rodríguez Manzo, Director General of *Litiga OLE;* Geraldina Gónzalez de la Vega, Collaborator of *Litiga OLE*; Adriana Muro Polo, Lawyer at Litiga OLE; Marisol Aguilar Contreras, Lawyer at Litiga OLE.

[16] Andrea Parra, Director of the Action Program for Equality and Social Inclusion (PAIIS) of the Law Faculty of the *Universidad de los Andes*, Colombia, and Natalia Acevedo Guerrero, Matías González Gil and Sebastián Rodríguez Alarcón, students attached to PAIIS.

[17] Caio Fabio Varela, Human Rights Defender, Marcelo Ernesto Ferreyra, in representation of Heartland Alliance, the *Coalização de Lésbicas, Gays, Bissexuais, Transgêneros, Transexuais, Travesti e Intersexuais (LGBTTTI) na América Latina e no Caribe* and of the *Campanha por uma Convencao Interamericana of Direitos Sexuais e Direitos Reprodutivos*, Rosa Posa, in representation of AKAHATA, Bruna Andrade Irineu and Mario Pecheny.

[18] The brief was submitted by Rodrigo Uprimny Yepes, Director of the *Centro de Estudios de Derecho, Justicia and Sociedad* (DEJUSTICIA) and Diana Esther Guzmán, Paola Molano, Annika Dalén and Paula Rangel Garzón, Researcher at DEJUSTICIA.

[19] The brief was submitted by the Clinic in collaboration with 11 human rights and international law academics and professionals who also signed the *amicus curiae*: Roger S. Clark, Law Professor, Rutgers School of Law, Camden, New Jersey; Lindsey Raub Kantawee, Associate at Clifford Chance, Law firm; Yvonne Donders, Professor of International Human Rights and Cultural Diversity and Executive Director of the Amsterdam Center for International Law of the Faculty of Law of the University of Amsterdam; Ellen Hey, Professor of International Public Law of the Faculty of Law of the Erasmus University Rotterdam; Jessica M. Almqvist, Lecturer on International Public Law of the *Universidad Autónoma de Madrid*, Faculty of Law; Freya Baetens, Assistant Professor of Public International Law of the Grotius Centre for International Legal Studies of the Faculty of Law of Leiden University; Konstantinos D. Magliveras, Associate Professor of the Department of Mediterranean Studies of the University of the Aegean, Unit of Rhodes; Belén Olmos Giupponi, Associate Professor of International Law of the *Universidad Rey Juan Carlos* of Madrid; Miguel Ángel Ramiro Avilés, Professor of Legal Philosophy of the *Universidad Carlos III* of Madrid, Director of the Master's Program in Fundamental Rights and Co-Director of the Master's Program in Human Rights and Democratization of the *Universidad Externado* of Colombia; Margherita Salvadori, Associate Professor of the Faculty of Law of the University of Turín, and Jaume Saura, Professor of International Law of the *Universidad de Barcelona* and President of the Human Rights Institute of Catalonia.

(36) Hernán Gullco and Martín Hevia, professors of the Law School of the Universidad Torcuatto Di Tella; (37) Alejandra Huerta Zepeda, professor of the Biomedical Research Institute (IIB) of the *Universidad Nacional Autónoma de México*, and José María Soberanes Diez, professor of the *Universidad Panamericana*, Mexico; (38) *Asociación de Médicos por los Derechos Humanos (AMEDEH)*;[21] (39) Latin American Federation of Obstetrics and Gynecology;[22] (40) Carlo Casini, Antonio G. Spagnolo, Marina Casini, Joseph Meaney, Nikolas T. Nikas and Rafael Santa María D'Angelo;[23] (41) Rafael Nieto Navia, Jane Adolphe, Richard Stitch and Ligia M. de Jesus;[24] (42) Hugo Martin Calienes Bedoya, Patricia Campos Olázabal, Rosa de Jesús Sánchez Barragán, Sergio Castro Guerrero and Antero Enrique Yacarini Martínez;[25] (43) Julian Domingo Zarzosa; (44) Kharla Zúñiga Vallejos of the Berit Family Institute of Lima; (45) Guadalupe Valdez Santos, President of the *Asociación Civil Promujer y Derechos Humanos*, and (46) Piero A. Tozzi, Stefano Gennarini, William L. Saunders and Álvaro Paúl.[26]

14. On September 26 and 28, 2012, Hany Fahmy, of the Human Rights Centre of the University of Peace of the United Nations, and Olga Cristina Redondo Alvarado, psychoanalyst, respectively, forwarded *amicus curiae* briefs. Given that the public hearing took place on September 5 and 6, 2012, and, consequently, the time frame for submitting *amicus curiae* briefs expired on September 21, 2012, on the instructions of the President of the Court, the foregoing were advised that said briefs could not be considered by the Court or included in the case file.

15. The Court observes that the *amicus curiae* briefs filed by Equal Rights Trust and the Human Rights Clinic of the University of Texas, INTERIGHTS, and jointly by Caio Varela, Marcelo Ferreyra, Rosa Posa, Bruna Andrade and Mario Pecheny were presented within the time frame established in Article 44 of the Rules of Procedure, but in a language that is not the official language of the instant case. Subsequently, the translations into Spanish were forwarded 5, 7 and 34 days, respectively, after the time frame had expired. Based on the provisions of Article 28(1) of its Rules of Procedure, the Court considers that, since the Spanish version of two of these *amici curiae* was presented within the 21-day period provided for to accompany the originals or all the annexes, these briefs are admissible.

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[20] The brief was submitted by the Costa Rican Ombudsman's Office. The brief was signed by Ofelia Taitelbaum Yoselewich, Ombudsman of Costa Rica.

[21] The brief was submitted by the *Asociación de Médicos por los Derechos Humanos (AMEDEH).* It was signed by Carlos María Parellada Cuadrado, President, and Juan Pablo Zaldaña Figueroa, Vice President of the association.

[22] The brief was submitted by the Latin American Federation of Obstetrics and Gynecology. The note was signed by Ivonne Díaz Yamal, Luis Távara Orozco, Executive Director, and Pio Iván Gómez Sánchez, Coordinator of the Federation's Committee on Sexual and Reproductive Rights.

[23] Carlo Casini, Magistrate, Member of the European Parliament for the Italian Pro-Life Movement and President of the Constitutional Affairs Committee of the European Parliament; Antonio G. Spagnolo, Director of the Bioethics Institute of the Sacred Heart Catholic University of Rome; Marina Casini, adjunct professor of Bioethics at the Bioethics Institute of the Sacred Heart Catholic University of Rome; Joseph Meaney, Director of the International Coordination at Human Life International; Nikolas T. Nikas, President and General Counsel of the Bioethics Defense Fund (BD), and Rafael Santa María D'Angelo, Lawyer, President of *Crece Familia* (CRECEFAM).

[24] Rafael Nieto Navia, Professor at the *Universidad Javeriana* in Bogotá; Jane Adolphe, Professor, Ave Maria School of Law; Richard Stitch, Professor, Valparaiso School of Law, and Ligia M. de Jesus, Professor, Ave Maria School of Law.

[25] Hugo Calienes Bedoya, Rector and Director of the Bioethics Institute of the *Universidad Católica Santo Toribio de Mogravejo* (USAT), Peru; Patricia Campos Olázabal, Dean of the Faculty of Medicine of USAT, and Rosa de Jesús Sánchez Barragán, Sergio Castro Guerrero and Antero Enrique Yacarini Martínez, members of the USAT Bioethics Institute.

[26] Piero A. Tozzi of the Alliance Defense Fund; Stefano Gennarini of the Center for Legal Studies at C-Fam; William L. Saunders of Americans United for Life, and Álvaro Paúl.

However, as the Spanish version of the brief of Caio Fabio Varela and others was presented with a delay of 34 days, it was declared inadmissible.

16. On October 4, 5 and 6, 2012, the representatives and the State forwarded their final written arguments and the Inter-American Commission presented its final written observations in this case, respectively. These briefs were forwarded to the parties, who were given until October 17, 2012, to submit any observations they deemed pertinent regarding the information provided in response to the Court's questions. Observations were forwarded by representative Molina. The Inter-American Commission stated that it had no observations to make. Representative May and the State did not submit observations.

III
PRELIMINARY OBJECTIONS

17. The State submitted three "preliminary objections": failure to exhaust domestic remedies, the fact that the petition presented by Karen Espinoza and Héctor Jiménez was time-barred, and the Inter-American Court's lack of competence to hear supervening facts after the submission of the petition.

A) *Failure to exhaust domestic remedies*

18. The State argued that it had not "waive[d] the filing" of objections. It indicated that the Constitutional Chamber had "declared unconstitutional a certain type of *in vitro* fertilization" and explained that "if the technique advances to the point where it permits it to be performed without the loss of embryos, it can be used." Consequently, the State indicated that "the petitioners could apply both to the constitutional jurisdiction and to the contentious administrative jurisdiction, so that the possibility that the health services could treat their infertility could be discussed," including the possibility of "a particular *in vitro* fertilization technique […] under the hypotheses provided by the Constitutional Chamber." The State indicated that, in the constitutional jurisdiction, "the existence of the ruling" did not "prevent the Constitutional Chamber from reviewing the matter by means of an action of unconstitutionality" given that the Law of Constitutional Jurisdiction states that the rulings of the said Chamber "are not binding for the Chamber itself, [which] could review the matter once again." It added that "the existence of a decision by the Constitutional Chamber does not preclude a ruling on the part of the Chamber itself," either "by means of a constitutional appeal or through the contentious administrative courts." Furthermore, the presumed victims "could have requested that the administrative authorities, respecting the decision of the Constitutional Chamber, provide a remedy for their condition of infertility" or "create a new regulation" on IVF, "in line with the parameters established by the ruling of the Constitutional Court." "If the administrative authorities refused to provide the required attention," it would have been appropriate to file an application for *amparo.* However, "none of the couples filed" this appeal.

19. The State further argued that "faced with the refusal of the administrative authorities, the presumed victims could have initiated a contentious administrative proceeding"; however, none of them did so before beginning the proceedings before the Commission. It added that the domestic remedies were "efficient" and that "proof of this is that one of the presumed victims turned to the contentious administrative court, after the petition had been filed before the Commission."

20. The Commission pointed out that, in the proceedings prior to the admissibility report, the State merely limited itself to "suggesting the possibility that the [alleged] victims could

file an application for *amparo*." It indicated that the State "did not specify the legal basis for that possibility nor did it explain how, through such an appeal, it was possible to eliminate the effects of an abstract ruling of unconstitutionality […] regulated as not being subject to appeal." It pointed out that the State "did not provide the required evidence to explain the reasons why the remedy of *amparo* could be effective."

21. Representative May stated that, in the proceedings before the Commission, "the State indicated that it expressly waived the privilege of filing preliminary objections," a waiver that "once filed is irrevocable and irreversible." He argued that the appropriate domestic remedy "must be suited to the purpose"; in other words, it must satisfy the claims and interests at stake, and since the fundamental objective of the victims is the annulment of the judgment of the Constitutional Chamber and the reinstatement of IVF, "there is no remedy within the domestic jurisdiction that would make it possible to achieve this objective." Representative Molina indicated that the State "had not proved the effectiveness of the remedies mentioned." Furthermore, he emphasized that "the decision of the Constitutional Chamber is a judgment against which there is no remedy whatsoever and its effects are *erga omnes."* He argued that the appeal filed by Ileana Henchoz was rejected.

Considerations of the Court

22. Article 46(1)(a) of the American Convention establishes that, when determining the admissibility of a petition or communication submitted to the Inter-American Commission under Articles 44 or 45 of the Convention, the domestic remedies must have been pursued and exhausted, according to the generally accepted principles of international law.[27] The Court recalls that the rule of prior exhaustion of domestic remedies is designed for the benefit of the State, since it seeks to exempt it from the need to respond before an international body for acts attributed to it before having had the opportunity to resolve them through its own remedies.[28] This not only means that such remedies must formally exist, but also that they must be adequate and effective, as contemplated in the provisions of Article 46(2) of the Convention.[29]

23. Furthermore, this Court has consistently held that an objection to the exercise of the Court's jurisdiction based on the alleged failure to exhaust domestic remedies should be presented at the proper procedural stage,[30] that is, during the admissibility proceeding before the Commission.[31] In alleging the failure to exhaust domestic remedies, the State must indicate, at the proper procedural moment, which remedies must be exhausted and their effectiveness. In this regard, the Court reiterates that it is not the duty of the Court or the Commission to identify *ex officio* the domestic remedies that have not been exhausted.

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[27] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections. Judgment* of June 26, 1987. Series C No. 1, para. 85, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012 Series C No. 246, para. 23..

[28] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61, and *Case of Furlan and family v. Argentina*, para. 23.

[29] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits*, para. 63, and *Case of Furlan and family v. Argentina*, para. 23.

[30] *Case Velásquez Rodríguez v. Honduras*, *Preliminary objections,* para. 88, and *Case of Furlan and family v. Argentina*, para. 24.

[31] *Cf. Case of Velásquez Rodríguez v. Honduras, Preliminary objections,* para. 88, and *Case of Furlan and family v. Argentina*, para. 24.

The Court emphasizes that it is not up to the international organs to correct the imprecision in the State's arguments.[32]

24. The Court observes that the first point to be determined in relation to this objection is the type of arguments submitted by the State prior to the issue of the admissibility report; in other words, at the proper procedural moment for filing this objection. In this regard, the State only submitted one brief in relation to this matter, on January 23, 2004, in which it indicated that one of the victims "could have filed an application for *amparo*."[33] The brief in which the State analyzed the possible effectiveness of the contentious administrative jurisdiction to decide this case was submitted in 2008,[34] four years after the admissibility report was issued. Consequently, the Court considers that the arguments presented regarding the need to exhaust contentious administrative proceedings or bring an action for the failure to regulate the IVF procedure in keeping with the parameters established by the Constitutional Chamber, are time-barred and therefore the analysis will focus on the arguments concerning the remedy of *amparo*.

25. With regard to the exhaustion of the remedy of *amparo*, the State raised two different arguments. First, with regard to the scope that the State attributed to the decision adopted by the Constitutional Chamber in this case, the State considered that this decision did not imply a prohibition of IVF but rather of a means of practicing this procedure. Thus, it claimed that the victims had other possibilities to address their infertility and, if appropriate, to use the application for *amparo* if these alternatives were denied. The Court considers that this is a matter of merits which will be decided opportunely when determining whether the Constitutional Chamber's decision constituted a limitation of the rights of the presumed victims (*infra* paras. 160 and 161). In this regard, the Court has stated that preliminary objections are acts that seek to prevent the analysis of the merits of a disputed matter by contesting the admissibility of a case or the competence of the Court to hear a specific case or any of its aspects, due either to the person, matter, time, or place, provided that these objections are of a preliminary nature.[35] Since this first claim by the State cannot be examined without previously analyzing the merits of the case, it cannot be examined by means of this preliminary objection.[36]

26. Second, the State argued that an application for *amparo* could have provided the Constitutional Chamber with a fresh opportunity to assess the possible violation of rights in the instant case. In this regard, the Court observes that it is an uncontested fact that a final and binding decision from the highest court of Costa Rica on constitutional matters exists declaring that the practice of *in vitro* fertilization, as regulated at the time, was unconstitutional. As will be analyzed below in more detail (*infra* para. 135), the purpose of this case is to determine whether this decision by the Constitutional Chamber entailed the State's international responsibility. Consequently, the matter of exhaustion of remedies is related to the remedies existing against the ruling of unconstitutionality. In this regard, the

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[32] *Cf. Case of Reverón Trujillo*, para. 23, and *Case Furlan and family v. Argentina*, para. 25. See also: ECHR, *Case of Bozano v. France*, Judgment of 18 December 1986, para. 46.

[33] Brief No. 03-AM-03 presented to the Inter-American Commission on January 23, 2004, by the Minister of Foreign Affairs of Costa Rica (file of attachments to the merits report, volume III, folio 1056 and 1058).

[34] Brief No. DJO-486-08 of November 17, 2008 (file of annexes to the merits report, volume V, folio 2276).

[35] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Vélez Restrepo and family v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 30

[36] Similarly, *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of Vélez Restrepo and family v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of September 3, 2012. Series C No. 248, para. 30.

Court observes that in conformity with Article 11 of the Law of Constitutional Jurisdiction of Costa Rica, judgments, decisions or rulings of the Constitutional Chamber cannot be appealed.[37] In addition, in Costa Rica the control of constitutionality is concentrated,[38] so that this Chamber hears all applications for *amparo* filed in the country.

27. Based on the foregoing, the Court considers that filing an application for *amparo* was not appropriate to remedy the situation of the presumed victims, because the highest court in the constitutional jurisdiction had issued its final decision with regard to the main legal problems that had to be resolved in this case concerning the scope of the protection of prenatal life (*infra* para. 162). Since the Constitutional Chamber hears all applications for *amparo* filed in Costa Rica, if the victims had filed an application for *amparo,* this same Chamber would have had to decide it. Furthermore, the presumed victims sought to receive the IVF treatment under the regulation contained in the Executive Decree. In view of the declaration of the unconstitutionality of the decree as a whole, the possibility of obtaining access to IVF under the conditions established by the Constitutional Chamber was substantially different from the interests and claims of the presumed victims. Consequently, in the specific circumstances of this case, the Court considers it unreasonable to require the presumed victims to continue exhausting applications for *amparo* if the highest judicial instance on constitutional matters had already ruled on the specific aspects contested by the presumed victims. Thus, the function of this remedy of domestic law was not appropriate to protect the legal situation harmed and, consequently, could not be considered a domestic remedy that had to be exhausted.[39]

28. Based on the foregoing, the Court rejects the preliminary objection filed by the State.

B) *Time-barred petition filed by Karen Espinoza and Héctor Jiménez Acuña*

29. The State argued that the Inter-American Commission had indicated that the petition filed by Karen Espinoza and Héctor Jiménez was "time-barred, because it had been submitted outside the six-month period established by Article 46(1)(b) of the American Convention." It indicated that these presumed victims "cannot be included in the petition of January 19, 2001, given that, at that time, they were unaware of their condition" of infertility, because Ms. Espinoza found out about her infertility in July 2002. It argued that "if it is considered that the brief of October 2, 2003, introduces for the first time" the complaint by these presumed victims, "it is clear that, from the time that she learned of her condition – July 2002 – to October 2003, considerably more than six months elapsed," which is the term established by the Convention to file a complaint. It added that "the problem with this petition was the Commission's delay in analyzing the admissibility of the request presented, a process that lasted approximately three years (from January 2001 to March 2004); this is why the petitioners were included who, in its own words, could not have been included in the original petition because they had not even been declared infertile

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[37] Law of the Constitutional Jurisdiction, Law No. 7135 of October 11, 1989. Article 4 of this law establishes that "the constitutional jurisdiction is exercised by the Constitutional Chamber of the Supreme Court of Justice." The second section of article 11 establishes that "There shall be no remedy against the judgments, decisions or rulings of the constitutional jurisdiction." *Cf.* File of the annexes to the report on merits, volume I, annex 1, folios 42 and 44.

[38] Article 2 of the Law of the Constitutional Jurisdiction (Law 7135 of October 11, 1989) establishes a concentrated constitutional control exercised by the Constitutional Chamber of the Supreme Court of Justice, making it the only body with competence to decide on the remedy of *amparo* and the constitutionality of laws of any nature.

[39] Similarly, *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 85.

at that time." The State indicated that in another admissibility report, "the Commission itself had noted that, in order to determine the time frame for presenting the petition in [IVF] cases, the date on which the person was declared infertile must be taken into account." It added that the alleged victim "was diagnosed with infertility in 2002, and the IVF technique was suggested in 2004, which results in the paradox that when she was presented before this Court as a presumed victim, she had not even thought of IVF as an applicable technique." Consequently, when they were included as petitioners in these proceedings "the six-month term had already expired; hence their petition should be considered time-barred."

30. The Commission indicated that "the vast majority of the arguments submitted by the State […] were not presented before the Commission" and they "differ substantially from the arguments submitted by the State at the admissibility stage," which is precisely the stage at which the Commission "decides on this requirement [of six months] in light of the information provided by the parties." It indicated that "the fact that the petitioner omits a specific requirement when presenting the initial complaint, and that this requirement is subsequently rectified, does not mean that the presentation of the complaint is time-barred."

31. Representative Molina Acevedo indicated that "whether or not a couple were aware of their infertility when the judgment of the Constitutional Court was issued does not close the door for any person, to date, to be limited by the six months established in the American Convention." Nevertheless, he argued that, in this case, "what determines the condition to be an alleged victim is not whether these persons were being treated by certain doctors in 2001, but whether they were aware of their possible and later confirmed infertility" and that, in addition, the only way they could procreate was through IVF. Lastly, the representative indicated that "hostility existed regarding the condition of those who might be on the confidential list of presumed victims in this case."

Considerations of the Court

32. Article 46(1)(b) of the Convention indicates the following:

> Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: […]
>
> b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights **was notified** of the final judgment; (underlining and bold type added)

33. In the instant case, the initial petition was filed on January 19, 2001. At that time the then legal representative of the victims had not made a specific and individual determination of the presumed victims. The inclusion of Ms. Espinoza and Mr. Jiménez occurred in a brief presented on October 10, 2003. In the proceedings before the Court it was reported that Ms. Espinoza found out about her infertility in July 2002.[40]

34. On January 16, 2004, the State submitted a brief asking the Commission to declare the inadmissibility of the petition with regarding to Ms. Espinoza due to the "time-barred" nature of her claim, "because it was filed more than six months after the presumed victim of the violated rights had been notified of the decision" of the Constitutional Chamber.[41]

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[40] Epicrisis (medical diagnosis) of Karen Espinoza Vindas (file of annexes to the pleadings and motions brief of Boris Molina, annex XIV, folio 5477).

[41] Brief No. 03-AM-03 of January 16, 2004.

35. The Court considers that the specific circumstances of this case require an interpretation of the six-month requirement established in Article 46(1)(b). The Court takes into account that the phenomenon of infertility generates different reactions that cannot be associated with a strict rule on the courses of action that a person should necessarily take. A couple may take months or years to decide whether to use a specific technique of assisted reproduction or other alternatives. Thus, the criterion of the time when the alleged victim learns of his or her infertility is a limited criterion in the circumstances of this case, where it is not possible to place the burden on the victims to make the decision to lodge a petition before the inter-American system within a specific time frame. Similarly, the European Court has indicated that the "six-month rule is autonomous and must be construed and applied according to the facts of each individual case, so as to ensure the effective exercise of the right to individual petition."[42]

36. Therefore, the Court considers that in this case there are no elements to cause it to diverge from the admissibility decision adopted by the Inter-American Commission, given that: (a) the judgment delivered by the highest instance of the constitutional jurisdiction continues to be in force; (b) the victims did not have to be aware of their infertility at the time this judgment was issued, and (c) the petition was lodged during the year after it was learned that this judgment would prevent access to IVF.

37. Based on the foregoing, the Court rejects the preliminary objection filed by the State.

C) Lack of competence of the Court to hear "new facts not included" in the "facts of the application"

38. The State argued that "both representatives included in their briefs with pleadings the State's responsibility for exposing the situation of the presumed victims to the media, owing to the media coverage during the proceedings before both the Commission and this Court." Similarly, the State argued that "none of the facts denounced by the representatives [in this regard] is included in the facts alleged by the Commission, and it cannot be considered that they are derived from the main or supervening facts." Therefore, it asked the Court "to declare inadmissible the petitions of the presumed victims related to facts not included by the Commission in the application it submitted."

39. Representative Molina indicated that "since the facts contested by the State are supervening facts and have a direct causal relationship to the fact that gave rise to the human rights violations in this case, it is fully in keeping with the proceedings" that "they have been presented" for the Court's consideration. Representative May argued that these are not "new facts," "they are situations all of which fall within the factual scenario of the prohibition" of IVF; in other words, they are "all conducts, personal situations, experiences, decisions and actions, and events that occurred in the life of the victims owing to the prohibition." He added that the corresponding decision should be made when deciding the merits of the case.

Considerations of the Court

[42] *Cf*. ECHR, Sabri Günes *v.* Turkey, Grand Chamber, judgment of 29 June 2012, Büyükdağ v. Turkey (dec.), no. 28340/95, judgment of 6 April 2000; Fernández-Molina González and 369 Others *v*. Spain (dec.), no. 64359/01, judgment of 8 October 2002, and Zakrzewska *v.* Poland, no. 49927/06, para. 55, judgment of 16 December 2008.

40. As indicated, preliminary objections are acts that seek to prevent the analysis of the merits of a disputed matter by contesting the admissibility of a case or the competence of the Court to hear a specific case or any of its aspects, due to either the person, matter, time, or place, provided that these objections are of a preliminary nature.[43] If the objections cannot be reviewed without entering into a prior analysis of the merits of the case, they cannot be analyzed by a preliminary objection.[44] In the instant case, the Court considers that it is not appropriate to rule in a preliminary manner on the factual framework of the case, because this analysis corresponds to the merits of the case (*infra* para. 133). However, the arguments presented by the State when filing the preliminary objection will be taken into consideration when establishing the facts that this Court finds proved and determining whether the State is internationally responsible for the alleged violations of the treaty-based rights, as well as when establishing the types of damage that could eventually arise to the detriment of the presumed victims. Based on the foregoing, the Court rejects the preliminary objection filed by the State.

IV
JURISDICTION

41. The Inter-American Court has jurisdiction to hear this case under Article 62(3) of the Convention, because Costa Rica has been a State Party to the American Convention since April 8, 1970, and accepted the binding jurisdiction of the Court on July 2, 1980.

V
EVIDENCE

42. Based on the provisions of Articles 46, 47, 50, 51 and 57 of its Rules of Procedure, and on its case law regarding evidence and the assessment thereof,[45] the Court will examine and assess the documentary evidence submitted by the Commission and by the parties at the different procedural stages, the statements of the presumed victims and witnesses and the expert opinions provided by affidavit and at the public hearing before the Court, as well as the helpful evidence requested by the Court (*supra* para. 11). To this end, the Court will abide by the principles of sound judgment, within the applicable legal framework.[46]

A) Documentary, testimonial and expert evidence

43. The Court received diverse documents offered as evidence by the Inter-American Commission, the representatives and the State, together with their main briefs. The Court also received affidavits provided by the deponents: Gerardo Escalante Lopez and Delia Ribas Valdés; the presumed victims: Andrea Regina Bianchi Bruna, Ana Cristina Castillo León,

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[43] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections*, para. 34, and *Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs. Judgment of February 27,* 2012. Series C No. 240, para. 39.

[44] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*, para. 39, and *Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs*, para. 39.

[45] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, para. 31.

[46] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala,* para. 76, and Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador,* para. 31.

Claudia María Carro Maklouf and Victor Hugo Sanabria León; and from the expert witnesses: Andrea Mesén Fainardi, Antonio Marlasca López, Alicia Neuburger, Maureen Condic, Martha Garza and Paul Hunt. As to the evidence provided at the public hearing, the Court heard the testimony of the presumed victims Miguel Mejías and Ileana Henchoz, and of the expert witnesses Fernando Zegers-Hochschild, Anthony Caruso, Paola Bergallo and Marco Gerardo Monroy Cabra.[47]

44. Representative Molina informed the Court that he had filed an application for *amparo* "against the physicians treating four of the [presumed] victims, because [these physicians had] allege[d], in two of these cases, that the former wives of [his] clients had expressly forbidden" them to provide representative Molina with "a copy of the medical records that led to the infertility consultations." In this regard, the representative indicated that this situation left him "at a clear disadvantage" and, for that reason, he had resorted to "domestic legal channels to try to gain access to the information required in order to submit it as evidence" before the Court. The representative indicated that his application had been denied. He stated that this was "a clear procedural violation and breach of the good faith that should prevail in any litigation, because it had harmed the "body of evidence," in the understanding that, for the purposes of these proceedings, the medical records contain important information that, although it can be substituted with other types of evidence, cannot be concealed if one of the parties has had access to it, because they are obliged to share it."

45. The representative requested "additional time" to refer to "and, as part of the brief with pleadings, motions and evidence, make any observation on the evidence presented by Ana Cristina Castillo León and Claudia Carro Maklouf, former wives of Enrique Acuña Cartín and Víctor Hugo Sanabria León," inasmuch as, "if they had furnished the relevant medical records, they would be using this evidence in clear violation of the principle of "community of evidence" and "of good faith in litigation." The representative asked the Court "to consider the possibility of requesting the State, through the appropriate channels, to require Drs. Gerardo Escalante López and Delia María Ribas Valdéz" to "hand over a copy of the medical records of the said individuals and of María del Socorro Calderón Porras and Carlos Vargas Solórzano, to whom for no reason, as of this date, a copy of the medical file was provided." Accordingly, the President took note of these requests and indicated that, if the Court determined that this evidence would be required in order to decide on aspects concerning the purpose of this case, it would be requested at the appropriate time. The Court considers that the said information is not essential to decide this case.

B) Admission of the evidence

B.1) Admission of documentary evidence

46. In this case, as in others, the Court grants probative value to those documents that were forwarded at the appropriate time by the parties and the Commission, and that were not disputed or challenged, and the authenticity of which was not questioned.[48] The documents requested by the Court as helpful evidence (*supra* para. 11) are incorporated into the body of evidence, in application of the provisions of Article 58 of the Rules of Procedure.

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[47] The purpose of all these statements is established in the Order of the President of the Court of August 6, 2012. Available at: http://www.corteidh.or.cr/docs/asuntos/artavia_06_08_12.pdf. In a communication of August 9, 2012, the Commission withdrew the statement of Florencia Luna.

[48] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 140, and Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador,* para. 35.

47. The Court decides to admit those documents that are complete or that, at least, allow the source and publication date to be verified, and will assess them taking into account the body of evidence, the arguments of the State, and the rules of sound judicial discretion.[49]

48. Also, regarding certain documents referred to by the parties and the Commission by means of their electronic links, the Court has established that if a party provides at least the direct electronic link to the document cited as evidence, and it is possible to access this document, legal certainty and procedural balance will not be affected, because it can be located immediately by the Court and the other parties.[50] In this case, the other parties and the Commission did not oppose or submit observations on the content and authenticity of such documents.

49. Furthermore, considering that the representatives submitted, with their final written arguments, vouchers for litigation expenses related to this case, the Court will only consider those that refer to request for costs and expenses incurred in relation to the proceedings before this Court, after the date on which the pleadings and motions brief was filed.

50. The State asked the Court to reject "the psychological reports provided" by representative Molina "to prove the supposed damage caused by the State." It indicated that the said reports do not analyze "the supposed impact of the prohibition" of IVF on the presumed victims, "but merely indicate the effects on their condition of infertility," which "is not the result of any act or omission of the State." It added that the reports "appear to mention the effects" that IVF have "had on the women, which far from recommending the technique, reveals the serious effects suffered by the women who submit to this procedure," which "cannot be attributed to the State, and nor can compensation be claimed on this basis." Lastly, it indicated that "the psychological reports appear to reveal the opinion of the presumed victims and not the objective opinion of the psychologists." Similarly, the State asked the Court to reject the "psychological reports issued by Dr. Andrea Meses Fernardi, in the cases of Ana Cristina Castillo León and Claudia María Carro Maklouf," which were presented by representative May, because they merely "analyze the impact that infertility has had on the supposed victims."

51. The State also asked the Court to reject the "financial files" of the presumed victims that were presented by representative Molina and that include "bank statements" and "certifications of earnings" based on which "compensation is sought from the State." The State argued that, the said documentation "does not reveal in any way the expenses that the supposed victims say they have incurred and, to the contrary, contain mere numbers without any identification that has a relationship" to the proceedings. It added that "no explanation is provided regarding the significance of the banking and earnings information for the settlement" of the case.

52. Regarding these observations of the State concerning the documentary evidence, the Court understands that they do not contest its admissibility, but rather are designed to question its probative value. Consequently, there is no problem as regards the admissibility of this evidence and it will be assessed together with the rest of the body of evidence, taking into account the State's observations and in keeping with the rules of sound judicial discretion.

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[49] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 146, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* para. 36.

[50] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador,* para. 37.

B.2) Admission of the statements of the presumed victims, and of the testimonial and expert evidence

53. With regard to the statements of the presumed victims and the witnesses and the expert opinions provided at the public hearing and by affidavit, the Court considers these pertinent only insofar as they relate to the purpose defined by the President of the Court in the Order requiring them (*supra* para. 11). These statements will be assessed in the relevant chapter, together with the entire body of evidence, taking into account the observations made by the parties.[51]

54. According to this Court's case law, the statements made by the presumed victims cannot be assessed separately, but only as part of the entire body of evidence in the proceedings, because they are useful insofar as they can provide more information on the alleged violations and their consequences.[52] Accordingly, the Court admits these statements (*supra* para. 11) and will assess them based on the criteria indicated.

55. In addition, in relation to the affidavits, the State requested that the Court declare inadmissible the statements of Paul Hunt, Antonio Marlasca, Gerardo Escalante and Delia Ribas. Likewise, it made observations on the substance of some of the statements.

56. On the matter of admissibility, the State indicated that the statements of Antonio Marlasca and Paul Hunt omitted any reference to the questions posed by the State, which affects the obligation of procedural cooperation, the principle of good faith, the adversarial principle and the right to defense. The Court reiterates that the fact that the Rules of Procedure permit the parties to submit written questions to the deponents offered by the opposing party and, if applicable, by the Commission, imposes the corresponding obligation of the party that offered the testimony to coordinate and take the necessary steps to forward the questions to the deponents, and that the respective answers are provided. In certain circumstances, failure to answer several questions may be incompatible with the obligation of procedural cooperation and with the principle of good faith that governs international proceedings.[53] Nevertheless, the Court considers that failure to provide answers to the questions of the opposing party does not affect the admissibility of a statement and is an aspect which, depending on the extent of a deponent's silence, could eventually affect the probative value that an expert opinion might have, and should be assessed when considering the merits of the case.

57. The State argued that "the failure to present" the Spanish translation of Paul Hunt's statement within the established time frame "breaches the obligation of procedural cooperation and good faith that should govern international proceedings." The State pointed out that it had "complied with [the requirement] to submit two translations within the same time frame granted the Commission, which clearly implied a reduction in the time for preparing the report," which "places it in a position of procedural inequality, since it also reduced the time […] granted […] to present the respective comments." In this regard, the Court observes that the English version of the report was submitted within the established time frame and that there was a delay of seven days in submitting the Spanish version. The

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[51] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador,* para. 43.

[52] *Cf. Case of Loayza Tamayo v. Peru. Merits,* para. 43, and Case of *Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 244, para. 27.

[53] *Case of Díaz Peña v. Venezuela,* para. 33*, and Case of Uzcátegui et al. v. Venezuela. Merits and reparations.* Judgment of September 3, 2012, Series C No. 249, para. 29.

Court takes into account that, in the proceedings before the Commission, the parties submitted various elements of information and evidence in English without providing a translation, which did not merit an objection from the parties and, furthermore, shows that, during the proceedings, steps were taken to ensure a proper procedural balance between the parties. Likewise, in the proceedings before the Court various time limits have been granted to the Commission and to the parties to forward translations into Spanish of some documents that were presented in English. Based on the foregoing, the Court concludes that the lack of a timely translation of the said statement did not create a disproportionate burden for the State or the representatives that could justify its inadmissibility.

58. The State asked the Court to reject the expert opinion of Antonio Marlasca, because "he should have appeared before a notary public," "and not as occurred in this case where it is clear from the document submitted that no such appearance took place, since the notary public affirms that he merely transcribed the report provided previously." In this regard, the Court has indicated that, in relation to the reception and assessment of evidence, the proceedings before it are not subject to the same formalities as the domestic judicial proceedings, and that the incorporation of certain elements into the body of evidence must be made paying particular attention to the circumstances of the specific case.[54] Furthermore, on other occasions, the Court has admitted sworn statements that were not made before notary public, when legal certainty and the procedural balance between the parties[55] are not affected, and this is respected and guaranteed in this case.

59. The State contested the admissibility of the statements of Gerardo Escalante and Delia Ribas, and the opinion of Alicia Neuburger, because they presumably refer to matters that were not contemplated within the purpose of their statements. The Court reiterates that it will only take into account the statements provided by affidavit to the extent that these are in keeping with the purpose established in the Order issued by the President.

60. As to the substantial issues, the State indicated the following: (i) Paul Hunt "omits the analysis of the balance of interests that is essential in order to determine the existence of a disproportionate impact"; (ii) the expert opinion of Alicia Neuburger "is not useful evidence to prove the causal relationship between the alleged violations of rights" and "the damage supposedly suffered by the presumed victims," and "is based on a series of facts that have not been proved in these proceedings"; (iii) "Mr. Marlasca fails in his attempt to draw a distinction that could be considered rational or objective between a human life and a human person"; (iv) "the statement [of Andrea Mesen] is so general that it makes it impossible to try to justify, much less prove, an alleged non-pecuniary damage to the presumed victims"; (v) Gerardo Escalante "limits the nature and content of his statement to the way in which IVF was practiced in Costa Rica at the time when he practiced it, so that he cannot make assessments or render opinions on the *in vitro* fertilization technique in general, or on its international regulation," and (vi) with regard to Delia Ribas: "she continually refers to the term "pre-embryo," using it as a basis to justify the treatment received by the embryo from its conception (or fertilization) until the moments before it is transferred to the mother's womb […] and, therefore, it is not acceptable that she tries to justify its manipulation by hiding behind that concept, because it is scientifically proved that a full and complete organism exists at this initial stage." The State also argued that "it is not correct […] to justify the practice of the IVF technique as a treatment for a disease that improves the health of the 'patients'"; "in her document, she advocates the practice of cryopreservation –

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[54] *Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs*. Judgment of March 1, 2005. Series C No. 120, para. 33.

[55] *Cf. Case of the Miguel Castro Castro Prison*, para. 189; *Case of Servellón García et al.*, para. 46; and Case of *Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151, para. 51.

or the freezing of the embryos – which is incompatible with the right to life and to human dignity"; "she does not answer the second question that was opportunely asked."

61. Regarding these observations made by the State regarding the expert opinions, the Court understands that these do not contest their admissibility, but rather are designed to question their probative value. The Court will consider the content of these expert opinions to the extent that they serve the purpose for which they were required (*supra* para. 11). Based on the foregoing, the Court admits the said expert opinions and will assess them together with the rest of the body of evidence, bearing in mind the State's observations and in accordance with the rules of sound judicial discretion.

VI
FACTS

A) Assisted reproduction and *in vitro* fertilization techniques

62. Infertility can be defined as "the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."[56] The most common causes of infertility are, *inter alia*, damage to the Fallopian tubes, pelvic infections, male factors (for example, low sperm count), endometriosis, immunological factors or diminished ovarian reserve.[57] It is estimated that the incidence of infertility extends to approximately 10% of women in reproductive age.[58]

63. Assisted reproductive techniques or procedures are a group of different medical treatments used to help infertile individuals and couples achieve pregnancy; they include "the manipulation of both ovocytes and spermatozoids, or embryos […] for the establishment of a pregnancy."[59] The techniques include *in vitro* fertilization, embryo transfer, gamete intratubal transfer, zygote intratubal transfer, intratubal embryo transfer, cryopreservation of ovocytes and embryos, oocyte donation and embryo donation and surrogate motherhood.[60] Assisted reproduction techniques do not include assisted or artificial insemination.[61]

64. For its part, *in vitro* fertilization is "a procedure in which a woman's eggs are removed from her ovaries, and are then fertilized with spermatozoids in a laboratory procedure; once this is completed, the fertilized egg (embryo) is re-implanted in the

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[56] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2818); Affidavit prepared by expert witness Garza (merits report, volume V, folio 2558); Opinion provided by expert witness Caruzo before the Inter-American Court during the public hearing held in this case and Statement by deponent Ribas (merits report, volume V, folio 2241).

[57] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2828). As expert witness Zegers-Hochschild explained, according to the World Health Organization, infertility is a disease of the reproductive system (merits report, volume VI, folio 2818).

[58] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2820).

[59] Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2821).

[60] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2820).

[61] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2820).

woman's uterus."[62] This technique is used when infertility is caused by the absence or blockage of the woman's Fallopian tubes; in other words, when an egg cannot pass through the Fallopian tubes to be fertilized and subsequently implanted in the uterus,[63] or in cases of male infertility,[64] and also in cases where the cause of infertility is unknown. The stages followed during IVF are:[65] (i) ovulation induction; (ii) retrieval (aspiration) of eggs from the ovaries; (iii) insemination of eggs with spermatozoids; (iv) monitoring of the embryo fertilization and incubation process, and (v) embryo transfer to the mother's uterus.

65. There are five stages in embryonic development in IVF and they last a total of five days. First, mature ovules are selected and fertilized, which leads to the development of the zygote. In the first 26 hours of development, the zygote divides into two cells, which subsequently divide into four cells on day 2 and, finally, these divide again to form eight cells on day 3. On day 4, the embryo reaches the morula stage, and on day 4 and day 5, the blastocyst stage. The embryos can remain in culture for up to five days before being transferred to a woman's uterus.[66] Consequently, the embryo can be transferred from day 2 until the evening of day 5. The decision on when to transfer the embryo is taken based on the morphological and dynamic nature of the cellular division.[67] The embryo can be transferred directly to the uterus or to the Fallopian tubes. It is possible to know if a woman has become pregnant 12 days after embryo transfer based on the marker hormones present in the woman.[68]

66. The first birth of a baby resulting from *in vitro* fertilization occurred in England in 1978.[69] In Latin America, the first baby born through *in vitro* fertilization and embryo transfer was reported in Argentina in 1984.[70] Since the birth of the first person as a result of Assisted Reproductive Techniques (hereinafter "ART") was reported, five million people in the world have been born thanks to the advances in this technology."[71] Furthermore, "each year, millions of ART procedures are performed. It is estimated that, in 2008, 1.6 million

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62 Affidavit prepared by expert witness Garza (merits report, volume V, folio 2559).

63 In this regard, expert witness Zegers-Hochschild indicated that "fertilization cannot occur if there is no Fallopian tube; embryonic development cannot occur, if the spermatozoids deposited in the vagina are not capable of reaching the [Fallopian] tube, just as there is no fertilization if the spermatozoids reach it but are not capable of fertilizing." Statement of expert witness Zegers-Hochschild at the public hearing held in this case. Also, Written summary of the expert opinion provided by Anthony Caruso at the public hearing before the Court (merits report, volume VI, folio 2937.210), and testimony of deponent Ribas (merits report, volume V, folio 2243).

64 *Cf.* Written summary of the expert opinion provided by Anthony Caruso at the public hearing before the Court (merits report, volume VI, folio 2937.214).

65 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folios 2825 to 2830); Affidavit prepared by expert witness Garza (merits report, volume V, folio 2559), and Statement by deponent Ribas (merits report, volume V, folios 2245 to 2248).

66 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folios 2828 and 2829).

67 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folios 2828 and 2829).

68 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folios 2828 and 2829).

69 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folios 2821) and Statement by deponent Ribas (merits report, volume V, folio 2242).

70 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folios 2822).

71 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, Volume VI, folios 2821 and 2822).

treatments resulted in the birth of 400,000 individuals between 2008 and September 2009" globally.[72] In Latin America, "it is estimated that from 1990 to 2010, 150,000 individuals were born," according to the Latin American Register of Assisted Reproduction.[73]

67. Based on the evidence in the case file, Costa Rica is the only State in the world that expressly prohibits IVF.[74]

B) The Executive Decree

68. In Costa Rica, Executive Decree No. 24029-S of February 3, 1995, issued by the Ministry of Health, authorized the technique of *in vitro* fertilization for married couples and regulated its practice. Article 1 of the Executive Decree regulated the practice of assisted reproduction techniques between married couples, and established rules for their practice.[75] Article 2 defined assisted reproduction techniques as "all those artificial techniques in which the union of the egg and the spermatozoid is achieved by a method of direct manipulation of the reproductive cells in the laboratory."[76]

69. The provisions of Decree Law No. 24029-S that specifically regulated the technique of IVF at issue in the action of unconstitutionality, were as follows:[77]

> Article 9. In cases of *in vitro* fertilization, the fertilization of more than six of the patient's eggs in each treatment cycle is strictly prohibited.
>
> Article 10. All the eggs fertilized in a treatment cycle shall be transferred to the patient's uterine cavity; discarding or eliminating embryos, or preserving them to be transferred during subsequent cycles of the same patient or of other patients is strictly prohibited.
>
> Article 11. Manipulation of the embryo's genetic code, as well as any form of experimentation on the embryo, is strictly prohibited.
>
> Article 12. The trade in homologous or heterologous reproductive cells – eggs and spermatozoids – to be used for treating patients by means of assisted reproduction techniques, is strictly prohibited.
>
> Article 13. Failure to comply with the provisions established herein shall give the Ministry of Health the authority to cancel the health services operating permit and the accreditation of the establishment in which the violation was committed; the matter is to be immediately referred to the Public Prosecutor's Office and to the respective Professional Association, for the appropriate sanctions to be established.

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72 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, Volume VI, folios 2821 and 2822).

73 *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folios 2821 and 2822).

74 The expert witness Zegers-Hochschild explained that "ART are used worldwide. This includes all the countries of Europe, Oceania, Asia and the Middle East, as well as the countries that have this kind of technology in Africa. In the Americas, ART are practiced in every country that has this kind of technology, with the exception of Costa Rica. Hence, it is reasonable to conclude that Costa Rica is the only country in the world that [prohibits] ART. *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, Volume VI, folio 2821).

75 Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, File No. 95-001734-007-CO (file of attachments to the report, volume I, folio 85).

76 Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, File No. 95-001734-007-CO (file of attachments to the report, volume I, folio 85)..

77 Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, File No. 95-001734-007-CO (file of attachments to the report, volume I, folio 85 and 86).

70. *In vitro* fertilization was practiced in Costa Rica from 1995 to 2000[78] by the private entity *Instituto Costarricense de Infertilidad*.[79] During that period, 15 Costa Rican babies were born.[80] The technique was declared unconstitutional by the Constitutional Chamber in Judgment No. 2000-02306 of March 15, 2000.

C) Judgment of the Constitutional Chamber of March 15, 2000

71. In accordance with article 75 of the Law on Constitutional Jurisdiction,[81] any citizen may file an action of unconstitutionality against a norm "when, owing to the nature of the matter, there is no direct individual injury, or when it relates to the defense of diffuse interests or those that relate to the community as a whole." Based on this article, on April 7, 1995, Hermes Navarro del Valle filed an action of unconstitutionality against the Executive Decree that regulated IVF in Costa Rica, using different arguments relating to the violation of the right to life.[82] The petitioner requested that: (i) the Decree be declared unconstitutional because it violated the right to life; (ii) the practice of *in vitro* fertilization be declared unconstitutional, and (iii) "the public authorities be instructed to monitor medical practice closely, to ensure that such acts do not recur." The arguments put forward in the action for unconstitutionality included the following: (i) in general, the percentage of malformations was greater than that recorded for natural fertilization"; (ii) "the generalized practice [of IVF] violates human life [and] owing to the private and isolated characteristics […] in which this insemination takes place, any regulation would be difficult for the State to implement and monitor"; (iii) "human life begins from the moment of fertilization; therefore, following conception, any elimination or destruction, whether voluntary or arising from the negligence of the doctor or the inaccuracy of the technique used – would result in a clear violation of the right to life contained" in the Costa Rican Constitution; (iv) reference was made to the Inter-American Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child; (v) it was argued that "the business of *in vitro* fertilization [is] a business, […] it does not provide a cure for […] a disease, and [is] not an emergency treatment to save a life," and (vi) "the elimination of the product of conception, in other words, children, discarding them, produces the same violation as eliminating them deliberately owing to the lack of technique in the procedure, attempting to play some kind of 'Russian roulette' with the six children introduced into the mother."

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78 "On October 14, 1995, the first child resulting from *in vitro* fertilization was born." *Cf.* Statement by deponent Escalante (merits file, volume V, folio 2388). See also newspaper articles in *La Nación* of October 15, 1995, entitled "*Nació Esteban*" and "*Esteban, alianza fecunda*" (merits file, volume I, folio 587.40).

79 *Cf.* Statement by deponent Ribas: "In Costa Rica, our group started *in vitro* fertilization in September 1994. […] Our results for 1994 to 1996 were published in the *Acta Medica Costarricense* […]. As we were the only center in the country, we decided to submit our efforts to the scrutiny of the Red *Latinoamericana de Reproducción Asistida* [Latin American Assisted Reproduction Network], which we had been members of since its creation until the decision that prohibited the technique" (merits report, volume V, folios 2242 and 2248).

80 Deponent Escalante stated that "[f]rom September 1994 to March 2000, 121 couples were treated with 149 complete cycles of *in vitro* fertilization; [of these,] 15 full-term pregnancies that resulted in the birth of a child were achieved" (merits report, volume V, folio 2392).

81 Article 75 stipulates that "[i]n order to file an action of unconstitutionality, there must be a matter pending a decision by the courts, including for *habeas corpus* or *amparo*, or in the proceedings to exhaust the administrative jurisdiction, in which this unconstitutionality is cited as a reasonable means of protecting the right or interest that is considered harmed. This previous case pending a decision shall not be necessary when, owing to the nature of the matter, there is no individual and direct harm, or in the case of the defense of diffuse interests or those that relate to the collectivity as a whole."

82 Action on unconstitutionality filed on April 7, 1995 (file of annexes to the answering brief, volume VII, folios 10455, 10456, 10458, 10464, 10465 and 10466).

72. On March 15, 2000 the Constitutional Chamber of the Supreme Court delivered a judgment,[83] whereby it declared "the admissibility of the action [and] annulled Executive Decree No. 24029-S due to unconstitutionality."[84] The reasons given by the Constitutional Chamber to support its decision were, first, the "violation of the legal principle" whereby "only through a formal law issued by the Legislature, according to the procedure established in the Constitution for the enactment of laws, is it possible to regulate and, if appropriate, restrict fundamental rights and freedoms." Based on the foregoing, the Chamber concluded that the Executive Decree regulated the "right to life and dignity of the human being," and therefore "[t]he regulation of these rights by the Executive Branch [was] incompatible with Constitutional law."

73. In addition, when considering that Article 4(1) of the American Convention was applicable, the Constitutional Chamber stated the following:

> The question of when human life begins is of transcendental importance in the matter under discussion here, since it is necessary to determine the moment from which the human being is subject to protection under our legal system. There are different views among specialists. Some consider that human embryos are entities at a stage of development where they have nothing more than a simple potential for life. [….] They point out that prior to its attachment, the pre-embryo is composed of undifferentiated cells, and that cellular differentiation does not occur until after it has attached to the lining of the uterus and after the appearance of the primitive cell line – the first outline of the nervous system; from that moment the organ systems and the organs are formed. […] Others, on the contrary, maintain that every human being has a unique beginning that occurs at the very moment of fertilization. They define the embryo as the original form of a being, or as the earliest form of a being and consider that the term pre-embryo does not exist, since prior to the embryo, at the preceding stage, there is a spermatozoid and an egg. When the spermatozoid fertilizes the egg that entity becomes a zygote and therefore an embryo. The most important feature of this cell is that everything that will allow it to evolve into an individual is already in place; all the necessary and sufficient information to determine the characteristics of a new human being appear to come together in the union of the twenty-three chromosomes of the spermatozoid and the twenty-three chromosomes of the ovocyte […] In describing the segmentation of the cells that occurs immediately after fertilization, this view holds that at the three-cell stage a minuscule human being exists and from that stage every individual is unique, rigorously different from any other. In short, as soon as conception occurs, a person is a person and we are in the presence of a living being, with the right to be protected by the legal system.[85] (Underlining added)

74. The Constitutional Chamber also determined that the practice of IVF "clearly jeopardizes the life and dignity of the human being."[86] In its reasoning, the Constitutional Chamber indicated that: (i) "[h]uman beings have the right not to be deprived of their life or to suffer unlawful attacks by the State or by private individuals, but not only this: public authorities and civil society must help them defend themselves from the dangers to their life"; (ii) "once conceived, a person is a person, and we are dealing with a living being, with the right to be protected by the law," and (iii) "since the right [to life] is declared for everyone, with no exception, it must be protected for both the individual who has been born, and also for the unborn child."[87]

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[83] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, File No. 95-001734-007-CO (file of annexes to the report, volume I, folios 76 to 96).

[84] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 95).

[85] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 88 and 89).

[86] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 94).

[87] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 88 and 90).

75. In addition, the Constitutional Chamber stated that "[i]nternational law […] establishes strong guiding principles regarding the issue of human life,"[88] citing Article I of the American Declaration, article 3 of the Universal Declaration of Human Rights, article 6 of the International Covenant on Civil and Political Rights, and Article 4 of the American Convention. Regarding Article 4 of the Convention, the Chamber considered that "[t]his international instrument takes a decisive step, given that it protects the right [to life] from the moment of conception[; in addition,] it emphatically prohibits imposing capital punishment on pregnant women, which constitutes direct protection and, therefore, full recognition of the legal and real personality of the unborn child and its rights."[89] The Chamber also referred to article 6 of the Convention on the Rights of the Child. In this regard, it concluded that "[t]he norms cited impose the obligation to protect the embryo from the abuse that it could be subject to in a laboratory and, especially, the most severe of all, the one that can eliminate its existence."[90]

76. Lastly, the Chamber concluded:

> The human embryo is a person from the time of conception; hence it cannot be treated as an object for investigation purposes, be submitted to selection processes, kept frozen and, the most essential point for the Chamber, it is not constitutionally legitimate to expose it to a disproportionate risk of death.[…] The main objection of the Chamber is that the application of the technique entails a high loss of embryos, which cannot be justified by the fact that it is intended to create a human being, providing a child to a couple who would otherwise be unable to have one. The key aspect is that the embryos whose life is first sought and then violated are human beings, and constitutional law does not allow any distinction among them. The argument that in natural circumstances there are embryos that are not implanted, or that even if they are implanted they do not develop until birth, is not admissible either, simply because the application of [IVF] entails a conscious and voluntary manipulation of the female and male reproductive cells in order to produce a new human life, which leads to a situation where it is known in advance that the human life, in a considerable percentage of the cases, has no possibility to continue. As the Chamber has been able to verify, the application of the technique of *in vitro* fertilization and embryo transfer, as it is currently performed, jeopardizes human life. This Court knows that advances in science and biotechnology are so dramatic that the technique could be improved so that the reservations included herein disappear. However, the conditions in which it is currently applied lead to the conclusion that any elimination or destruction of embryos – whether voluntary or derived from the negligence of the person executing the technique or its inaccuracy – violates the right to life, hence the technique is not in keeping with constitutional law and, consequently, the regulation under consideration is unconstitutional as it violates article 21 of the Constitution and Article 4 of the American Convention on Human Rights. Since the technique violates the right to life, it shall be expressly placed on record that its application cannot be authorized even based on a norm with legal status, at least while its scientific development remains at the current state and entails conscious damage to human life.[91] (Underlining added)

77. Justices Arguedas Ramirez and Calzada Miranda presented a joint dissenting opinion on the judgment.[92] In this opinion, the justices considered that IVF "is not incompatible with the right to life or human dignity; on the contrary, it constitutes a scientific instrument and technique created to assist humanity, given that infertility […] must be regarded as a

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[88] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 90).

[89] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 91).

[90] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 92).

[91] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 94 and 95).

[92] Dissenting opinion of March 15, 2000, of Justices Arguedas Ramirez and Calzada Miranda (file of annexes to the answering brief, volume VII, folios 10994 to 10996).

genuine disease."[93] They also indicated that "assisted reproduction techniques […] are offered as a way to exercise the legitimate right to human reproduction which, even though it is not expressly recognized in [the] Constitution, is derived from the right to freedom and to self-determination, the right to privacy and family life, and the freedom to found a family."[94]

D) Remedies filed by Ileana Henchoz and Karen Espinoza

78. On May 30, 2008, Ms. Henchoz filed an action on unconstitutionality against the judgment of the Constitutional Chamber of March 15, 2000, which was rejected summarily.[95] In its decision, the Chamber considered that its case law was binding "*erga omnes* except for itself, so that the opinion provided in it can be amended when this is justified or for reasons of public order."[96]

79. Subsequently, Ms. Henchoz filed a judicial complaint against the Costa Rican Social Security Institute with the purpose that she be allowed to undergo IVF. The Institute argued that it was not possible to practice this procedure owing to the judgment of March 15, 2000.[97] In a judgment of October 14, 2008, the Superior Court of Accounts for Contentious Administrative and Civil Proceedings, concluded that IVF as an assisted reproduction mechanism was not prohibited in Costa Rica while it did not entail the problems indicated by the Constitutional Chamber, "especially because the actual evolution of this medical procedure makes it possible to fertilize a single egg during the female reproductive cycle for its subsequent transfer to the mother's uterus."[98]

80. The Superior Court of Accounts for Contentious Administrative and Civil Proceedings, ordered the Costa Rican Social Security Institute to make a diagnosis and perform the corresponding medical tests in order to determine the feasibility of practicing assisted reproduction methods, including IVF, on Ms. Henchoz.[99] In addition, it indicated that this procedure should be performed respecting the guidelines established by the Constitutional Chamber, based on the current development of the technique, "so that it [was] not permitted to fertilize more than one ovule in each of the patient's reproductive cycles for transfer, or to fertilize two or more ovules in the same reproductive cycle and much less to

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[93] Dissenting opinion of March 15, 2000, of Justices Arguedas Ramírez and Calzada Miranda (file of annexes to the answering brief, volume IX, folios 10994).

[94] Dissenting opinion of March 15, 2000, of Justices Arguedas Ramírez and Calzada Miranda (file of annexes to the answering brief, volume IX, folios 10994).

[95] *Cf.* Decision No. 2008009578. Action of unconstitutionality filed by Ileana Henchoz Bolaños of June 11, 2008 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folios 5842).

[96] Judgment of the Constitutional Chamber 2005-10602 of August 16, 2005 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folios 5842).

[97] Judgment No. 835-2008 delivered by the Fifth Section of the Court of Accounts for Contentious Administrative and Civil Proceedings in the case brought by Ileana Henchoz Bolaños seeking a declaratory judgment against the Costa Rican Social Security Institute, Case file No. 08-00178-1027-CA of October 14, 2008 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folios 5845 to 5872).

[98] Judgment No. 835-2008 delivered by the Fifth Section of the Court of Accounts for Contentious Administrative and Civil Proceedings in the case brought by Ileana Henchoz Bolaños seeking a declaratory judgment against the Costa Rican Social Security Institute, Case file No. 08-00178-1027-CA of October 14, 2008 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folio 5859).

[99] Judgment No. 835-2008 delivered by the Fifth Section of the Court of Accounts for Contentious Administrative and Civil Proceedings in the case brought by Ileana Henchoz Bolaños seeking a declaratory judgment against the Costa Rican Social Security Institute, File No. 08-00178-1027-CA of October 14, 2008 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folio 5871).

select one embryo among several, and destroy, discard, freeze or experiment on any of them."[100]

81. The Costa Rican Social Security Institute appealed the judgment delivered by the Superior Court and, on May 7, 2009, the justices of the First Chamber of the Supreme Court of Justice annulled the said ruling and declared the action unfounded.[101] The First Chamber indicated that "it has been proved […] that the technique of *in vitro* fertilization would not be advisable for the plaintiff based on her age, because at 48 years old she has already lost her reproductive capacity with her own ovules, which makes an assisted pregnancy extraordinarily improbable and remote," in addition to the fact that the plaintiff, "after the contested judgment, stated through the different media that she would not subject herself to *in vitro* fertilization owing to her age."[102]

82. Furthermore, on January 6, 2005, the Ombudsman's Office issued note No. 00117-2005-DHR, based on a complaint filed by Ms. Espinoza, indicating that, following an appointment with a hospital of the Costa Rican Social Security Institute, the hospital had denied her the possibility of a fertility treatment, arguing the absence of the relevant programs,[103] and had not provided her with a medicine called Menotropin," which the patient had been given on other occasions.[104] In the said note, the Ombudsman's Office issued a series of recommendations, including:

> [The established of] a special program for the treatment of infertility and sterility of all couples and women experiencing this situation, who wish to exercise their right to maternity and paternity, and do not have the financial resources to opt for private medicals service, attention and treatment.[105]

83. The Ombudsman's Office also recommended improving the provision of services and medical attention in those areas in which medical treatment and monitoring is required, such as infertility and, lastly, the establishment of clear guidelines with regard to health care medicines.[106]

E) Draft legislation

84. The Court observes that, in the context of an attempt to comply with the recommendations made by the Inter-American Commission (*supra* para. 1), a bill was

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[100] Judgment No. 835-2008 issued by the Fifth Section of the Administrative Court in the declaratory proceeding filed by Ileana Henchoz Bolaños against The Costa Rican Social Security Institute, File No. 08-00178-1027-CA of October 14, 2008 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folio 5872).

[101] First Chamber of the Supreme Court of Justice, Judgment of May 7, 2009, Case file 08-000178-1027-CA, Decision 000465-F-S1-2009 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folios 5873 to 5879).

[102] First Chamber of the Supreme Court of Justice, Judgment of May 7, 2009, Case file 08-000178-1027-CA, Decision 000465-F-S1-2009, forwarded by the State with the communication of January 22, 2010 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folios 5873 to 5879).

[103] *Cf.* Note No. 00117-2005-DHR of the Ombudsman's Office of January 6, 2005 (file of annexes to the pleadings and motions brief, volume IV, annex XV, folios 5556 to 5562).

[104] *Cf.* Doctor's prescription for Menotropina (file of annexes to the pleadings and motions brief, volume IV, annex XV, folio 5520).

[105] *Cf.* Note No. 00117-2005-DHR of the Ombudsman's Office of January 6, 2005 (file of annexes to the pleadings and motions brief, volume IV, annex XV, folio 5561).

[106] *Cf.* Note No. 00117-2005-DHR of the Ombudsman's Office of January 6, 2005 (file of annexes to the pleadings and motions brief, volume IV, annex XV, folio 5561).

submitted to the Legislative Assembly in 2010 to try and regulate IVF.[107] Among other elements, the bill was based on the protection of all human rights from the moment of fertilization[108] and established that IVF could only be practiced "if all eggs fertilized during a treatment cycle are transferred to the woman who produced them."[109] Furthermore, it prohibited "the reduction or destruction of embryos."[110] In addition, the bill established that "whoever, when applying the [IVF] technique, destroys or reduces or in any other way causes the death of one or more embryos, shall be punished with one to six years' imprisonment."[111] The Court observes that the bill was not approved.[112] For its part, the Pan-American Health Organization (PAHO) criticized the bill and emphasized the "risks of multiple pregnancies that may occur when all the eggs fertilized in a treatment cycle are transferred to the woman who produced them, which also increases the risk of spontaneous abortions, obstetric complications, premature births and neonatal morbidity."[113] The PAHO indicated that the "transfer to a woman of all embryos produced in each treatment cycle, including the defective ones, may endanger the woman's right to life, and even cause a therapeutic abortion which, in turn, negatively affects the enjoyment of the right to health and other related human rights that have been agreed on by PAHO member States."[114]

F) Specific situation of the presumed victims

F.1) Grettel Artavia Murillo and Miguel Mejías Carballo

85. Grettel Artavia Murillo and Miguel Mejia Carballo were married on December 13, 1993.[115] A work-related accident in 1985 when he was 19 years of age had left Mr. Mejia permanently paraplegic;[116] the couple therefore decided to seek medical help.

86. Their doctor diagnosed that the couple would be unable to procreate naturally; thus, it was impossible to achieve a pregnancy without medical assistance. Accordingly, they underwent eight artificial insemination treatments.[117] To cover the cost of the

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107 *Cf.* Bill on *in vitro* fertilization and embryo transfer, File 17,900, October 22, 2010 (file of annexes to the answering brief, volume IX, folios 11055 a 11068).

108 *Cf.* Article 6 of the bill on *in vitro* fertilization and embryo transfer, File 17,900, October 22, 2010 (file of annexes to the answering brief, volume IX, folios 11055 a 11068).

109 *Cf.* Article 8 of the bill on *in vitro* fertilization and embryo transfer, File 17,900, October 22, 2010 (file of annexes to the answering brief, volume IX, folio 11064).

110 *Cf.* Article 8 of the bill on *in vitro* fertilization and embryo transfer, File 17,900, October 22, 2010 (file of annexes to the answering brief, volume IX, folio 11064).

111 *Cf.* Article 19 of the bill on *in vitro* fertilization and embryo transfer, File 17,900, October 22, 2010 (file of annexes to the answering brief, volume IX, folios 11055 a 11068).

112 *Cf.* The State's answer to the application (answering brief file, volume III, folio 1007).

113 Pan-American Health Organization, Technical opinion of the Pan-American Health Organization/ World Health Organization (PAHO/WHO) regarding the content of the Costa Rican bill on *in vitro* fertilization and embryo transfer in the context of the human right to health (file of annexes to the merits report, volume II, folio 835).

114 Pan-American Health Organization, Technical opinion of the Pan-American Health Organization/World Health Organization (PAHO/WHO) regarding the content of the Costa Rican bill on *in vitro* fertilization and embryo transfer in the context of the human right to health, folio 835.

115 *Cf*. Certification of the Civil Registry of December 14, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4074).

116 Mr. Mejías indicated that "an embankment beside the construction buried [him] and when they were able to extract [him, he] was completely paraplegic (T-10 to T12), and was told that he would never be able to walk again, because he had suffered a spinal cord injury." Testimony of Miguel Mejías Carballo at the public hearing held in this case.

117 Brief of Ms. Artavia and Mr. Mejías of December 19, 2011 (file of annexes to the pleadings and motions briefs, volume I, folio 4075).

inseminations, the couple applied for loans and mortgages; they mortgaged their home and sold some of their belongings.[118] However, the artificial inseminations were unsuccessful.[119]

87. In February 2000, their doctor informed the couple that their last alternative to treat their infertility would be to undergo IVF. One month later, on March 15, 2000, the Constitutional Chamber of Costa Rica delivered the judgment that banned this practice in the country.[120] The couple did not have the financial resources to travel abroad to undergo the treatment.[121]

88. The couple divorced on March 10, 2001, and one of the reasons was the impossibility of having biological children.[122]

F.2) Ileana Henchoz and Miguel Yamuni

89. Miguel Antonio Yamuni Zeledón and Ileana Henchoz Bolaños were married on February 22, 1992.[123] Their family unit included a daughter from Ms. Henchoz's first marriage.[124]

90. In 1994 they decided to have children. Starting in 1994 the couple underwent 16 artificial insemination treatments, which were unsuccessful.[125] In 1999, after undergoing three more artificial inseminations with another doctor, as well as other tests, they received the diagnosis that the only way they could have children was by IVF.[126] To this end, the

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118 In this regard, Ms. Artavia indicated that "in order to meet the expenses, [her] former husband had to take out loans and mortgages which he has still not been able to pay off completely." Brief of Ms. Artavia and Ms. Mejías of December 19, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4075). Furthermore, Mr. Mejías declared that he "had already mortgaged [his] house, had spent all [his] savings so that [they] could undergo *in vitro* fertilization in Costa Rica." Statement by Miguel Mejías Carballo at the public hearing held in this case.

119 Brief of Ms. Artavia and Mr. Mejías of December 19, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4075). Similarly, Mr. Mejías indicated that they had undergone all the inseminations, but "they were unsuccessful because there was a problem with [his wife's] uterus." Statement by Miguel Mejías Carballo at the public hearing held in this case.

120 Mr. Mejías stated that, when his wife was operated on to resolve the problem she had with her uterus, and when "she was well enough to undergo the technique of *in vitro* fertilization, and [they] were happy and content, that was when it was banned and, to date, they have been unable to." Statement by Miguel Mejías Carballo at the public hearing held in this case.

121 On this point, Ms. Artavia indicated that, since the time the practice of IVF was banned, they had become desperate and frustrated "owing to the impossibility of going abroad to undergo […] this technique because of the lack of funds." Brief of Ms. Artavia and Mr. Mejías of December 19, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4076). Similarly, statement by Miguel Mejías Carballo during the public hearing held in this case.

122 Brief of Ms. Artavia and Mr. Mejías of December 19, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4077) and Divorce certificate of March 10, 2011 (file of the State's annexes, volume VIII, folios 10269 to 10285).

123 *Cf*. Certification of the Civil Registry of December 6, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXIX, folio 5902).

124 Statement by Ileana Henchoz Bolaños at the public hearing in this case.

125 In this regard, Ms. Henchoz Bolaños indicated that "a doctor recommended [that they] undergo artificial insemination; [they] underwent approximately 15 or 16 artificial inseminations, but saw no results, which was very difficult because this went on for a long time." Statement by Ms. Ileana Henchoz Bolaños at the public hearing held in the instant case.

126 Affidavit of Ileana Henchoz Bolaños of December 13, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXIX, folio 5885) and Affidavit of Miguel Antonio Yamuni Zeledón of December 13, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXIX, folio 5881).

couple underwent a series of laboratory tests.[127] Following this, their doctor indicated that "there was a suboptimal male factor, and an intracytoplasmic sperm injection procedure was performed without results."[128]

91. In 1999, Ms. Henchoz underwent several procedures and medical tests; for example a myomectomy in which a fibroid was removed.[129] Her doctor stated that "in November that year, an unsuccessful insemination was performed."[130] On January 7, 2000, Ms. Henchoz was prescribed ovarian stimulation medication.[131] On February 15 Ms. Henchoz had two hormone laboratory tests and an ultrasound.[132]

92. On March 10, 2000, the judgment of the Constitutional Chamber was handed down; accordingly, the couple decided to travel to Spain to continue the treatment.[133] Prior to the trip, in April that year, they had several tests and were prescribed medication.[134]

93. The couple were in Spain from April 18 to 28, 2000.[135] On April 21 they underwent the necessary procedures and laboratory tests.[136] On April 23, two embryos were implanted in Ms. Henchoz.[137] The cost of the treatment in Spain was 463,000 pesetas.[138]

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[127] *Cf.* Certifications from the *Laboratorio Clínico "La California"* of hematology, urine tests, "anti-sperm antibody test," hysterosalpingography, transvaginal ultrasound of June 1999 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5700 to 5703).

[128] Written statement of Dr. Gerardo Escalante Lopez of August 29, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5827).

[129] *Cf.* Certification of the *Centro Médico de Diagnostico por Ultrasonido "La California*" of vaginal and transvaginal ultrasounds of August and November 1999 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5708, 5730 to 5733); certifications of the *Laboratorio Clínico "La California*" of hormone tests of November 23 and 25, 1999 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5738, 5739 and 5742), and certification of the myomectomy of September 9, 1999 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5789 and 5790).

[130] *Cf.* Written statement of Dr. Gerardo Escalante Lopez of August 29, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5827).

[131] *Cf.* Prescription by Dr. Escalante for Ms. Henchoz Bolaños of five ovary stimulation medicines of January 1, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5744 and 5745).

[132] *Cf.* Certifications from *Laboratorio Clínico "La California"* for a transvaginal ultrasound and hormone tests of February 15, 2000, (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5748 to 5750).

[133] Affidavit of Miguel Antonio Yamuni Zeledón of December 13, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXIX, folio 5881). Similarly, Ms. Henchoz Bolaños indicated that, since the only way they could have children was by undergoing IVF, "the only solution was to go abroad, because Costa Rica had just banned it. [Their] right to have children was curtailed in 2000." Affidavit of Ileana Henchoz Bolaños of December 13, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXIX, folio 5885).

[134] *Cf.* Certification of the *Laboratorio Clínico "La California"* of hormone tests and transvaginal ultrasounds of April 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5753 and 5756 to 5762), and hormone stimulation prescription from her doctor of April 10, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5754).

[135] *Cf.* Certification of the Ministry of the Interior and Police of the exit on April 17, 2000, and entry on April 28, 2000, of Miguel Antonio Yamuni Zeledón and Ileana Henchoz Bolaños (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5764 and 5767); Invoice of the Hotel Renasa in Valencia dated April 24, 2000; Invoice for IVF of the *Instituto Valenciano de Infertilidad* (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5781).

[136] *Cf.* Certification of procedures and laboratory exams of April 21, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5775 and 5776).

[137] *Cf.* Certification of embryo transfer (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5773).

[138] *Cf.* Invoice for treatment dated April 28, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5781).

94. On May 2, 5, 8, 15 and 16, 2000, Ms. Henchoz had seven hormonal tests in order to monitor her pregnancy.[139] The doctor indicated that "an IVF procedure was performed at the *Instituto Valenciano de Infertilidad* (IVI), Valencia, Spain, and a biochemical pregnancy was achieved but it disappeared in a few days. Biochemical abortion."[140]

95. The couple decided to travel to Colombia. Consequently, several medical tests were performed on Ms. Henchoz for the first stage of IVF.[141] Mr. Yamuni and Ms. Henchoz flew to Colombia on November 25, 2000.[142] The IVF in Colombia took place between November 25 and December 3, 2000.[143] On December 5, 13, 14 and 22, 2000, Ms. Henchoz underwent five hormone tests to monitor a possible pregnancy,[144] and two ultrasounds on December 19 and 27.[145] This new attempt was unsuccessful.[146] On April 27, 2001, the couple were given a cytogenetic report on the human genetics section, which indicated that there had been two abortions.[147]

F.3) Oriéster Rojas and Julieta González

96. Oriéster Rojas and Julieta Gonzalez were married on July 20, 1996.[148] Several months later and in view of the absence of a pregnancy for Ms. González, Mr. Rojas started a treatment with the Costa Rican Social Security Institute. Between 1997 and 1999, Mr. Rojas had an operation and various medical tests.[149]

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139 *Cf.* Certification from *Laboratorio Clínico "La California"* of hormone tests on May 2, 5, 8 and 15, 2000, (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5782 to 5787).

140 *Cf.* Written statement of Dr. Gerardo Escalante Lopez of August 29, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5827).

141 *Cf.* Certifications from *Laboratorio Clínico "La California"* for transvaginal ultrasounds from November 13, 20 and 23, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5791 to 5794 and 5799 to 5802). Certification from *Laboratorio Clínico "La California"* for hormone test on November 15, 2000, (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5792).

142 *Cf.* Certification of the Ministry of the Interior and Police of the exit on November 25, 2000, and entry on December 2, 2000, of Miguel Antonio Yamuni Zeledón and Ileana Henchoz Bolaños (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5764 and 5767).

143 *Cf.* Certification of IVF from the "Conceptum" Laboratory of Bogotá, Colombia, of December 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5804).

144 *Cf*. Certifications from *Laboratorio Clínico "La California"* for hormone test son December 5, 13, 14 and 22, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5805 to 5807 and 5810).

145 *Cf.* Certifications from *Laboratorio Clínico "La California"* for transvaginal ultrasounds of December 19, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folios 5808-5809 and 5813-5814).

146 Written statement of Dr. Gerardo Escalante Lopez of August 29, 2011 (file of annexes to the pleadings and motions brief, volume V, annex XXVII, folio 5827). Similarly, Ms. Henchoz Bolaños indicated that they "went to Colombia, and it was the same anguish, same lack of sleep, the same crystal box on the 'plane. [They] came back here and well, the baby did not happen." Statement of Ileana Henchoz Bolaños during the public hearing held in the instant case.

147 *Cf.* Report of cytogenetic laboratory results, human genetics section, INISA, *Universidad de Costa Rica*, dated April 27, 2000 (file of annexes to the pleadings and motions brief, volume V, annex XXIX, folios 5817 and 5818).

148 *Cf.* Marriage certificate of Oriester Rojas and Julieta Gonzalez (file of annexes to the pleadings and motions brief, volume VIII, folio 10247).

149 *Cf.* Medical records of Oriéster Rojas at the Costa Rican Social Security Institute's Hospital Mexico, medical examinations, reports, certifications and prescriptions of August, October and December 1997, May and July 1999 (file of annexes to the pleadings and motions brief, volume II, folio 4224 to 4234, 4256, 4257 and 4258).

97. On February 6, 2001, Ms. González initiated the first stage to prepare for IVF, and was issued with two prescriptions for the medicines known as Puregon and Lupron,[150] so as to be able to undergo IVF in Panama. On March 3, 5, 9 and 12, 2001, Ms. Gonzalez started the ovulation induction cycle, one of the required prior steps, in order to subsequently travel to Panama for the IVF.[151]

98. Mr. Rojas and Ms. Gonzalez were in Panama from March 13 to 20, 2001, in order to undergo the IVF procedure.[152] The IVF procedure was performed with intracytoplasmic sperm injection (ICSI) due to the severe male factor.[153] After this procedure they were prescribed several medicines.[154]

99. Upon returning from Panama Ms. Gonzalez again underwent hormone tests, which determined that there was no pregnancy.[155]

100. On January 23, 2002, Ms. Gonzalez and Mr. Rojas began a direct adoption procedure,[156] which was authorized.[157]

F.4) Víktor Sanabria León and Claudia Carro Maklouf

101. Claudia Carro Maklouf and Viktor Sanabria were married on April 16, 1999. Ms. Carro had three children from her first marriage, while Mr. Sanabria had no children from his first marriage.[158] Before their marriage, the couple had both been to the doctor and, on September 21, 1998, Mr. Sanabria was diagnosed with "hypomotility sperm" and "elevated seminal viscosity,"[159] associated with male infertility, a pathology that, if not corrected, would result in a low probability of obtaining a natural pregnancy.[160]

102. Meanwhile, Ms. Carro, following a series of medical tests that included a hysterosalpingogram, was diagnosed with tubal damage; hence it was recommended that

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150 *Cf.* Medical records of Julieta González Rojas at the Costa Rican Social Security Institute's Hospital Mexico (file of annexes to the pleadings and motions brief, volume II, folios 4263 and 4264).

151 *Cf.* Medical records of Julieta González, medical examinations and ultrasounds of March 3, 5, 9 and 12, 2001 (file of annexes to the pleadings and motions brief, volume II, folios 4270 to 4281).

152 *Cf.* Receipts from Hotel Roma for March 13 to 16, 2001 (file of annexes to the pleadings and motions brief, volume II, folios 4283 to 4285).

153 *Cf.* Certification by the treating physician that "[Julieta González] underwent ICSI in Panama, where she had to stay for three more days before returning to the country." Certification of June 8, 2001 (file of annexes to the pleadings and motions brief, volume II, folio 4300).

154 *Cf.* Prescriptions issued by the treating physician (file of annexes to the pleadings and motions brief, volume II, folios 4286, 4289 and 4290); prescriptions issued by *Clínica Hospital San Fernando* (file of annexes to the pleadings and motions brief, volume II, folios 4288 and 4290), and receipts from several pharmacies, March 2001 (file of annexes to the pleadings and motions brief, volume II, folios 4287 and 4293).

155 *Cf.* Medical records of Julieta González, medical examination of March 30, 2001 (file of annexes to the pleadings and motions brief, volume II, folio 4299).

156 *Cf.* Adoption file of Oriéster Rojas and Julieta González, Notification of start of the adoption procedure (file of annexes to the pleadings and motions brief, volume II, folios 4302).

157 *Cf.* Judgment No. 318, File No. 02-000029-0673-FA-3 authorizing the adoption (file of annexes to the pleadings and motions brief, volume II, folios 4498 to 4501).

158 *Cf.* Affidavit of Claudia María Carro Maklouf, "Life story."

159 *Cf.* Medical certification from Dr. Gerardo Escalante López dated August 12, 2011 (file of annexes to the pleadings and motions brief, volume II, folio 4700).

160 *Cf.* Medical certification from Dr. Gerardo Escalante López dated November 14, 2011 (file of annexes to the pleadings and motions brief, volume II, folio 4702).

they undergo IVF.[161] In October 1998 she underwent surgery to repair the possible tubal damage. In December 1999, Ms. Carro underwent the first IVF attempt, which was unsuccessful. In early 2000, Ms. Carro had another operation.[162]

103. Owing to the Constitutional Chamber's judgment, the couple went to Spain to undergo IVF at the *Instituto Valenciano de Infertilidad* (hereinafter "IVI") in Madrid.[163]

104. The couple travelled to Spain in October 2001.[164] On October 22, 2001, the IVI issued an invoice for 413,000 Spanish pesetas, for "professional services to the patient."[165] The IVF performed in Spain was not successful, thus there was no pregnancy.[166]

105. The couple initiated an adoption procedure on December 10, 2002, and they were given the temporary guardianship of a girl child.[167] Ms. Carro and Mr. Sanabria separated in November 2003, and were divorced on January 27, 2005.[168] On December 1, 2006, Mr. Sanabria adopted a girl child on an individual basis[169] and, in April 2009, Ms. Carro adopted a boy child on an individual basis.[170]

F.5) Giovanni Vega and Joaquinita Arroyo

106. Joaquinita Arroyo and Giovanni Vega were married on December 8, 1989.[171]

107. Around October 1990, since she had not become pregnant, Ms. Vega began a medical treatment that entailed several tests.[172] Following this treatment, 12 artificial inseminations were performed.[173] Mr. Vega also underwent several medical tests.[174]

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161 *Cf.* Medical certification from Dr. Gerardo Escalante López dated August 29, 2011: "[…] with a history of infertility owing to posterior bilateral tubal impermeability after two caesarean sections during her first marriage" (file of annexes to the pleadings and motions brief, volume I, folio 4119).

162 *Cf.* Medical certification from Dr. Gerardo Escalante López dated August 29, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4119).

163 To this end, she had to take daily doses of Lupron subcutaneously. *Cf.* Medical certification of Dr. Gerardo Escalante López of October 1, 2001 (file of annexes to the pleadings and motions brief, volume II, folio 4688).

164 *Cf.* Voucher for purchase of plane ticket dated September 20, 2001 (file of annexes to the pleadings and motions brief, volume II, folio 4695).

165 *Cf.* Invoice for 413,000 Spanish pesetas issued by the IVI on October 22, 2001, in the name of Carro Maklouf, Claudia (file of annexes to the pleadings and motions brief, volume II, folio 4690).

166 *Cf.* Psychiatric expert appraisal: "[t]wo embryos are implanted and the result is negative" (file of annexes to the pleadings and motions brief, volume I, folio 4127)

167 *Cf.* Adoption file, authorization by the National Child Welfare Agency, Adoptions Office, for the delivery of the child to Viktor Hugo Sanabria León and Claudia María Carro Maklouf on May 19, 2003 (file of annexes to the pleadings and motions brief, volume III, folio 4776).

168 *Cf.* Civil Registry Office, Divorce certificate dated December 16, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4118).

169 *Cf.* Judicial decision approving the request for individual adoption filed by Víktor Hugo Sanabria Leon dated December 1, 2006 (file of annexes to the pleadings and motions brief, volume III, folios 4928 to 4932).

170 *Cf.* Psychiatric expert appraisal: "In 2009 [Claudia María Carro Maklouf] adopt[ed] her son" (file of annexes to the pleadings and motions brief, volume I, folio 4128).

171 *Cf*. Certification of the Civil Registry of March 22, 2012 (file of annexes to the pleadings and motions brief, volume VIII, folio 10251).

172 "In February 1991, the medical evaluations began to determine why [she] was not becoming pregnant, [her] ovulation was monitored for several cycles and [she] received treatments to stimulate ovulation." Affidavit of Joaquinita Arroyo Fonseca (file of annexes to the pleadings and motions brief, volume IV, annex XI, folio 5266). *Cf*. Certification of anovulation from *Clínica Ultrasonido Paseo Colon, S.*A. dated October 15, 1991, and prescription for

108. The couple went to another doctor, and another series of artificial insemination procedures were performed. On some occasions, two inseminations were performed in a single cycle.[175]

109. On October 25, 2000, Ms. Arroyo underwent a laparoscopy in order to determine the reasons for her inability to conceive a child.[176] On October 13, 2001, her doctor classified the case as "unknown cause" and referred the couple to the Barraquer Clinic in Colombia, in order to undergo IVF.[177]

110. The couple programmed a trip to Colombia around October 25, 2001;[178] but this trip to Colombia, where the second phase of IVF would be carried out, was not made. Once again, the couple decided to begin preparing for IVF to be performed in Colombia; however, on March 7, 2002, Ms. Arroyo was diagnosed with "intramural fibroids."[179] On April 4, 2002, she had a uterine myomectomy.[180] On April 15 a biopsy was carried out.[181]

111. In 2003, the couple adopted a child. In 2006, Ms. Arroyo became pregnant and gave birth to a daughter on June 25, 2007.[182]

F.6) Karen Espinoza and Héctor Jiménez

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progesterone: 1 ml, and Omifín for five days (file of annexes to the pleadings and motions brief, volume III, annex X, folio 4990).

173 Affidavit of Joaquinita Arroyo Fonseca (file of annexes to the pleadings and motions brief, volume III, annex X, folios 5266 and 5267). *Cf*. Certifications from *Clinica Ultrasonido Paseo Colon, S.A*. of ultrasounds for follicular monitoring of March 24 and 27, and September 7, 1992 (file of annexes to the pleadings and motions brief, volume III, annex X, folio 4991, 4993, 4994 and 5267).

174 *Cf*. Certification from *Laboratorio Clínico Doctor Valenciano*, UCR, of an ultrasound for follicular monitoring of April 23, 1992 (file of annexes to the pleadings and motions brief, volume III, annex X, folio 4992). Certification from *Laboratorio Clínico Doctor Valenciano*, UCR for a spermogram dated March 29, 1995 (file of annexes to the pleadings and motions brief, volume III, annex X, folio 5003).

175 In this regard Joaquinita Arroyo indicated that they "began the testing protocol that included fresh procedures to monitor ovulation, ultrasounds, a radiological study of the uterine cavity and Fallopian tubes." Affidavit of Joaquinita Arroyo Fonseca (file of annexes to the pleadings and motions brief, volume IV, annex XI, folio 5268), and Certifications from the *Centro Médico de Diagnostico por Ultrasonido "La California"* of vaginal ultrasounds of April 18, May 14 and September 5, 1996, and October 28 and 29, 1997 (file of annexes to the pleadings and motions brief, volume III, annex X, folios 5010, 5011, 5014, 5016 and 5017)

176 *Cf.* Certification of diagnosis laparoscopy from the Costa Rican Social Security Institute's Hospital Mexico (file of annexes to the pleadings and motions brief, volume III, annex X, folios 5044 to 5046).

177 *Cf.* Report of the treating physician referring the case to the specialist at the Barraquer Clinic in Bogotá, Colombia, dated October 13, 2001 (file of annexes to the pleadings and motions brief, volume III, annex X, folio 5050).

178 Affidavit of Joaquinita Arroyo Fonseca (file of annexes to the pleadings and motions brief, volume IV, annex X, folios 5271).

179 *Cf.* Certification from *Centro Médico de Diagnostico por Ultrasonido "La California"* for a transvaginal ultrasound on March 7, 2002 (file of annexes to the pleadings and motions brief, volume III, annex X, folio 5051).

180 *Cf.* Certification from the *Asociación Hospital Clínica Católica de la Purisima Concepción* of uterine myomectomy of April 4, 2002 (file of annexes to the pleadings and motions brief, volume III, annex X, folios 5053 to 5082).

181 *Cf.* Certification from *Laboratorio "Itopat S.A*. of April 15, 2002 (file of annexes to the pleadings and motions brief, volume III, annex X, folio 5084).

182 *Cf.* Birth certification of Sofia Alejandra Vega Arroyo from the Civil Registry dated December 6, 2011 (file of annexes to the pleadings and motions brief, volume IV, annex XI, folio 5316).

112. Ms. Espinoza and Mr. Jiménez were married on February 10, 2001. Towards the end of 2001, the couple sought medical treatment, in order to obtain a pregnancy. During this treatment they underwent several tests.[183] On July 23, 2002, Ms. Espinoza had a laparoscopy owing to a diagnosis of endometriosis, seven-year primary infertility and tubal impermeability.[184]

113. Between August 2002 and 2004 the couple continued undergoing medical examinations[185] and laboratory tests.[186] In 2004, Ms. Espinoza underwent three artificial inseminations and one laparoscopy, which determined "the presence of pelvic endometriosis and anatomic anomaly due to a primary tubal infertility factor" in the patient and, consequently, "the doctor recommended moving on to the assisted reproduction technique [IVF] as a conception method for her and her husband."[187]

114. On January 24, 2006, Ms. Espinoza underwent an exploratory laparotomy due to infertility and pelvic pain.[188] In 2006, her doctor issued a second opinion about resorting to IVF. Consequently, the first phase of IVF was performed twice in Costa Rica in order to go to Colombia. However, there was no ovarian response;[189] therefore they did not continue with the following stage of IVF.

115. On October 26, 2007, the couple had a daughter by natural pregnancy.[190]

F.7) Carlos Eduardo de Jesús Vargas Solórzano and María del Socorro Calderón Porras

116. María del Socorro Calderón had two children from her first marriage. She began to live with Mr. Vargas in 1989 and they were married in 1995.[191]

117. In 1994, a doctor told Ms. Calderón that another doctor had cut her Fallopian tubes.[192] Subsequently, ovarian cysts were discovered and she had an operation. Then, Mr.

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183 *Cf.* Certifications of gynecological ultrasound, mammography, hysterosalpingography, spermogram, and blood tests carried out in 2002 (file of annexes to the pleadings and motions brief, volume IV, annex XIV, folios 5462 to 5486).

184 *Cf.* Brief of the treating physician (file of annexes to the pleadings and motions brief, volume IV, annex XIV, folios 5512).

185 *Cf.* Certifications of transvaginal ultrasounds and hormone tests, among other tests, carried out in 2002 (file of annexes to the pleadings and motions brief, volume IV, annex XIV, folios 5487 to 5499).

186 *Cf.* Certifications of laboratory tests of March 16, 19, 20, 22 and 24, 2004 (file of annexes to the pleadings and motions brief, volume IV, annex XIV, folios 5503 to 5509).

187 *Cf.* Brief of the treating physician (file of annexes to the pleadings and motions brief, volume IV, annex XIV, folios 5512).

188 In this regard, Ms. Karen Espinoza indicated that "in 2004, it was determined that [she] ha[d] cysts of a considerable size, and at Hospital Mexico [she] had an operation with a possible risk of hysterectomy." Affidavit of Karen Espinoza Vindas (file of annexes to the pleadings and motions brief, volume IV, annex XVI, folio 5567).

189 Affidavit of Karen Espinoza Vindas (file of annexes to the pleadings and motions brief, volume IV, annex XVI, folio 5567).

190 *Cf.* Birth certificate from the Civil Registry of December 6, 2011 (file of annexes to the pleadings and motions brief, volume IV, annex XVI, folio 5572).

191 *Cf.* Affidavit of María Del Socorro Calderón Porras of December 11, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5616) and marriage certificate from the Civil Registry dated December 6, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5631).

192 *Cf.* Affidavit of María Del Socorro Calderón Porras of December 11, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5616).

Vargas was diagnosed with varicocele, which called for various tests based on which it was determined that the only option that the couple had to conceive would be by IVF.[193]

118. Following the judgment of the Constitutional Chamber of March 15, 2000, the doctor explained the need to use medication and to travel abroad to carry out the second phase of IVF.[194] The couple decided to adopt a child, but they were not awarded custody of a child.[195]

F.8) Enrique Acuña Cartín and Ana Cristina Castillo León

119. Enrique Acuña Cartín and Ana Cristina Castillo León were married on September 27, 1988.[196] After four years of marriage they started to seek a pregnancy. While undergoing tests, Mr. Acuña was diagnosed with varicocele in 1997, and it was found that the low spermatozoid count would make natural conception impossible; it was therefore suggested that they resort to IVF.[197]

120. Meanwhile, Ms. Castillo went to several doctors and she was diagnosed with endometriosis and retroverted uterus. It was also determined that Ms. Castillo suffered from "third degree prolapse of the uterus" and endometriosis in the Fallopian tubes. She therefore underwent surgery to correct the "prolapse" and inspect her Fallopian tubes. She also underwent hormone treatment to suspend her menstrual period for over a year.[198]

121. Subsequently, the couple underwent 11 artificial inseminations.[199] In March 2000, Ms. Castillo was following a medical protocol to control the problems diagnosed and awaiting the result of the latest insemination and, if the results were not positive, the next step would be to undergo the first IVF.[200]

122. Finally, Mr. Acuña and Ms. Castillo were divorced on March 21, 2007.[201]

F.9) Andrea Bianchi Bruna y Germán Moreno Valencia

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193 He underwent a varicocelectomy, which improved the condition of his spermazoids by 60%, but without achieving normal parameters. Owing to both the irreversible tubal factor in the patient, and her spouse's male factor, the only option for this couple to conceive would be by *in vitro* fertilization. *Cf.* Attestation of the treating physician dated November 16, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5614).

194 *Cf.* Medical certification of Dr. Ribas of November 16, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5613).

195 *Cf.* Affidavit of María Del Socorro Calderón Porras of December 11, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5618)

196 *Cf.* Marriage certification from the Civil Registry dated December 6, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5678).

197 *Cf.* Affidavit of Enrique Francisco Acuna Cartín of December 7, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5671)), and attestation of the treating physician of October 27, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4080).

198 *Cf.* Testimony of Ana Cristina Castillo León (file of annexes to the pleadings and motions brief, volume I, folio 4102).

199 *Cf.* Affidavit of Enrique Francisco Acuna Cartín of December 7, 2011 (file of annexes to the pleadings and motions brief, volume IV, folio 5673).

200 *Cf.* Testimony of Ana Cristina Castillo León (file of annexes to the pleadings and motions brief, volume I, folio 4103).

201 *Cf.* Divorce certificate from the Civil Registry dated March 21, 2007 (file of annexes to the pleadings and motions brief, volume I, folio 4079).

123. Andrea Bianchi Bruna and Germán Moreno Valencia were married on June 15, 1996.[202]

124. After three years of marriage and since they were unable to achieve a pregnancy, the couple sought medical treatment. During the treatment Ms. Bianchi underwent several medical tests, including a hysterosalpingogram, which revealed that she suffered from endometriosis.[203] Accordingly, Ms. Bianchi underwent a first operation, an exploratory laparoscopy,[204] which revealed total obstruction of her Fallopian tubes. The doctor therefore indicated that there was no possibility of a pregnancy, because this involved using the passage through the Fallopian tubes.[205]

125. During 2000 the couple underwent three artificial inseminations without success. Following the March 15 judgment of the Constitutional Chamber, the couple were advised that their only option to achieve a pregnancy would be to travel to another country to do so and, in June 2001, it was recommended that they leave for Colombia immediately owing to the unexpected development of follicles in the ovary. The couple travelled to Bogotá, Colombia, to begin the tests. After several medical evaluations, IVF was performed; however, the procedure was unsuccessful.[206] In December 2001, the couple returned to Colombia, where a second IVF was performed.[207] On December 17, 2001, the pregnancy test was positive. Ms. Bianchi gave birth to twins on July 11, 2002.[208]

VII
PRIOR CONSIDERATION ON THE PURPOSE OF THE INSTANT CASE

Arguments of the Commission and the parties

126. Representative Molina argued that, in this case, "the State of Costa Rica has, for over 11 years, maintained a consistent and ongoing policy of banning [IVF] and any other method of assisted reproduction, and this has permeated not only the acts and omissions of all branches of the State, but has extend[ed] to encouraging among civil society the repudiation of persons who suffer from this type of reproductive disability."[209] He also

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202 *Cf.* Marriage certificate from the Civil Registry dated December 19, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4107).

203 *Cf.* Expansion of the expert deposition of Dr. Delia Ribas (file of annexes to the pleadings and motions brief, volume I, folio 2374).

204 *Cf.* Expansion of the expert deposition of Dr. Delia Ribas (file of annexes to the pleadings and motions brief, volume V, folio 2374).

205 *Cf.* Testimony of Andrea Bianchi Bruna and Germán Moreno Valencia of December 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4112).

206 *Cf.* Testimony of Andrea Bianchi Bruna and Germán Moreno Valencia of December 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4113 to 4116).

207 *Cf.* Testimony of Andrea Bianchi Bruna and Germán Moreno Valencia of December 2011; "By December we had saved enough for the second attempt […]" (file of annexes to the pleadings and motions brief, volume I, folio 4116).

208 *Cf.* Testimony of Andrea Bianchi Bruna and Germán Moreno Valencia of December de 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4116).

209 In this regard, he added that the alleged "State policy [was] demonstrated by several and continuous acts and omissions of the State," for example: (i) t]he Constitutional Chamber's prohibition of the practice of […] IVF"; (ii) "the Chamber's prohibition that the Legislature perform its function [of] legislating on the matter"; (iii) "the inactivity of the Legislature and the Executive regarding assisted reproduction methods"; (iv) "a complaint before

argued that, "after the ruling, the victims suffered social stigmatization that undermined their honor and social reputation." In this regard, he argued that "[t]he disclosure in the media of the ban on IVF, and the way that infertility was characterized by some persons stigmatized the [presumed] victims and their family and violated their right to privacy. [In addition,] in their campaign against IVF, some of the media emitted offensive and denigrating messages against the plaintiffs in general, affecting their mental health." He added that the presumed "victims of the case were judged by civil society based on the lack of information on the subject; [thus] value judgments were constantly made in the different media with a broad range of defamatory terms, aimed at denigrating the struggle undertaken by these couples."

127. With regard to the public exposure of the presumed victims, representative May argued that "[…] the pain and suffering derived from the public exposure of the private life of the victims to society and the media persists, because it is clear that, ultimately, this is a fundamental and decisive consequence of the Constitutional Chamber's judgment."

128. Regarding the arguments of the representatives, the State presented a preliminary objection (*supra* para. 40) that these facts were not included in the brief submitting the case presented by the Commission, and were not supervening facts. It also argued that IVF "not only does not resolve the health problems of infertile persons, mainly women, but also increases the risks to their health[, inasmuch as] women can suffer from the syndrome of ovarian hyperstimulation, which in some cases can cause electrolyte imbalance, hepatic dysfunction and thrombotic phenomena that can be fatal. Other complications include bleeding, infection and adnexal torsion, which can put the mother's life at risk."[210] Furthermore, the State argued that "the psychological effects of IVF on women and on couples are well documented."[211] In addition, the State argued potential damage to the children conceived with the assistance of IVF and "abnormal syndromes."[212] The State asserted that "another problem associated with IVF technique and ovarian hyperstimulation is the generation of multiple births [which] are common in this practice," and which imply "a danger to the health of women."[213]

129. Regarding the cryoconservation of embryos, the State argued that "to achieve adequate conservation […] cryoprotectors are used; these are chemical agents that […] exercise a certain degree of toxicity on the embryos depending on their concentration and

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the Ombudsman's Office"; (v) an administrative proceeding," and (vi) "an action on unconstitutionality against the Chamber's decision."

[210] It assured that "[t]he mortality rate in pregnancies using [IVF] is higher than the rate of maternal mortality in the general population, [because it can] cause complications during birth and preeclampsia, as well as an increase in the risk of endometrial cancer and ovarian tumors."

[211] It indicated that, "the psychological problems reported in patients that undergo [IVF] include, above all, depression, anxiety, unresolved mourning; in addition to problems for the couple, in both their sexual relationship and life style."

[212] It argued that "in children conceived with the assistance of the [IVF] technique the risk is 2 times higher for heart septum defects, 2.4 times higher for harelip, with or without cleft palate, 4.5 times higher for esophageal atresia, 3.7 times higher for anal atresia, 9.8 times higher for gastrointestinal anomalies, and 1.54 times higher for musculoskeletal defects, in relation to children conceived naturally. In addition, […] it is more frequent to find abnormal syndromes." Furthermore, it indicated that "other studies […] show that [IVF] could be related to an alteration of the epigenetic changes in the gametes [IVF], thus affecting overall patterns of methylation and genetic regulation, and these changes could affect genetic expression in the long-term."

[213] It argued that "if multiple pregnancies are compared to single pregnancies, twins and triplets are, respectively, four and eight times more prone to perinatal death and have a higher risk of presenting disabilities in the long term." It indicated that an alternative for multiple births […] is a practice named "embryo reduction," a technique "intended to cause the selective death of the embryos already implanted," considering it a type of "provoked abortion" and thus subject to criminal sanctions.

the time that they are exposed. At the same time, "freezing and unfreezing embryos can cause alterations to their morphologic characteristics and the survival rate of blastocysts, which could translate into lower implantation rates." Lastly, the State indicated that "[IVF] entails a number of dilemmas and legal problems that are equally profound and complex to resolve." In this regard, it mentioned the following issues: (i) "there is no consensus […] regarding the legal status of frozen embryos, and on the regulation and duration of their conservation and purpose. Specifically, these situations are problematic when the parents […] separate or divorce"; (ii) "the separation of the parents who have frozen their embryos can lead to the problem of forced paternity […] if one of the parents demands the implantation of the embryo in spite of the separation or divorce," and (iii) "[IVF] poses a far-reaching problem with regard to the regulation of paternity," in particular the problem of "the paternity rights of the husband of the woman who under[went] a heterogeneous [IVF] – with genetic material from a man other than her husband or partner," given that "one of the essential factors to determine paternity is the determination of the genetic material."[214]

Considerations of the Court

130. The Inter-American Commission focused the purpose of this case on the effects of the judgment delivered by the Constitutional Chamber. However, the parties have presented arguments concerning the following issues, which exceed the analysis made in the Constitutional Chamber's judgment, namely: (i) a presumed "context" alleged by representative Molina; (ii) the alleged interference of the media and society in the private life of the presumed victims, and (iii) general arguments about the problems that IVF could represent. In order to determine the purpose of this case, the Court will establish whether these disputes fall within the framework of the case.

131. First, the Court has established that the factual framework of the proceedings before the Court consists of the facts included in the Merits Report submitted to the Court's consideration.[215] Consequently, it is not admissible for the parties to argue new facts that differ from the contents of this report, without prejudice to describing those that explain, clarify or reject the facts that it mentions and that were submitted to the Court's consideration.[216] The exceptions to this principle are facts categorized as supervening, provided that they are related to the facts of the proceedings. In addition, the presumed victims and their representatives can invoke the violation of rights other than those included in the merits report, provided they abide by the facts contained in the said document, because the presumed victims are the holders of all the rights recognized in the Convention.[217] In summary, it corresponds to the Court to decide in each case on the

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[214] The State added that (iv) Another area "where there is no consensus is the area of the maternity rights of the ovule donor or surrogate mother – an assumption that would have to be considered in the event that the sterile woman lacks a uterus"; (v) regarding "posthumous conception," meaning "when the woman requests the implanting of the frozen embryos of her husband or partner who is deceased […], conception occurs after the death of the bearer of the genetic material" and this "poses an unresolved question […]: the inheritance rights of a child born from this conception, and (vi) "the regulation of the liability regime for clinics and doctors who practice [IVF] is particularly sensitive in cases where genetic material has been confused and embryos that are not her own have been implanted in a woman."

[215] *Cf. Case of the Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Vélez Restrepo and family v. Colombia*, para. 47.

[216] *Cf. Case of the Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and Case of the *Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012 Series C No. 250, para. 52.

[217] *Cf. Case of the Five Pensioners v. Peru. Merits, reparations and costs*, para. 153, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012 Series C No. 250, para. 52.

admissibility of arguments related to the factual framework in order to safeguard the procedural equality of the parties.[218]

132. The Court notes that the Commission did not allege the context mentioned by representative Molina. However, the facts used by the representative to allege this context were described by the Inter-American Commission in its Merits Report. In this regard, the Court considers that the representative did not provide sufficient information or arguments to allow it to be considered that this case falls within the framework of "a State policy" against IVF and "any other method of assisted reproduction" in Costa Rica. Therefore, the Court considers that this case is not related to the alleged "State policy" presented by representative Molina. Notwithstanding the above, it will take into account the facts described by the representative when analyzing the merits.

133. In relation to the violations alleged by the two representatives on the interference of the media and society in the private life of the presumed victims, regarding which the State filed a preliminary objection (*supra* para. 40), the Court observes that the facts that support this argument were not included in the merits report issued by the Commission; therefore, they will not be considered part of the factual framework of the case.

134. Lastly, the Court underscores that the State presented general arguments related to the presumed effects or problems that IVF could cause in relation to: (i) potential risks that the practice could have for women; (ii) alleged psychological effects on couples who seek this treatment; (iii) presumed genetic risks to the embryos and the children born as a result of the treatment; (iv) the alleged risk of multiple births; (v) the supposed problems resulting from cryoconservation of embryos, and vi) the possible legal problems and dilemmas that could arise from the application of the technique.

135. In this regard, the Court considers that although the State produced evidence and arguments regarding the above, in order to analyze their merits, the Court will only take into account the evidence and allegations related to the arguments explicitly used in the reasoning of the Constitutional Chamber's judgment. Thus, and based on the subsidiary nature of the inter-American system,[219] the Court is not competent to decide disputes that were not taken into account by the Constitutional Chamber to support the judgment that declared Executive Decree No. 24029-S unconstitutional.

VIII
RIGHT TO PRIVATE AND FAMILY LIFE AND RIGHT TO PERSONAL INTEGRITY IN RELATION TO PERSONAL AUTONOMY, SEXUAL AND REPRODUCTIVE HEALTH, THE RIGHT TO ENJOY THE BENEFITS OF SCIENTIFIC AND TECHNOLOGICAL PROGRESS AND THE PRINCIPLE OF NON-DISCRIMINATION

136. In this chapter, the Court will determine, first, the scope of the rights to privacy and to family life, and their relationship with other treaty-based rights, as relevant to settling the dispute (A). Next, it will analyze the effects of the ban on IVF (B). Then, it will interpret Article 4(1) of the American Convention as relevant to this case (C). Finally, it will decide

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[218] *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 134, para. 58, and *Case of Vélez Restrepo and family v. Colombia*, para. 47.

[219] *Cf. Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the Judgment on preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006. Series C No. 157, para. 66, and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 16.

the alleged violation of the treaty-based rights of the presumed victims in light of a determination of proportionality (D).

A) Scope of the rights to personal integrity,[220] personal liberty,[221] and private and family life[222] in this case

Arguments of the Commission and allegations of the parties

137. The Commission observed that "the decision […] to have biological children […] belongs to the most intimate sphere of private and family life, [and …] the way in which couples arrive at this decision is part of a person's autonomy and identity, both as an individual and as a partner." It indicated that "living together and the possibility of procreating is part of the right to found a family." It considered that "[t]he use of IVF to combat infertility is also closely related to the enjoyment of the benefits of scientific progress."

138. Representative Molina argued that "the couple's decision on whether or not to have children occurs in the private sphere," and described the infertility of the presumed victims as a "disability owing to which they have been discriminated against as regards having a family."

139. Representative May argued that the regulation [of IVF] should "develop and facilitate the content of the rights to health, access to scientific progress, respect for privacy and autonomy in the family sphere, the right to found a family and the full exercise of the reproductive rights of the individual."

140. The State argued that "the possibility of procreating by means of *in vitro* fertilization techniques […] is not a right recognized in the context of personal liberty," and that "[e]ven though the right to found a family includes the possibility of procreating, the State should not permit this possibility at any cost." Furthermore, it argued that "[h]uman life and dignity does not need to prove its nature in the face of the demands of scientific or medical progress."

Considerations of the Court

141. As indicated previously *(supra* para. 3), the Commission considered that the prohibition of IVF violated Articles 11(2), 17(2) and 24, in relation to Article 1(1) of the American Convention, to the detriment of the presumed victims. The common interveners

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220 The pertinent part of Article 5 of the American Convention (Right to Humane Treatment) indicates:

1. Every person has the right to have his physical, mental, and moral integrity respected. […]

221 The pertinent part of Article 7 of the American Convention (Right to Personal Liberty) indicates:

1. Every person has the right to personal liberty and security.

222 The pertinent part of Article 11 of the American Convention (Right to Privacy) states: […]

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. […].

The pertinent part of Article 17 of the American Convention (Rights of the Family), indicates:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

added the presumed violation of Articles 4(1), 5(1), and 7 of the Convention, in relation to Articles 1(1) and 2 thereof. The State rejected the violation of all these rights. In this regard, the Court observes that a dispute exists between the parties regarding the rights that were allegedly violated in this case. The Court will now proceed to interpret the American Convention in order to determine the scope of the rights to personal integrity and to private and family life, as relevant to decide the dispute.

142. Article 11 of the American Convention requires the State to protect individuals against the arbitrary actions of State institutions that affect private and family life. It prohibits any arbitrary or abusive interference with the private life of the individual, indicating different spheres of this, such as the private life of the family. Thus, the Court has held that the private sphere is characterized by being exempt from and immune to abusive or arbitrary interference or attacks by third parties or by public authorities.[223] In addition, this Court has interpreted Article 7 of the American Convention broadly when indicating that it includes a concept of liberty in a broad sense as the ability to do and not do all that is lawfully permitted. In other words, every person has the right to organize, in keeping with the law, his or her individual and social life according to his or her own choices and beliefs. Liberty, thus defined, is a basic human right, inherent in the attributes of the person, that is evident throughout the American Convention.[224] The Court has also underscored the concept of liberty and the possibility of all human beings to self-determination and to choose freely the options and circumstances that give meaning to their life, according to their own choices and beliefs.[225]

143. The scope of the protection of the right to private life has been interpreted in broad terms by the international human rights courts, when indicating that this goes beyond the right to privacy.[226] The protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world.[227] The effective exercise of the right to private life is decisive for the possibility of

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223 *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006 Series C No. 148, para. 194, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 161.

224 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21. 2007. Series C No. 170, para. 52.

225 *Cf. Case of Atala Riffo and daughters v. Chile*, para. 136. *Mutatis mutandi*, *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 52.

226 *Cf. Case of Atala Riffo and daughters v. Chile*, para. 135.

227 *Cf. Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, para. 119, and *Case of Atala Riffo and daughters v. Chile*, para. 162. See also: ECHR, *Case of Dudgeon v. United Kingdom* (No. 7525/76), Judgment of 22 October 1981, para. 41; *Case of X and Y v. The Netherlands* (No. 8978/80), Judgment of 26 March 1985, para. 22; *Case of Niemietz v. Germany*, (No. 13710/88), Judgment of 16 December 1992, para. 29; *Case of Peck v. United Kingdom* (No. 44647/98), Judgment of 28 January 2003. Final, 28 April 2003, para. 57; *Case of Pretty v. United Kingdom* (No. 2346/02), Judgment of 29 April 2002. Final, 29 July 2002, para. 61. ("The concept of ['']private life['] is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person […]. It can sometimes embrace aspects of an individual's physical and social identity […]. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world […]. Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.")

exercising personal autonomy on the future course of relevant events for a person's quality of life.[228] Private life includes the way in which individual views himself and how he decides to project this view towards others,[229] and is an essential condition for the free development of the personality. Furthermore, the Court has indicated that motherhood is an essential part of the free development of a woman's personality.[230] Based on the foregoing, the Court considers that the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense.[231]

144. The Court considers that this case addresses a particular combination of different aspects of private life that are related to the right to found a family, the right to physical and mental integrity and, specifically, the reproductive rights of the individual.

145. First, the Court emphasizes that, unlike the European Convention on Human Rights, which only protects the right to family life under Article 8 of this instrument, the American Convention contains two articles that protect family life in a complementary manner.[232] In this regard, the Court reiterates that Article 11(2) of the American Convention is closely related to the right recognized in Article 17 of this instrument.[233] Article 17 of the American Convention recognizes the central role of the family and family life in a person's existence and in society in general. The Court has already indicated that the family's right to protection entails, among other obligations, facilitating, in the broadest possible terms, the development and strength of the family unit.[234] This is such a basic right of the American Convention that it cannot be waived even in extreme circumstances.[235] Article 17(2) of the American Convention protects the right to found a family, which is also comprehensively

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228 *Cf.* ECHR, *Case of R.R. v. Poland*, (No. 27617/04), Judgment of 26 May 2011, para. 197..

229 *Cf. Case of Rosendo Cantú et al. v. Mexico*, para. 119, and *Case of Atala Riffo and daughters v. Chile*, para. 162. See also: ECHR, *Case of Niemietz v. Germany* (No. 13710/88), Judgment of 16 December 1992, para. 29, and *Case of Peck v. United Kingdom* (No. 44647/98), Judgment of 28 January 2003. Final, 28 April 2003, para. 57.

230 *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011 Series C No. 221, para. 97.

231 Similarly, *Cf.* ECHR, *Case of Evans v. United Kingdom*, (No. 6339/05), Judgment of 10 April 2007, paras. 71 and 72, where the ECHR indicated that "`private life […] incorporates the right to respect for both the decisions to become and not to become a parent" and, regarding the regulation of the practice of IVF, clarified that "the right to respect for the decision to become a parent in the genetic sense, also falls within the scope of Article 8." In the *Case of Dickson v. United Kingdom* (No. 44362/04), Judgment of 4 December 2007, para. 66, the Court indicated, with regard to the technique of assisted reproduction that "Article 8 is applicable to the applicants' complaints in that the refusal of artificial insemination facilities concerned their private and family lives which notions incorporate the right to respect for their decision to become genetic parents." In the *Case of S.H. and others v. Austria* (No. 57813/00), Judgment of 3 November 2011, para. 82, the Court referred explicitly to the right of access to assisted reproduction techniques, such as IVF, indicating that "the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life." See also ECHR, *Case of P. and S. v. Poland* (No. 57375/08), Judgment of 30 October 2012, para. 96, where the ECHR indicated that, "[w]hile the Court has held that Article 8 cannot be interpreted as conferring a right to abortion, it has found that the prohibition of abortion when sought for reasons of health and/or well-being falls within the scope of the right to respect for one's private life and accordingly of Article 8."

232 *Cf. Case of Atala Riffo and daughters v. Chile*, para. 175.

233 *Cf. Case of Atala Riffo and daughters v. Chile*, para. 169.

234 *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011 Series C No. 221, para. 125, and *Case of Atala Riffo and daughters v. Chile*, para. 169. See also, *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 66.

235 *Cf.* Article 27(2) of the American Convention establishes: "[t]he foregoing provision does not authorize any suspension of the following articles: […] 17 (Rights of the Family)."

protected in different international human rights instruments.[236] For its part, the United Nations Human Rights Committee has indicated that the possibility of procreating is part of the right to found a family.[237]

146. Second, the right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right. The right to reproductive autonomy is also recognized in Article 16(e) of the Convention for the Elimination of All Forms of Discrimination against Women, according to which women enjoy the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights." This right is violated when the means by which a woman can exercise the right to control her fertility are restricted.[238] Thus, the protection of private life includes respect for the decisions both to become a mother or a father, and a couple's decision to become genetic parents.

147. Third, the Court emphasizes that, in the context of the right to personal integrity, it has analyzed some of the situations that cause particular distress and anxiety to the individual,[239] as well as some serious impacts of the lack of medical care or problems of accessibility to certain health procedures.[240] In the European sphere, case law has defined the relationship between the right to private life and the protection of physical and mental integrity. The European Court of Human Rights has indicated that, although the European Convention on Human Rights does not guarantee the right to a specific level of medical care as such, the right to private life includes a person's physical and mental integrity, and that the State also has the positive obligation to ensure this right to its citizens.[241] Consequently, the rights to private life and to personal integrity are also directly and immediately linked to health care. The lack of legal safeguards that take reproductive health into consideration can result in a serious impairment of the right to reproductive autonomy and freedom. Therefore, there is a connection between personal autonomy, reproductive freedom, and physical and mental integrity.

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[236] *Cf.* Paragraph 1 of Article 16 of the Universal Declaration of Human Rights establishes the right of men and women to marry and to found a family, and paragraph 3 establishes that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Likewise, Article 23(2) of the International Covenant on Civil and Political Rights recognizes the right of men and women of marriageable age to marry and to found a family.

[237] *Cf.* Human Rights Committee, Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies, General Comment No. 19: Article 23 (The Family) adopted at the thirty-ninth session, U.N. Doc. HRI/GEN/1/Rev.7, (1990), para. 5 ("The right to found a family implies, in principle, the possibility to procreate and live together").

[238] Committee on the Elimination of Discrimination against Women, General Recommendation No. 24 (Women and Health), 2 February 1999, paras. 21 and 31(b).

[239] *Cf. Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8, 2005. Series C No. 130, paras. 205 and 206, and *Case of Furlan and family v. Argentina*, para. 250.

[240] *Cf. Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, paras. 220, and *Case of Diaz Peña v. Venezuela*, para. 137.

[241] *Cf.* ECHR, *Case of Glass v. United Kingdom* (No. 61827/00), Judgment of 9 March 2004, paras. 74 to 83; *Case of Yardımcı v. Turkey* (No. 25266/05), Judgment of 5 January 2010. Final, 28 June 2010, paras. 55 and 56, and *Case of P. and S. v. Poland* (No. 57375/08), Judgment of 30 October 2012, para. 96. In this last case, the European Court of Human Rights declared that State have "a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity [which] may involve the adoption of measures including the provision of an effective and accessible means of protecting the rights to respect for private life"; see also ECHR, *Case of McGinley and Egan v. United Kingdom* (No. 10/1997/794/995-996), Judgment of 9 June 1998, para. 101.

148. The Court has indicated that States are responsible for regulating and overseeing the provision of health services to ensure effective protection of the rights to life and personal integrity.[242] Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity.[243] In relation to the right to personal integrity it is important to highlight that, according to the Committee on Economic, Social and Cultural Rights, "reproductive health means that women and men have the freedom to decide if and when to reproduce, and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as the right of access to appropriate health care services."[244] The Programme of Action of the International Conference on Population and Development, held in Cairo in 1994, and the Declaration and Platform for Action of the Fourth World Conference on Women, held in Beijing in 1995, also contain definitions of reproductive health and of women's health. According to the International Conference on Population and Development (1994), "[r]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant UN consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."[245] Moreover, adopting a broad and integrated concept of sexual and reproductive health, it stated that:

> "Reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity – in all matters relating to the reproductive system and to its functions and processes. Consequently, reproductive health implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so. Implicit in this is right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility, which are not against the law, and the right of access to health-care services that will enable women to go safely through pregnancy and childbirth."[246]

149. Furthermore, according to the Conference's Programme of Action, "*in vitro* fertilization techniques should be provided in accordance with ethical guidelines and appropriate medical standards."[247] In the Declaration of the Fourth World Conference on Women (1995), the States agreed to "guarantee equal access to and equal treatment of men and women in […] health care and promote sexual and reproductive health."[248] The Platform for Action, approved jointly with the Declaration, defined reproductive health care

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[242] *Cf. Case of Ximenes Lopes v. Brazil*, Judgment of July 4, 2006. Series C No. 149, para. 99, and *Case of Albán Cornejo et al. v. Ecuador*. *Merits, reparations and costs.* Judgment of November 22, 2007. Series C No. 171, para. 121.

[243] *Cf.* the Constitution of the World Health Organization was adopted by the International Health Conference held in New York from June 19 to July 22, 1946, signed on July 22, 1946, by the representatives of 61 States, and entered into force on April 7, 1948; http://www.who.int/governance/eb/who_constitution_sp.pdf.

[244] Committee on Economic, Social and Cultural Right, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12 of the International Covenant on Civil and Political Rights), E/C.12/2000/4, 11 August 2000 para. 14, footnote 12.

[245] *Cf.* Programme of Action of the International Conference on Population and Development, Cairo, 1994, para. 7.3; UN A/CONF.171/13/Rev.1 (1995).

[246] *Cf.* Programme of Action of the International Conference on Population and Development, Cairo, 1994, para. 7.2; UN A/CONF.171/13/Rev.1 (1995).

[247] *Cf.* Programme of Action of the International Conference on Population and Development, Cairo, 1994, para. 7.17; UN A/CONF.171/13/Rev.1 (1995).

[248] *Cf.* Declaration of the Fourth World Conference on Women, Beijing, 1995, para. 30; <www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20S.pdf.

as the "constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems."[249] According to the Pan-American Health Organization (PAHO), sexual and reproductive health "implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so."[250]. The right to reproductive health entails the rights of men and women to be informed and to have free choice of and access to methods to regulate fertility, that are safe, effective, easily accessible and acceptable.

150. Finally, the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right. The right to enjoy the benefits of scientific progress has been internationally recognized[251] and, in the inter-American context, it is contemplated in Article XIII of the American Declaration[252] and in Article 14(1)(b) of the Protocol of San Salvador. It is worth mentioning that the General Assembly of the United Nations, in its declaration on this right, described its connection to the satisfaction of the material and spiritual needs of all sectors of the population.[253] Therefore, and in keeping with Article 29(b) of the American Convention, the scope of the rights to private life, reproductive autonomy and to found a family, derived from Articles 11(2) and 17(2) of the Convention, extends to the right of everyone to benefit from scientific progress and its applications. The right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, *de iure* or *de facto,* to exercise the reproductive decisions that correspond to each individual.

151. In this case, the State considered that the said rights could be exercised in different ways, under the assumption that IVF was not prohibited absolutely. This aspect has been contested by the other parties. Accordingly, the Court will proceed to determine whether there was a restriction of the rights mentioned and will then examine the justification given by the State to support this restriction.

B) Effects of the absolute prohibition of IVF

Arguments of the Commission and allegations of the parties

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249 *Cf.* Platform for Action of the Fourth World Conference on Women, Beijing, para. 94, which also indicates that "[r]eproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant";<www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20S.pdf>

250 Pan-American Health Organization, Health in the Americas 2007, Volume I - Regional, Washington D.C, 2007, p. 151, cited in the affidavit prepared by expert witness Paul Hunt.

251 Article 15(b) of the International Covenant on Economic, Social and Cultural Rights establishes that "the States Parties to the present Covenant recognize the right of everyone: […] (b) to enjoy the benefits of scientific progress and its applications."

252 Article XIII of the American Declaration establishes that: "Every person has the right […] to participate in the benefits that result from intellectual progress, especially scientific discoveries.

253 *Cf.* United Nations, Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, proclaimed by General Assembly resolution 3384 (XXX), of 10 November 1975, para. 3.

152. The Commission described the result of the Constitutional Chamber's decision as a "prohibition" of IVF of an "absolute" nature, which constitutes "a restriction of the right to found a family according to the decision of the couple." The Commission also argued that, "inasmuch as [IVF] is a means to realize a decision protected by the American Convention, the prohibition of access to the technique necessarily constitutes an interference or restriction to the exercise of the treaty-based rights.

153. Representative Molina characterized the result of the Constitutional Chamber's judgment as an "absolute" and "continued prohibition" of IVF, because "it not only resulted in interference or an abusive and arbitrary invasion of the autonomy and privacy of the [presumed] victims in the case, but also constituted an absolute annulment of the right to decide to have biological children."

154. Representative May argued that "[t]he prohibition of [IVF] perpetuates a situation of physical inability to enjoy bodily health fully, which can be rectified by modern science" and, therefore, "it is also a form of physical abuse against sterile couples because it limits their possibility of overcoming their condition of disease or infirmity." He added that "[t]he prohibition of the practice [of IVF …] is a real restriction of the full exercise of the natural functions of women and men."

155. The State argued that the ruling of the Constitutional Chamber did not result in a "prohibition" of IVF as such, because the judgment "did not annul definitively the possibility of practicing *in vitro* fertilization in Costa Rica, [but] only banned a specific technique that had existed since 1995, regulated by the Executive Decree." It added that "fertilization methods that endanger" "the right to life from the moment of conception cannot be practiced"; but, "when the State considers that a certain technique is compatible with those parameters, it may permit and regulate it." The State argued that "it should be considered a disputed fact that the presumed victims truly formed part of a waiting list to undergo the procedure" of IVF "in 2000 when the prohibition was announced"; particularly because "many of the couples were not diagnosed with infertility until a long time after the proceedings before the Commission had started and other were still undergoing insemination procedures at that time."

156. Furthermore, the State argued that the judgment "does not prohibit IVF in general, but refers exclusively to the technique that was used at that time, in which it is known that, in a considerable percentage of the cases, human life had no possibility of continuing." Regarding the possibility of practicing IVF nowadays, the State indicated that "[t]o date science does not offer an in *vitro* technique that is compatible with the right to life protected in Costa Rica; proof of this is that, when the report of the Inter-American Commission on Human Rights was issued, an attempt was made to regulate the matter and a bill was submitted to the Legislative Assembly of Costa Rica that regulated this technique, but also protected the right to life from conception, as this has been understood in Costa Rica. In this regard, the bill prohibited the freezing of embryos and required all the fertilized eggs to be implanted without the possibility of making a selection." It added that this is why "any technique that is attempted in Costa Rica, protecting life from conception, would be medically non-viable at present, 12 years after the judgment of the Constitutional Chamber."

Considerations of the Court

157. The Court notes that the Constitutional Chamber declared unconstitutional and annulled the Executive Decree that authorized the practice of IVF (*supra* para. 72). Both the two representatives and the Inter-American Commission have described the decision as an "absolute prohibition" that does not allow this technique to be applied for any reason, while

the State has argued that it was a "relative prohibition," inasmuch as the practice of IVF could be regulated when the technique was able to comply with the requirements established by the Constitutional Chamber in its judgment; in other words when, in the words of the State, IVF does not endanger "the right to life from the moment of conception."

158. In this regard, the Court observes that the Constitutional Chamber's judgment included a concept of absolute protection of the life of the embryo, because it stated that "since the right is declared in favor of everyone, without exception – any exception or limitation destroys the very content of the right – it must be protected for those who are born and also for the unborn."[254] Despite the foregoing, the Constitutional Chamber indicated that "advances in science and biotechnology are so rapid that the technique could be improved in such a way that the concerns that have been indicated disappear";[255] thus the Chamber stated that "it [should be expressly recorded that, not even by norm of legal rank, is it possible to authorize legally [the] application of [IVF], at least, […] while its scientific development remains at its current stage and entails the conscious damage to human life."[256]

159. The Court notes that the Constitutional Chamber considered that, if the IVF technique could be applied respecting the concept of absolute protection of the life of the embryo, it could be practiced in the country. However, the Court considers that, although the Constitutional Chamber's judgment accepted the practice of IVF in the country under certain conditions, the fact is that 12 years after the judgment was delivered, this technique is not practiced in Costa Rica (*supra* para. 67). Therefore, the Court considers that the "suspended status" established in the judgment has not produced any real practical effects to date. Consequently, without proceeding to define it as an "absolute" or "relative" prohibition, it is possible to conclude that the Constitutional Chamber's decision resulted in the undisputed fact that IVF is not practiced in Costa Rican territory and that, therefore, couples wishing to use this technique cannot do so in this country. In addition, since the Constitutional Chamber conditioned the possibility of applying the technique to ensuring that there was no embryonic loss whatsoever, in practice, this entails a prohibition of IVF, because the evidence in the case file indicates that, to date, there is no option for practicing IVF without some possibility of embryonic loss.[257] In other words, it would be impossible to comply with the condition imposed by the Chamber.

160. Although the practical effect has been mentioned above, the Court considers that the restriction or interference caused to the presumed victims by the Constitutional Chamber's decision could not be foreseen adequately. In this regard, the Court recalls that a norm or mandate is foreseeable, if it is worded with sufficient precision to allow a person to regulate his conduct based on it.[258] In this regard, the Court observes that the judgment was not

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[254] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 90).

[255] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 95).

[256] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 95).

[257] *Cf.* Opinion of expert witness Zegers-Hochschild (merits report, volume VI, folio 2848) and of expert witness Garza (merits report, volume VI, folio 2576).

[258] *Cf. Case of López Mendoza v. Venezuela. Merits, reparations and costs*. Judgment of September 1, 2011. Series C No. 233, para. 199; See also ECHR, *Case of Landvreugd v. The Netherlands*, (No. 37331/97), Judgment of 4 June 2002. Final, 4 September 2002, para. 59 ("[T]he Court reiterates that a rule is 'foreseeable' if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct").

sufficiently clear, from the outset, in establishing whether or not the practice of IVF was proscribed in the country, and this is revealed by the discussion that has arisen between the parties as to whether the ban is absolute or relative (*supra* paras. 152 to 156) or by the judgment of the Superior Court of Accounts for Contentious Administrative and Civil Proceedings of October 14, 2008, which stated that it was possible to perform IVF in the country if "a single egg was fertilized for its subsequent transfer to the mother's uterus."[259]

161. Thus the judgment of the Constitutional Chamber implied that IVF would no longer be practiced in Costa Rica. In addition, the judgment led to the interruption of the medical treatment that some of the presumed victims in this case had begun, while others were forced to travel to other countries to be able to have access to IVF. These facts constitute an interference with the private and family life of the presumed victims, who had to modify or change their possibilities of having access to IVF, which involved a decision of the couples regarding the methods or practices that they wished to try in order to have biological children. The said judgment meant that the couples had to change their course of action with respect to a decision that they had already taken: to try to have children by means of IVF. The Court clarifies that, in this case, the interference is not related to the fact that the families could or could not have children since, even if they could have had access to the IVF technique, it is not possible to determine whether that objective could have been achieved; thus, the interference is circumscribed to the possibility of taking an autonomous decision on the type of treatments they wished to try to exercise their sexual and reproductive rights. Notwithstanding the foregoing, the Court observes that some of the presumed victims indicated that one of the reasons that influenced the breakup of the marriage bond was related to the impact of the prohibition of the IVF on their possibility of having children.[260]

162. Having verified that interference existed, owing both to the prohibitive effect resulting from the Constitutional Chamber's judgment caused in general, and to the impact it had on the presumed victims in this case, the Court considers it necessary to proceed to examine whether this interference or restriction was justified. Before assessing the proportionality in that regard, the Court considers it pertinent to examine in detail the main argument developed by the Constitutional Chamber: that the American Convention makes the absolute protection of the "right to life" of the embryo compulsory and, consequently, makes it obligatory to prohibit IVF because it entails the loss of embryos.

C) Interpretation of Article 4(1) of the Convention as relevant in this case

Arguments of the Commission and allegations of the parties

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[259] Judgment No. 835-2008 delivered by the Fifth Section of the Court of Accounts for Contentious Administrative and Civil Proceedings in the case brought by Ileana Henchoz Bolaños seeking a declaratory judgment against the Costa Rican Social Security Institute, Case file No. 08-00178-1027-CA of October 14, 2008 (file of annexes to the pleadings and motions brief, volume V, annex XXVIII, folio 5859).

[260] *Cf.* Written statement by Grettel Artavia Murillo (file of annexes to the pleadings and motions brief, volume I, folio 4077) ("I wish to place on record that the State, through one of its Branches, curtailed my right to be a mother and, consequently, led to the failure of my marriage owing to the depression that both my former husband and I suffered because of [the] ban [on IVF], with the result that we decided to end our marriage, leaving an even bigger wound, and with incalculable moral damage") and affidavit prepared by Ana Cristina Castillo León (merits report, volume V, folio 2224) ("Although it is true that a marriage may break up or be worn down for many reasons, eight years of constant hormonal treatments, visits to doctors, laboratories, pharmacies, constant financial disbursements, the exposure of our most intimate life to be judged by society, tension between ourselves because we could not resolve the problem of having children; definitively, this takes a toll on the relationship of a couple. That was my case. The great disappointment, the frustration of seeing the constitutional rights to found a family curtailed, and not having the financial resources to go to another country to seek IVF were a heavy burden for my marriage. The marriage bond ceded, divorce was imminent").

163. The Commission indicated that "Article 4(1) of the Convention can be interpreted to mean that a State is granted the power to regulate the protection of life from the moment of conception, but is not necessarily a mandate to grant this protection." It argued that this article "does not establish an absolute or categorical right in relation to the prenatal stages of life" and that "an international and comparative recognition [exists] of the concept of gradual and incremental protection of life at the prenatal stage." The Commission added that "the interpretation of Article 4(1) of the Convention indicates that the exercise of a right conceived by this international instrument is not exempt from scrutiny [by the Court] when it interferes with the exercise of other rights established therein, such as, in this case, the rights to private life, family life, autonomy and to found a family."

164. Representative Molina argued that "conception […] is not a clear-cut concept," and that "the Chamber's decision adhered to a specific philosophical tendency as regards [its] definition, […] disregarding the protection required by the reproductive disability to procreate." He added that "the phrase 'in general' […] presupposes the existence of sufficient exceptions to ensure that other rights are not left unprotected" and that "an interpretation is required with regard to the right to life that permits and does not restrict absolutely the safeguard of the treaty-based rights."

165. Representative May argued that the right to life "is not absolute or unrestricted" and "is subject to exceptions and conditions." He indicated that "the case law of the international human rights bodies […] has never affirmed that the unborn child deserves absolute, unrestricted and unconditional protection from the moment of conception or implantation" and "nor have the Constitutional Courts made this assertion." He noted that although "[d]omestic law can grant a broader protection, […] this expanded protection cannot eliminate the enjoyment and exercise of rights." He argued that the definitions in several dictionaries indicate that the "moment of fertilization is a distinct process to that of conception or implantation." In addition, he argued that any legal protection of life as of the moment of "conception" must arise as of the implantation of the embryo in the mother's uterus, "because prior to successful and healthy implantation in the maternal uterus, there is no possibility of creating a new being." He stated that "[p]ostulating fertilization as the creation of a new human being is arbitrary and incorrect" and "undervalues the role of the mother during development in the uterus." In addition, he argued that "live birth determines the existence of the human being and the recognition of his or her legal personality," so that the unborn child "is not the holder of an unlimited and unconditional right to life," and "[t]he unborn child is a legally protected interest, but not a person."

166. Representative May argued that "Article 4(1) [of the American Convention does not] contemplate […] the embryo within its content or *ratio legis*" and that international human rights treaties do not contain "an explicit indication from which it can be inferred that an embryo or a pre-embryo constitutes human life, and even less that it is a human person or a human being." He added that the "position of the margin of appreciation" was unsustainable because it would make the substantive content of human rights depend on the State's interpretation." Representative May argued that "[n]o international text (except Article 4(1) [of the Convention] protects the right to life from the moment or process of conception or implantation," while the "other international instruments only refer to a right that protects the life of the individual who has been born alive, and not the unborn child."

167. The State alleged that "scientific evidence […] reveals that human life begins with conception, or what is the same, with fertilization," which occurs when "the membranes of the cells of the spermatozoid and the egg merge." It considered that "[s]cientifically, the zygote and the adult are equivalent, [because they are] complete human organisms at different stages of the human life cycle." It added that the zygote "is not simply a human

cell […] but a new human being," that "contains all the instructions necessary to build the human body, and that immediately begins a complex sequence of events that establishes the molecular conditions for the continuous process of embryonic development" and that "by means of successive divisions and differentiation will form each of the cells present in the embryo, fetus, newborn, child and adult." In addition, it asserted that "if the human embryo is […] a human being, in accordance with the definition contained in Article 1(2) [of the Convention], the human embryo is a person."

168. With regard to the teleological interpretation, the State argued that "although, in 1968, when the American Convention was being drafted there was no certainty as to when conception occurred, and [IVF] did not exist, it is clear that the provision requires States to protect human life from its earliest embryonic stage," because "the intention of most of the States of the inter-American system was always to protect human life from [the] moment of conception," so that the "terms 'conception' and 'fertilization' should be treated as synonyms." It argued that the process of approving the American Convention "clearly reveals that it is not true that the intention of the States was not the protection of life as of conception, because that was indeed the objective pursued in approving the provision, contrary to what occurred many years previously when the American Declaration was issued." It alleged that the interpretation of the word 'conception' cannot be made by referring to the *Diccionario de la Real Academia de la Lengua Española*, because that is not "the reference work normally used to understand scientific terms," nor has "the definition of conception been updated in line with scientific advances since 1947," and an "interpretation of this nature has a restrictive nature, which is not permitted under Article 29(1) of the Convention." In addition, it argued that "the phrase 'in general' was only included for exceptional cases, such as legitimate defense, the risk of death of the mother, or involuntary abortion."

169. As for other international human rights instruments, the State indicated that the Universal Declaration of Human Rights "protects the human being from the moment of its individualization, which can be determined from the moment when the spermatozoid and the egg unite" and that the "International Covenant on Civil and Political Rights […] recognizes the life of the embryo separately from that of its mother." It added that the "absolute right to life has been accepted […] even by the Human Rights Committee," and that the Convention on the Rights of the Child protects "the child even before birth." Regarding this last treaty, it argued that "the States agreed that the concept [of child] should be sufficiently broad to enable countries that chose to provide protection to children from before birth to be parties to the international instrument without having to amend their respective laws"; it therefore argued that "a margin of appreciation [exists] to grant the status of child to unborn children," as the relevant Costa Rican law does.

170. Finally, the State alleged that "the doctrine of moral consensus as a factor in the margin of appreciation […] has established that, in order to restrict it, the consensus must be clear and evident." In this regard, it argued that: (i) "there is no consensus regarding the legal status of the embryo"; (ii) "there is no consensus on the beginning of human life, [therefore] a margin of appreciation should also be granted concerning the regulation of the technique" of IVF, and (iii) it is not valid to argue that, "since, through legislative omission, the practice of IVF is permitted in other States, Costa Rica has lost its margin of appreciation." It considered that "[t]he doctrine of the margin of appreciation has been comprehensively developed by the European Court of Human Rights" and that, in the case law of the Inter-American Court, there are precedents that "contemplate the State's possibility of regulating certain matters according to its discretion."

Considerations of the Court

171. The Court has indicated that the purpose of this case focuses on establishing whether the Constitutional Chamber's judgment resulted in a disproportionate restriction of the rights of the presumed victims (*supra* para. 135). The decision of the Constitutional Chamber considered that the American Convention required the prohibition of IVF, as regulated in the Executive Decree (*supra* para. 76). To this end, the Constitutional Chamber interpreted Article 4(1) of the Convention based on the understanding that the Convention requires the absolute protection of the embryo (*supra* para. 75). For its part, the State has offered complementary arguments to defend the interpretation made by the Chamber. In this regard, the Court has analyzed this case with great thoroughness, taking into account that the highest court of Costa Rica has intervened and that, in its judgment, it made an interpretation of Article 4 of the American Convention. However, this Court is the ultimate interpreter of the Convention, so that it finds it relevant to make the relevant clarification with regard to the scope of this right. Consequently, the Court will analyze whether the interpretation of the Convention that substantiated the interferences that occurred (*supra* para. 75) is admissible in light of this treaty, bearing in mind the pertinent sources of international law.

172. To date, the Court's case law has not ruled on the disputes that have arisen in this case with regard to the right to life. In cases of extrajudicial executions, enforced disappearances and deaths that can be attributed to the failure of the States to adopt measures, the Court has indicated that the right to life is a fundamental human right, the full enjoyment of which is a prerequisite for the enjoyment of all other human rights.[261] Based on this fundamental role assigned to it in the Convention, States have an obligation to create the conditions to ensure that no violations of that right occur. The Court has also indicated that the right to life presupposes that no one may be arbitrarily deprived of his life (negative obligation) and that the States must adopt all appropriate measures to protect and preserve the right to life (positive obligation) of all those who are subject to their jurisdiction.[262] This includes adopting the necessary measures to create an adequate regulatory framework that deters any threat to the right to life and safeguards the right to have access to conditions that ensure a decent life.

173. In the instant case, the Constitutional Chamber considered that these and other aspects of the right to life require the absolute protection of the embryo within the framework of the inviolability of life from conception (*supra* para. 76). To determine whether an obligation of absolute protection exists in those terms, the Court proceeds to analyze the scope of Articles 1(2) and 4(1) of the American Convention in relation to the terms "person," "human being," "conception" and "in general." The Court reiterates its case law according to which a provision of the Convention must be interpreted in good faith, according to the ordinary meaning to be given to the terms of the treaty and their context, and bearing in mind the object and purpose of the American Convention, which is the effective protection of the human person,[263] as well as by an evolutive interpretation of

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[261] *Cf. Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of August 24, 2010. Series C No. 214, para. 186.

[262] *Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs.* Judgment of January 31, de 2006. Series C No. 140, para. 120, and *Case of Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs*. Judgment of October 25, 2012. Series C. No. 252, para. 145.

[263] *Mutatis mutandi*, *Case of González et al. ("Cotton field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 33.

international instruments for the protection of human rights.[264] Within this framework, the Court will now make an interpretation that is: (i) in accordance with the ordinary meaning of the terms; (ii) systematic and historic; (iii) evolutive, and (iv) of the object and purpose of the treaty.

C.1) Interpretation in accordance with the ordinary meaning of the terms

174. Article 1 of the American Convention establishes:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
>
> 2. For the purposes of this Convention, "person" means every human being. (Underlining added)

175. Article 4(1) of the American Convention states:

> 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.

176. In this case the Court observes that the concept of "person" is a legal term that is analyzed in many of the domestic legal systems of the States Parties. However, for the purposes of the interpretation of Article 4(1), the definition of person stems from the mentions made in the treaty with regard to "conception" and to "human being," terms whose scope should be assessed based on the scientific literature.

177. The Court notes that the Constitutional Court chose one of the scientific positions on this issue to define as of when it was considered that life began (*supra* para. 73). On this basis, the Constitutional Court understood that conception would be the moment when the egg is fertilized and assumed that, as of that moment, a person existed who held the right to life (supra para. 73).

178. In this regard, in the instant case, the parties also forwarded as evidence a series of scientific articles and expert opinions that will be used in the following paragraphs to determine the scope of the literal interpretation of the terms "conception," "person" and "human being." In addition, the Court will refer to the literal meaning of the expression "in general" in Article 4(1) of the Convention.

179. The Court underlines that the evidence in the case file shows that IVF has transformed the discussion on how the phenomenon of "conception" is understood. Indeed, IVF has revealed that some time may elapse between the fusion of the egg and the spermatozoid and implantation. Therefore, the definition of "conception" accepted by the authors of the American Convention has changed. Prior to IVF, the possibility of fertilization occurring outside a woman's body was not contemplated scientifically.[265]

180. The Court observes that in the current scientific context there are two different

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[264] *Cf. Case of Ivcher Bronstein v. Peru. Competence.* Judgment of September 24, 1999. Series C No. 54, para. 38, and *Case of González et al. ("Cotton field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 244, para. 33.

[265] In this regard, expert witness Zegers-Hochschild indicated that, "in 1969, no one imagined that it would be possible to create human life outside a woman's body. It was 10 years later that the birth of the first baby using ART was announced." Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2846).

interpretations of the term "conception." One school of thought understands "conception" as the moment of union, or fertilization of the egg by the spermatozoid. Fertilization results in the creation of a new cell: the zygote. Certain scientific evidence considers the zygote as a human organism that contains the necessary instructions for the development of the embryo.[266] Another school of thought understands "conception" as the moment when the fertilized egg is implanted in the uterus.[267] The implantation of the fertilized egg in the mother's uterus allows the new cell, the zygote, to connect with the mother's circulatory system, providing it with access to all the hormones and other elements necessary for the embryo's development.[268]

181. For his part, expert witness Zegers-Hochschild indicated that when the American Convention was signed in 1969, the *Real Academia de la Lengua Española* defined "conception" as "the action and effect of conceiving,"[269] "to conceive as "for the female to become pregnant," and "to fertilize"[270] as "to unite the male and female reproductive elements, to create a new being."[271] The Court observes that the current dictionary of the *Real Academia de la Lengua Española* maintains almost completely the definitions of these words.[272] Furthermore, the expert witness indicated that:

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266 *Cf. Inter alia*, the following scientific articles provided by the State: Tanya Lobo Prada, *Inicio de la vida* (file of annexes to the answering brief, volume I, folios 6653 to 6656); Maureen L. Condic, *Preimplantation Stages of Human Development: The Biological and Moral Status of Early Embryos,* in: Is this cell a Human Being?, Springer-Verlag Berlin, 2011 (file of annexes to the answering brief, volume I, folios 6576 to 6594); Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective*, in: The Westchester Institute for Ethics and the Human Person, Vol. 1, No.1, 2008 (file of annexes to the answering brief, volume I, folios 6621 to 6648); Jerome Lejeune, *El Origen de la Vida Humana*, in: Diario ABC, Madrid, 1983 (file of annexes to the answering brief, volume I, folio 6652), and Natalia Lopez Moratalla and María J. Iraburu Elizalde, *Los primeros quince días de una vida humana*, Ediciones Universidad de Navarra, 2004, (file of annexes to the answering brief, volume VI, folios 9415 to 9503).

267 Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2846).

268 *Cf. Inter alia*, the following scientific articles provided by the State: Tanya Lobo Prada, *Inicio de la vida* (file of annexes to the answering brief, volume I, folios 6653 to 6656); Maureen L. Condic, *Preimplantation Stages of Human Development: The Biological and Moral Status of Early Embryos,* in: Is this cell a Human Being?, Springer-Verlag Berlin, 2011 (file of annexes to the answering brief, volume I, folios 6576 to 6594); Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective*, in: The Westchester Institute for Ethics and the Human Person, Vol. 1, No.1, 2008 (file of annexes to the answering brief, volume I, folios 6621 to 6648); Jerome Lejeune, *El Origen de la Vida Humana*, in: Diario ABC, Madrid, 1983 (file of annexes to the answering brief, volume I, folio 6652), and Natalia Lopez Moratalla and María J. Iraburu Elizalde, *Los primeros quince días de una vida humana*, Ediciones Universidad de Navarra, 2004, (file of annexes to the answering brief, volume VI, folios 9415 to 9503).

269 *Cf. Diccionario de la Real Academia de la Lengua Española,* 1956 edition. Available at: http://ntlle.rae.es/ntlle/SrvltGUIMenuNtlle?cmd=Lema&sec=1.0.0.0.0. (Last visited November 28, 2012).

270 *Cf. Diccionario de la Real Academia de la Lengua Española*, 1956 edition. Available at: http://ntlle.rae.es/ntlle/SrvltGUIMenuNtlle?cmd=Lema&sec=1.1.0.0.0. (Last visited November 28, 2012).

271 *Cf. Diccionario de la Real Academia de la Lengua Española*, 1956 edition. Available at: http://ntlle.rae.es/ntlle/SrvltGUIMenuNtlle?cmd=Lema&sec=1.2.0.0.0. (Last visited November 28, 2012). Similarly, expert witness Bergallo stated that the *Diccionario de la Real Academia*, "in its 19th edition, which was in force at the time the Convention was drafted, defined 'conception' including the fact of the fertilization and the protection of the implanted embryo." Opinion of expert witness Paola Bergallo before the Court during the public hearing held in this case.

272 In this regard, the current edition of the *Diccionario de la Real Academia de la Lengua Española* defines "conception" as "action and effect of to conceive." The expression" is defined in its third acceptance as "said of a female: "to become pregnant"; and the expression "to fertilize" is defined as "to unite the male and female reproductive cell in order to create a new being." Available at: http://lema.rae.es/drae/?val=concepci%C3%B3n; http://lema.rae.es/drae/?val=concebir, and http://lema.rae.es/drae/?val=fecundar (Last visited November 28, 2012).

> A woman has conceived when the embryo has been implanted in her uterus […]. The word conception makes explicit reference to pregnancy or gestation, [which] begins with the implantation of the embryo, […] since **conception or gestation is an event of the woman, not of the embryo.** There is only evidence of the presence of an embryo when it is joined to the woman at a cellular level and the chemical signals of this event can be identified in the woman's fluids. This signal corresponds to a hormone called chorionic gonadotropin and **the earliest that it can be detected is seven days after fertilization, with the embryo already implanted in the endometrium.**"[273] (Bold type and underlining added)

182. Furthermore, according to expert witness Monroy Cabra, the term conception is "a medical-scientific term that has been interpreted to mean that it takes place [at the moment of] the fusion of the egg and the spermatozoid."[274] In similar terms, expert witness Condic considered that "human life begins with the fusion of spermatozoid and egg, an observable 'moment of conception.'"[275]

183. However, in addition to these two possible hypotheses on the moment at which "conception" should be understood to occur, the parties have presented a different thesis regarding the moment when it is believed that the embryo reaches a sufficient degree maturity to be considered a "human being." Some hold the view that life begins with fertilization, recognizing the zygote as the first corporal manifestation of the continuing process of human development,[276] while others consider that the starting point for the development of the embryo, and subsequently of its human life, is its implantation in the uterus where it has the capacity to add its genetic potential to the mother's potential.[277] Moreover, others emphasize that life begins when the nervous system develops.[278]

184. The Court observes that, while some articles consider that the embryo is a human being,[279] others stress that fertilization occurs in one minute but that the embryo is formed

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[273] Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2846). Furthermore, expert witness Zegers-Hochschild stated that "[i]f the intention had been to define the right to protection as of the moment of fertilization, this word would have been used, which is defined perfectly in the dictionary." Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2846).

[274] *Cf.* Statement by expert witness Monroy Cabra before the Inter-America Court during the public hearing held in this case.

[275] Affidavit prepared by expert witness Condic (merits report, volume V, folio 2592).

[276] *Cf.* In this regard, *inter alia:* Tanya Lobo Prada, *Inicio de la vida* (file of annexes to the answering brief, volume I, folios 6653 to 6656), and Maureen L. Condic, *Preimplantation Stages of Human Development: The Biological and Moral Status of Early Embryos*, en: Is this cell a Human Being?, Springer-Verlag Berlin, 2011 (file of annexes to the answering brief, volume I, folios 6576 a 6594).

[277] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2846).

[278] In this regard, expert witness Condic indicated that "a number of alternative definitions have been offered as to when human life starts, including syngamy (approximately 24 hours after the fusion of the spermatozoid and egg); implantation (approximately five days after the fusion of the spermatozoid and egg); formation of the primitive streak (approximately 14 days after the fusion of the spermatozoid and egg), and the beginning of the neural function." Affidavit prepared by expert witness Condic (merits report, volume V, folio 2589).

[279] *Cf. Inter alia* the following scientific articles provided by the State: Tanya Lobo Prada, *Inicio de la vida* (file of annexes to the answering brief, volume I, folios 6653 to 6656); Maureen L. Condic, *Preimplantation Stages of Human Development: The Biological and Moral Status of Early Embryos,* in: Is this cell a Human Being?, Springer-Verlag Berlin, 2011 (file of annexes to the answering brief, volume I, folios 6576 to 6594); Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective*, in: The Westchester Institute for Ethics and the Human Person, Vol. 1, No.1, 2008 (file of annexes to the answering brief, volume I, folios 6621 to 6648); Jerome Lejeune, *El Origen de la Vida Humana*, in: Diario ABC, Madrid, 1983 (file of annexes to the answering brief, volume I, folio 6652), and Natalia Lopez Moratalla and María J. Iraburu Elizalde, *Los primeros quince días de una vida humana*, Ediciones Universidad de Navarra, 2004, (file of annexes to the answering brief, volume VI, folios 9415 to 9503).

seven days later, for which reason they refer to the concept of a "pre-embryo."[280] Some articles associate the concept of pre-embryo with the first 14 days because, after this, it is known whether there is one child or more.[281] Expert witnesses Condic and Caruzo, and some scientific literature reject these ideas associated with the notion of pre-embryo.[282]

185. Regarding the dispute as to when human life begins, the Court considers that this is a question that has been assessed in different ways from a biological, medical, ethical, moral, philosophical and religious perspective, and it concurs with domestic and international courts[283] that there is no one agreed definition of the beginning of life.[284]

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[280] Deponent Escalante affirmed that "[f]rom the moment of fertilization – in other words, penetration of the egg by the spermatozoid – and during the following 14 days, the fertilized egg consists of a growing cell group, with identical cells, where there are no specialized tissues or organs. During this period (pre-embryonic) there is no individuality given that one of eight cells can divide itself into two of four and if both are implanted, identical twins would be born and, similarly, in the opposite sense, the fusion of two of four cells in one of eight, would result in the birth of only one baby." Statement of deponent Escalante (merits file, volume V folio 2441).

[281] In this regard, deponent Escalante stated that "prior to day 14 in the formation of the human species there is no individuality. […] Therefore, a patient who has, for example, two embryos in an IVF laboratory in preparation for their transfer two or three days later, still has 'children in progress'; she is not pregnant." Statement of deponent Escalante (merits report, volume V, folio 2386).

[282] In this regard, expert witness Caruso stated that he "did not know what a 'pre-embryo was." The term was first used by a frog biologist, Clifford Grobstein, in 1979. He believed that, since identical twins can occur 14 days after fertilization, before this, only one 'genetic individual' is present; not a developing individual and, therefore, an embryo or 'person' was not present. Moreover, the terms 'pre-embryo' and individuality have been discredited by almost all human biologists and rejected by the Terminology Committee of the American Association of Anatomists for inclusion in the Embryological Terminology. These terms are not used in any official work on human embryology or in the Carnegie Stages of human embryonic development." Written summary of the expert opinion provided by Anthony Caruso at the public hearing before the Court (merits report, Volume VI, folio 2937.216). In addition, expert witness Condic indicated that "[s]ome people have tried to refer to an embryo prior to syngamy (or prior to the implantation or the formation of the primitive streak) as a "pre-embryo," but this is not a legitimate scientific term." Affidavit prepared by expert witness Condic (merits report, volume V, folio 2590).

[283] With regard to decisions of constitutional courts: the United States Supreme Court, *Case of Roe v. Wade*, 410 U.S. 115, 157 (1973) ("We need not resolve the difficult question of when life begins. If those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary ….is not in a position to speculate as to the answer"); the Supreme Court of the United Kingdom, *Case of Smeaton v. The Secretary of State for Health*, [2002] EWHC 610 (Admin), Opinion of Justice Munby, paras. 54 and 60 ("It is no part of my function, as I conceive it, to determine the point at which life begins […] Thus, even biology and medicine cannot tell us precisely when it is that "life" really starts"). Supreme Court of Justice of Ireland, *Case of Roche v. Roche & Ors*, Judgment of December 15, 2009, [2009] IESC 82, Opinion of Judge Murray C.J. ("In my opinion, it is not for a court of law, faced with the most divergent, although most learned views, in the said disciplines available to it, to rule on the truth of the precise moment at which human life begins"); Opinion of Judge Denham J: para. 46. ("This is not the appropriate arena for attempting to define "life", "the beginning of life", "the timing of ensoulment", "potential life", "the unique human life", when life begins, or other imponderables relating to the concept of life. This is not the forum for deciding principles of science, theology or ethics. This is a court of law which has been asked to interpret the Constitution and to make a legal decision on the interpretation of an article of the Constitution"). Court Constitutional of Colombia, Judgment C-355 of 2006. ("This Court considers that determining the exact moment at which human life begins is a problem that has been dealt with in different ways, not only from different perspective such as those of genetics, medicine, religion or morals, but also based on the different criteria expressed by each of the respective experts, whose assessment does not correspond to the Constitutional Court in this decision). ECHR, *Case of Vo. v. France* (No. 53924/00), GC, Judgment of 8 July 2004, para. 84.

[284] *Cf.* Maureen L. Condic; '*Pre-implantation Stages of Human Development: The Biological and Moral Status of Early Embryos*' (file of annexes to the answer to the application, volume III, folios 6580 to 6594). In particular, she indicates that "[c]urrently, there is little consensus among scientists, philosophers, ethicists, and theologians regarding when human life begins. While many assert that life begins at 'the moment of conception', precisely when this moment occurs has not been rigorously defined. Indeed, the legislative bodies of different countries have defined the "moment" of conception quite differently. For example, Canada defines a human embryo as 'a human organism during the first 56 days of its development following fertilization or creation,' a definition that is very similar to the one proposed in the United States of America. Recent statements by bio-ethicists, politicians, and scientists have suggested that human life commences even later, at the eight-cell stage (approximately 3 days post-fertilization) (for example, Peters 2006); at the implantation of the embryo in the uterus [5–6 days post-fertilization; Agar (2007), Hatch (2002), or at formation of the primitive streak (2 weeks post-fertilization)."

Nevertheless, it is clear to the Court that some opinions view a fertilized egg as a complete human life. Some of these opinions may be associated with concepts that confer certain metaphysical attributes on embryos. Such concepts cannot justify preference being given to a certain type of scientific literature when interpreting the scope of the right to life established in the American Convention, because this would imply imposing specific types of beliefs on others who do not share them.

186. Despite the foregoing, the Court considers that it is appropriate to define how to interpret the term "conception" in relation to the American Convention. In this regard, the Court underscores that the scientific evidence agrees in making a difference between two complementary and essential moments of embryonic development: fertilization and implantation. The Court observes that it is only after completion of the second moment that the cycle is concluded, and that conception can be understood to have occurred. Taking into account the scientific evidence presented by the parties in this case, the Court notes that, even though, once the egg has been fertilized, this gives rise to a different cell with sufficient genetic information for the potential development of a "human being," the fact is that if this embryo is not implanted in a woman's body its possibilities of development are nil. If an embryo never manages to implant itself in the uterus, it could not develop, because it would not receive the necessary nutrients, nor would it be in a suitable environment for its development (*supra* para. 180).

187. Thus, the Court considers that the term "conception" cannot be understood as a moment or process exclusive of a woman's body, given that an embryo has no chance of survival if implantation does not occur. Proof of this is that it is only possible to establish whether or not pregnancy has occurred once the fertilized egg has been implanted in the uterus, when the hormone known as "chorionic gonadotropin" is produced, which can only be detected in a woman who has an embryo implanted in her.[285] Prior to this, it is impossible to determine whether the union between the egg and a spermatozoid occurred within the body or whether this union was lost prior to implantation. In addition, it has already been pointed out that when Article 4 of the American Convention was drafted the dictionary of the *Real Academia* differentiated between the moment of fertilization and the moment of conception, understanding conception as implantation (*supra* para. 181). When drafting the relevant provisions in the American Convention, the moment of fertilization was not mentioned.

188. Furthermore, with regard to the expression "in general," the *Diccionario de la Real Academia Española* states that this means "in common, generally" or "without specifying or individualizing anything."[286] According to the structure of the second phrase of Article 4(1) of the Convention, the term "in general" is related to the expression "from the moment of conception." The literal interpretation indicates that the expression relates to anticipating possible exceptions to a particular rule. The other methods of interpretation would suggest the meaning of a provision that contemplates exceptions.

189. Taking the above into account, the Court understands the word "conception" from the moment at which implantation occurs, and therefore considers that, before this event, Article 4 of the American Convention cannot be applied. In addition, the term "in general" infers exceptions to a rule, but the interpretation in keeping with the ordinary meaning does not allow the scope of those exceptions to be specified.

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[285] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2846).

[286] *Cf. Diccionario de la Real Academia de la Lengua Española*. Available at: http://lema.rae.es/drae/?val=en%20general (Last visited November 28, 2012).

190. However, taking into consideration that Article 4(1) is a matter that is the subject of the discussion in this case and also in the context of the deliberations of the Constitutional Chamber, the Court finds it appropriate to interpret this article using the following methods of interpretation, namely the systematic and historical, and the evolutionary and teleological interpretation.

C.2) Systematic and historical interpretation

191. The Court emphasizes that, according to the systematic argument, norms should be interpreted as part of a whole, the meaning and scope of which must be defined based on the legal system to which they belong.[287] Thus, the Court has considered that "the interpretation of a treaty should take into account not only the agreements and instruments formally related to it (Article 31(2) of the Vienna Convention), but also its context (Article 31(3))";[288] in other words, international human rights law.

192. In this case, the Constitutional Chamber and the State based their arguments on an interpretation of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), the Convention on the Rights of the Child, and the 1959 Declaration on the Rights of the Child. In particular, the State affirmed that treaties other than the American Convention require the absolute protection of prenatal life. The Court will proceed to examine this argument based on a general assessment of the provisions established by the protection systems in relation to the protection of the right to life. Accordingly, it will analyze: (i) the inter-American system; (ii) the universal system; (iii) the European system, and (iv) the African system.

193. Moreover, according to Article 32 of the Vienna Convention, "the supplementary means of interpretation, especially the preparatory work of the treaty, can be used in order to confirm the meaning resulting from that interpretation or when it leaves an ambiguous or obscure meaning, or leads to a result which is manifestly absurd or unreasonable."[289] This means that they are usually used only in a subsidiary manner,[290] after the methods of interpretation set out in Article 31 of the Vienna Convention have been used, in order to confirm the meaning that was found or to establish whether ambiguity remains in the interpretation or whether the application is absurd or unreasonable. However, in the present case, the Court considers that Article 31(4) of the Vienna Convention, which provides that a special meaning shall be given to a term if it is established that the parties so intended, is relevant for determining the interpretation of Article 4(1) of the American Convention. Therefore, the interpretation of the text of Article 4(1) of the Convention is directly related to meaning intended by the States Parties to the Convention.

C.2.a) Inter-American human rights system

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287 *Cf. Case of González et al. ("Cotton field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 43.

288 *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 113, and *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 192.

289 *Cf. Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights). Advisory Opinion* OC-3/83 of September 8, 1983. Series A No. 3, para. 49

290 *Cf. Case of González et al. ("Cotton field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 68

i) Preparatory work of the American Declaration of the Rights and Duties of Man

194. Pursuant to Resolution XL of the 1945 Inter-American Conference on Problems of War and Peace, the Inter-American Juridical Committee drew up a draft Declaration of the Rights and Duties of Man to be considered by the Ninth International Conference of American States in 1948.[291] This text was analyzed during the Conference in conjunction with the preliminary text of the International Declaration on Human Rights prepared by the United Nations in December 1947.[292]

195. Article I of the draft declaration submitted by the Juridical Committee stated the following with regard to the right to life:

> 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.[293]

196. Subsequently, a working group was created,[294] which submitted a new preliminary text to the Sixth Committee entitled American Declaration of the Fundamental Rights and Duties of Man;[295] the new Article 1 of which reads:

> Every human being has the right to life, liberty, and the security and integrity of his person.[296]

197. In its report to the Sixth Committee, the working group explained this new article and other changes introduced as a compromise to resolve the problems raised by the delegations of Argentina, Brazil, Cuba, Mexico, Peru, Uruguay, the United States of America and Venezuela, mainly as a result of the conflict existing between the laws of those States and the draft prepared by the Juridical Committee,[297] because the definition of the scope of the right to life in the Juridical Committee's draft was incompatible with the laws on capital punishment and abortion in most American States.[298]

198. On April 22, 1948, the Sixth Committee approved article I of the Declaration with a slight change in the wording of the Spanish text.[299] The definitive text of the Declaration was approved at the seventh plenary session of the Conference on April 30, 1948.[300] The only difference in the final version was the elimination of the word "integrity."[301] The final version that was approved stated:

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291 *Cf.* Inter-American Juridical Committee, Reports and Recommendations, Official Documents, 1945-1947, Río de Janeiro, 1960.

292 *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), para. 19(a)

293 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, p. 449.

294 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, pp. 474 and 475.

295 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, pp. 476 and 478.

296 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V,* p. 479.

297 *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case of 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), para. 19(d) (citing *IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, pp. 474-484, 513-514).

298 *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case of 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), para. 19(e).

299 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, p. 578. The final text was: "Every human being has the right to life, liberty and the safety and integrity of his person."

300 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, pp. 231, 234 and 236.

301 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, p. 248.

> Every human being has the right to life, liberty and the security of his person.[302]

199. The Court observes that, in their domestic law, several countries, including Argentina, Brazil, Costa Rica, Cuba, Ecuador, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela, established exceptions to the criminalization of abortion in cases of danger to a woman's life, grave danger to a woman's health, eugenic abortions, or rape.[303]

200. Taking into account this background information leading up to the American Declaration, the Court considers that the preparatory work does not provide a clear answer to the matter in dispute.

ii) Preparatory work of the American Convention on Human Rights

201. During the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, held in 1959, the decision was taken to facilitate the preparation of a human rights convention, and the Inter-American Council of Jurists was entrusted with the preparation of the respective draft document.[304] The Inter-American Council of Jurists drew up this draft[305] to be considered at the Ninth International American Conference to be held in 1960. The Inter-American Council took into account the experiences of the European human rights system with regard to the European Convention on Human Rights, and the United Nations universal human rights system. Regarding the right to life, the following wording was included in Article 2 of the draft convention:

> Every person has the right to have his life respected. The right to life is inherent in the human being. This right shall be protected by law from the moment of conception. No one may be deprived of life arbitrarily.[306]

202. This wording, without the phrase "in general" which was incorporated later, was proposed in the three drafts on which the American Convention was based.[307]

203. Subsequently, the 1965 Second Special Conference of Inter-American States commissioned the OAS Council to update and complete the "draft human rights convention" prepared by the Inter-American Council of Jurists in 1959, taking into account the draft conventions presented by the Governments of Chile and Uruguay and obtaining the opinion of the Inter-American Commission on Human Rights.[308]

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302 *Cf. IX Conferencia Internacional Americana - Actas y Documentos, Vol. V*, , Vol. I, pp. 231, 234 and 236.

303 *Cf.* Luis Jiménez de Asua, *Códigos Penales Iberoamericanos*, Vols. I, II, cited in Inter-American Commission on Human Rights, *Case of Baby Boy v. United States of America.* Decision No. 23/81, Case of 2141 (1981), para. 19(f).

304 *Cf. Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 97.

305 Approved on September 8, 1959, by Resolution No. XX of the Inter-American Council of Jurists.

306 *Cf.* Draft human rights convention, approved by the fourth meeting of the Inter-American Council of Jurists, Final Proceedings, Santiago de Chile, September 1959 Doc. CIJ-43, in: *Anuario Interamericano de Derechos Humanos*, 1968, OAS, Washington D.C., 1973, pp. 236.

307 *Cf.* the Draft human rights convention, approved by the fourth meeting of the Inter-American Council of Jurists, Santiago, Chile, September 1959; the draft human rights convention presented by the Government of Chile at the Second Inter-American Special Conference, Río de Janeiro, 1965, doc. 35, and the draft human rights convention presented by the Government of Uruguay at the Second Inter-American Special Conference, Río de Janeiro, 1965, doc. 49, *Cf. Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, pp. 236, 280 & 298.

308 It also commissioned the OAS Council to ensure that the revised draft was submitted to the Governments so that they could make any observations and amendments they considered pertinent and to convene an Inter-American Specialized Conference to consider the draft and the observations, and to approve the Convention. The OAS Council asked the Inter-American Commission for its opinion and the latter issued an opinion on the matter

204. In order to accommodate the different opinions concerning the wording "from the moment of conception" that had been voiced since the Ninth International Conference of American States held in Bogotá in 1948 owing to the legislation of the American States that permitted abortion, the Inter-American Commission on Human Rights redrafted Article 2 (Right to Life) to introduce the words "in general" immediately before the phrase "from the moment of conception."[309] This compromise was the origin of the new text of Article 2(1) that indicated:

> Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception.[310]

205. This proposal was reviewed by the Commission's rapporteur, who reiterated his dissenting opinion and proposed the elimination of the entire phrase, "in general, from the moment of conception," in order to avoid any possible conflict with paragraph 1 of article 6 of the International Covenant on Civil and Political Rights, which establishes this right in a general way only.[311] However, the Commission considered that "on principle, it was essential to establish the protection of the right to life as recommended by the Council of the Organization of American States in its Opinion (Part I).[312] It was accordingly decided to keep the proposed text of Article 2(1) without change.

206. At the Inter-American Specialized Conference on Human Rights, held from November 7 to 22, 1969, which approved the American Convention, the delegations of the Dominican Republic and Brazil introduced separate amendments to delete the phrase "in general, from the moment of conception."[313]

207. Regarding the text of the right to life (Article 3), the delegation of the Dominican Republic considered that "it would enhance the universal concepts of human rights if the

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that it forwarded to the OAS Council on November 4, 1996 (Part I) and on April 10, 1967 (Part II). *Cf.* "Opinion prepared by the Inter-American Commission on Human Rights on the draft Convention on Human Rights approved by the Inter-American Council of Jurists (Civil and political rights), Part I," OEA/Ser.L/V/II.15/doc.26, and "Opinion prepared by the Inter-American Commission on Human Rights on the draft Convention on Human Rights approved by the Inter-American Council of Jurists Part II," OEA/Ser.L/V/II.16/doc.8. in: *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, pp. 320 ff. and 334 ff. In addition, by a resolution of June 7, 1967, the OAS Council consulted the Governments of the Member States on the possibility of the coexistence of the conventions signed within the United Nations and an inter-American convention on human rights. Subsequently, the Council commissioned the Inter-American Commission on Human Rights to draft a revised and complete text for a draft Convention. *Cf.* Inter-American Specialize Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, Proceedings and documents, General Secretariat, OAS, Washington, D.C., OEA/Ser.K/XVI/1.2.

309 *Cf.* "Opinion prepared by the Inter-American Commission on Human Rights on the draft Convention on Human Rights approved by the Inter-American Council of Jurists (Civil and political rights), Part I," OEA/Ser.L/V/II.15/doc.26, in: *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 320.

310 *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 321.

311 *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 98.

312 *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 98.

313 *Cf.* "Observations and comments on the draft convention for the protection of human rights presented by the Government of the Dominican Republic, June 20, 1969," and "Observations and amendments to the draft inter-American convention for the protection of human rights presented by the Government of Brazil, November 10, 1969," in: Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, *Proceedings and Documents*, General Secretariat, OAS, Washington, D.C., OEA/Ser.K/XVI/1.2, p. 50 ss., and 121 ss.

inter-American text was the same as the one adopted by the United Nations in article 6(1) of the Covenant."[314]

208. The Brazilian delegation justified its proposal to delete the phrase by considering that "[t]his final phrase is vague and, thus, would not be effective to prevent the States Parties to the future convention including in their domestic law the most diverse cases of abortion."[315] It argued that "[t]he said phrase could […] raise doubts that would impede not only the acceptance of this article, but also its application, if the actual wording is retained,"[316] concluding that "thus, it would be better to eliminate the phrase 'in general, from the moment of conception,' because this is a matter that should be left to the legislation of each country."[317]

209. The United States delegation, supporting Brazil's position, suggested that "this text should be harmonized with article 6, paragraph 1, of the United Nations Covenant on Civil and Political Rights."[318]

210. The delegation of Ecuador proposed the deletion of the words "in general"[319] and the Venezuelan delegate considered that "regarding the right to life from the moment of the conception of the human being, no concessions can be made,"[320] considering "inacceptable a convention that did not establish this principle."[321]

211. Finally, by majority vote, the Conference adopted the text of the draft submitted by the Inter-American Commission on Human Rights,[322] which became the present text of Article 4(1) of the American Convention.

212. When ratifying the Convention, only Mexico made an interpretative declaration, clarifying that "regarding paragraph 1 of Article 4, [it] considers that the expression 'in general' […] does not constitute an obligation to adopt or to maintain in force legislation that protects life "from the moment of conception,' because this matter pertains to the domain reserved to the States."[323]

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314 *Cf.* "Observations and comments on the draft convention for the protection of human rights presented by the Government of the Dominican Republic, June 20, 1969", p. 57.

315 *Cf.* "Observations and amendments to the draft inter-American convention for the protection of human rights presented by the Government of Brazil, November 10, 1969," in: Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, *Proceedings and Documents*, p. 121.

316 *Cf.* "Observations and amendments to the draft inter-American convention for the protection of human rights presented by the Government of Brazil, November 10, 1969," p. 121.

317 *Cf.* "Observations and amendments to the draft inter-American convention for the protection of human rights presented by the Government of Brazil, November 10, 1969," p. 121.

318 *Cf.* Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, *Proceedings and Documents*, p. 160.

319 *Cf.* Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, *Proceedings and Documents*, p. 160.

320 *Cf.* Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, *Proceedings and Documents*, p. 160.

321 *Cf.* Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, *Proceedings and Documents*, p. 160.

322 *Cf.* Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, *Proceedings and Documents*, pp. 161 and 481.

323 *Cf.* Interpretative Declaration by Mexico. Available at: http://www.oas.org/es/cidh/mandato/Basicos/convratif.asp (Last visited November 28, 2012)

213. Since the Costa Rican State defines the embryo as "human being" and "person," the Court will now review briefly the preparatory work concerning these expressions. Article 1 of the draft human rights convention, approved by the Fourth Meeting of the Inter-American Council of Jurists,[324] established that:

> The States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons who are in their territory and who are subject to their jurisdiction the free and full exercise of those rights and freedoms.[325]

214. Meanwhile, Article 2(1) established that:

> The right to life is inherent in the human being. This right shall be protected by law from the moment of conception.[326]

215. The wording of article 1 of the draft human rights convention submitted by the Government of Uruguay[327] was identical to the draft prepared by the Inter-American Council of Jurists,[328] while article 2(1) indicated:

> Every human being has the right to have his life respected. This right shall be protected by law from the moment of conception. No one can be deprived of life arbitrarily.[329]

216. In the "Opinion of the Inter-American Commission on Human Rights on the draft Convention on Human Rights approved by the Inter-American Council of Jurists (Civil and Political Rights), Part I," and the "Text of the amendments suggested by the Inter-American Commission on Human Rights to the draft Convention on Human Rights prepared by the Inter-American Council of Jurists,"[330] the Commission suggested, with regard to Article 1 of the draft of the Inter-American Council of Jurists, "in the interests of greater brevity and technical precision of the wording" the substitution of the expression "human beings" by "persons."[331] However, at the same time, it maintained the expression "human being" in Article 2(1), proposing the following wording that included the phrase "in general":

> Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception.[332]

217. Finally, article 1 of the draft Inter-American Convention on Protection of Human Rights established:

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[324] *Cf.* Draft human rights convention, approved by the fourth meeting of the Inter-American Council of Jurists, Final proceedings, Santiago de Chile, September 1959. Doc. CIJ-43, in: *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 236.

[325] *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 236.

[326] *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 236.

[327] Draft human rights convention, presented by the Government of Uruguay, Second Special Inter-American Conference, Río de Janeiro, 1965, doc. 49, in: *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 298.

[328] *Cf. Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 236.

[329] *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 236.

[330] Text of the amendments suggested by the Inter-American Commission on Human Rights to the draft human rights convention prepared by the Inter-American Council of Jurists, Annex to the document, OEA/Ser.L/V/II.16, doc. 18, in: *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, pp. 356 and *ff.*

[331] *Cf. Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, p. 318.

[332] *Anuario Interamericano de Derechos Humanos* 1968, OAS, Washington D.C., 1973, pp. 320 and 356.

> 1. The contracting States undertake to respect the rights and freedoms recognized herein and to ensure to all persons within their territory and subject to their jurisdiction the free and full exercise of those rights and freedoms […].
>
> 2. "Person" for the intents and purposes of this Convention, means every human being;

218. In addition, Article 3(1) indicated:

> "Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

219. The Court observes that during the preparatory work the words "person" and "human being" were used without the intention of making a distinction between the two terms. Article 1(2) of the Convention specifies that the two terms must be understood as synonyms.[333]

220. The Court also observes that the Inter-American Commission on Human Rights, in the case of *Baby Boy v. United States of America,*[334] rejected the petitioners' request to declare that two judgments of the United States Supreme Court of Justice[335] that legalized unrestricted abortion before fetal viability violated the American Declaration of the Rights and Duties of Man. Regarding the interpretation of Article I of the American Declaration, the Commission rejected the argument of the petitioners according to which "Article I of the Declaration has incorporated the notion that the right to life exists from the moment of conception,"[336] considering that, when approving the American Declaration, the Ninth American International Conference had "discussed this matter and decided not to adopt wording that would have clearly established this principle."[337] Regarding the interpretation of the American Convention, the Inter-American Commission indicated that the protection of the right to life was not absolute.[338] It considered that "[t]he addition of the phrase 'in general, from the moment of conception' did not mean that those who drafted the Convention had the intention of modifying the concept of the right to life established in Bogota, when the American Declaration was approved. The legal implications of the phrase 'in general, from the moment of conception' are substantially different from those of the shorter phrase 'from the moment of conception,' which appeared repeatedly in the petitioners' document."[339]

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[333] Article 1(2) has been analyzed by the Court in cases in which the violation of rights has been alleged to the detriment of legal persons, and the Court has rejected this, because they have not been recognized as holders of the rights established in the American Convention. *Cf. Case of Cantos v. Argentina. Preliminary objections.*. Judgment of September 7, 2001. Series C No. 85, para. 29, and *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of January 28, 2009. Series C No. 195, para. 398. However, in these cases, the Court did not develop significant arguments on the meaning of Article 1(2) in the context of the disputes in this case.

[334] *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case of 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981).

[335] *Cf.* United States Supreme Court of Justice, *Cases of Roe v. Wade*, 410 U.S. 113, and *Doe v. Bolton*, 410 U.S. 179.

[336] *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case of 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), para. 19(h).

[337] *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case of 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), para. 19(h).

[338] *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case of 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), para. 25.

[339] *Cf.* Inter-American Commission on Human Rights, *Baby Boy v. United States*, Case of 2141, Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), para. 30.

221. The Court concludes that the preparatory work indicates that the proposals to eliminate the phrase "and, in general, from the moment of conception," did not prosper, and neither did the proposal of the delegations that merely requested the elimination of the words "in general."

iii) Systematic interpretation of the American Convention and the American Declaration

222. The expression "every person" is used in numerous articles of the American Convention[340] and the American Declaration.[341] When analyzing these articles, it is not feasible to maintain that an embryo is the holder of and exercises the rights established in each of these article. Also, taking into account, as indicated previously, that conception can only take place within a woman's body (*supra* paras. 186 and 187), it can be concluded with regard to Article 4(1) of the Convention, that the direct subject of protection is fundamentally the pregnant woman, because the protection of the unborn child is implemented essentially through the protection of the woman, as revealed by Article 15)(3)(a) of the Protocol of San Salvador, which obliges the States Parties "to provide special care and assistance to mothers during a reasonable period before and after childbirth," and article VII of the American Declaration, which establishes the right of all women, during pregnancy, to special protection, care, and aid.

223. Consequently, the Court concludes that the historic and systematic interpretation of precedents that exist in the inter-American system confirms that it is not admissible to grant the status of person to the embryo.

C.2.b) Universal human right system

i) Universal Declaration of Human Rights

224. Regarding the State's argument that "the Universal Declaration of Human Rights […] protects the human being from […] the moment of the fusion of the egg and the spermatozoid," the Court considers that, according to the preparatory work of this instrument, the word "born" was used precisely to exclude the unborn child from the rights recognized in the Declaration.[342] The authors expressly rejected the idea of eliminating that word, so that the resulting text expresses with full intention that the rights set forth in the Declaration are "inherent from the moment of birth."[343] Therefore, the expression "human being" used in the Universal Declaration of Human Rights has not been understood to include the unborn child.

ii) International Covenant on Civil and Political Rights

225. Regarding the State's argument that the "International Covenant on Civil and Political Rights […] recognizes the life of the embryo independently from that of its mother," the Court observes that, during the second session of the Commission on Human Rights, held from December 2 to 17, 1947, Lebanon proposed the protection of the right to life from

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340 *Cf.* In this regard, Articles 1(1), 3, 4(6), 5(1), 5(2), 7(1), 7(4), 7(5), 7(6), 8(1), 8(2), 10, 11(1), 11(3), 12(1), 13(1), 14(1), 16, 18, 20(1), 20(2), 21(1), 22(1), 22(2), 22(7), 24, 25(1) and 25(2) of the American Convention.

341 *Cf.* In this regard Articles II, III, IV, V, VI, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVI and XXVII of the American Declaration.

342 E/CN.4/SR/35 (1947).

343 E/CN.4/SR/35 (1947)).

the moment of conception.[344] In view of the resistance to the wording "from the moment of conception" in light of the admissibility of abortion in many States, Lebanon suggested the wording "at any stage of human development."[345] This wording, which was initially accepted,[346] was subsequently eliminated.[347] A proposal made by the United Kingdom to regulate the issue of abortion in a separate article was initially considered,[348] but then was also discarded.[349] During the sixth session of the Commission on Human Rights from March 27 to May 19, 1950, a new attempt made by Lebanon to protect human life from the moment of conception failed.[350] In the deliberations of the Third Committee of the General Assembly from November 13 to 26, 1957, a group of five States (Belgium, Brazil, El Salvador, Mexico and Morocco) proposed an amendment to article 6(1) in the following terms: "from the moment of conception, this right [to life] shall be protected by law."[351] However, this proposal was rejected by 31 votes against, 20 votes in favor and 17 abstentions.[352] Thus, the preparatory work for article 6(1) of the ICCPR reveals that the States did not seek to treat the unborn child as a person and grant it the same level of protection as those who are born.

226. The Human Rights Committee did not comment on the right to life of the unborn child in either General Comment No. 6 (Right to Life)[353] or General Comment No. 17 (Rights of the Child).[354] On the contrary, in its concluding observations on the reports of the States, the Human Rights Committee has indicated that the right to life of the mother is violated when laws that restrict access to abortion force women to resort to unsafe abortion, exposing them to death.[355] These decisions allow the Court to state that an absolute

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344 *Cf.* UN Doc. E/CN.4/386 and 398.

345 *Cf.* UN Doc. E/CN.4/AC.3/SR.2, para. 2 f (1947).

346 *Cf.* UN Doc. E/CN.4/AC.3/SR.2, para. 2 f (1947).

347 *Cf.* UN Doc. E/CN.4/AC.3/SR.9, para. 3 (1947).

348 *Cf.* UN Doc. E/CN.4/AC.3/SR.9, para. 3 (1947).

349 *Cf.* UN. Doc. E/CN.4/SR.35, para. 12 (1947).

350 *Cf.* UN. Doc. E/CN.4/SR.149, para. 16 (1950).

351 *Cf.* UN Doc. A/C.3/L.654.

352 *Cf.* UN Doc. A/C.3/SR.820, para. 9 (1957).

353 *Cf.* Committee on Human Rights, General Comment No. 6, Right to Life (Article 6), U.N. Doc. HRI/GEN/1/Rev.7 at 143 (1982).

354 *Cf.* Committee on Human Rights, General Comment No. 17, Rights of the Child (Article 24).

355 For example, the Human Rights Committee has issued the following Concluding Observations in this regard: Argentina, para. 14, UN Doc. CCPR/CO/70/ARG (2000); Bolivia, para. 22, UN Doc. CCPR/C/79/Add.74 (1997); Costa Rica, para. 11, UN Doc. CCPR/C/79/Ad.107 (1999); Chile, para. 15, UN Doc. CCPR/C/79/Add.104 (1999); El Salvador, para. 14, UN Doc. CCPR/CO/78/SLV (2003); Ecuador, para. 11, UN Doc. CCPR/C/79/Add.92 (1998); The Gambia, para. 17, UN Doc. CCPR/CO/75/GMB (2004); Guatemala, para. 19, UN Doc. CCPR/CO/72/GTM (2001); Honduras, para. 8, UN Doc. CCPR/C/HND/CO/1 (2006); Kenya, para. 14, UN Doc. CCPR/CO/83/KEN (2005); Kuwait, para. 9, CCPR/CO/69/KWT (2000); Lesotho, para. 11, UN Doc. CCPR/C/79/Add.106 (1999); Mauritius, para. 9, UN Doc. CCPR/CO/83/MUS (2005); Morocco, para. 29, UN Doc. CCPR/CO/82/MAR (2004); Paraguay, para. 10, UN Doc. CCPR/C/PRY/CO/2 (2006); Peru, para. 15, UN Doc. CCPR/C/79/Ad.72 (1996); Peru, para. 20, UN Doc. CCPR/CO/70/PER (2000); Poland, para. 8, UN Doc. CCPR/CO/82/POL (2004); Republic of Tanzania, para. 15, UN Doc. CCPR/C/79/Ad.97 (1998); Trinidad and Tobago, para. 18, UN Doc. CCPR/CO/70/TTO (2000); Venezuela, para. 19, UN Doc. CCPR/CO/71/VEN (2001), and Vietnam, para. 15, UN Doc. CCPR/CO/75/VNM (2002). Also, in the Case of *K.L. v. Peru*, the Human Rights Committee determined that, by having refused a therapeutic abortion to a woman, even though the continuation of the pregnancy placed her life and mental health in grave danger, the State had violated her right not to be subjected to cruel, inhuman or degrading treatment. *Case of K.L. v. Peru*, HRC, Communication No. 1153/2003, Doc. UN CCPR/C/85/D/1153/2003 (2005). This interpretation was ratified in the Case of *L.M.R. v. Argentina*, where the Committee observed that refusing legal abortion in a case of rape caused the victim physical and mental suffering, so that her right to privacy and not to be subjected to torture or to cruel, inhuman or degrading treatment was

protection of the prenatal life or the life of the embryo cannot be inferred from the ICCPR.

iii) Convention on the Elimination of All Forms of Discrimination against Women

227. The reports of the Committee on the Elimination of Discrimination against Women (hereinafter also "CEDAW") makes it clear that the fundamental principles of equality and non-discrimination require that precedence be given to protecting the rights of pregnant women over the interest of protecting the life in formation. In the case of *L.C. v. Peru*, the Committee found the State responsible for violating the rights of a girl who was denied a crucial surgical operation, based on the excuse that she was pregnant, giving priority to the fetus over the mother's health. In view of the fact that the continuation of the pregnancy represented a grave danger for the young woman's physical and mental health, the Committee concluded that denying her a therapeutic abortion and postponing the operation constituted gender-based discrimination and a violation of her right to health and non-discrimination.[356]

228. The Committee also expressed its concern over the potential of anti-abortion laws to jeopardize women's rights to life and health.[357] The Committee has established that the total ban on abortion, as well as its criminalization under certain circumstances, violates the provisions of the Convention.[358]

iv) Convention on the Rights of the Child

229. The State argued that the embryo should be considered a "child" and, consequently, that there is a special obligation to protect it. The Court will proceed to analyze whether this interpretation has a basis in the international *corpus juris* on the protection of children.

230. According to Article 6(1) of the Convention on the Rights of the Child, "States Parties recognize that every child has the inherent right to life." The term "child" is defined in article 1 of the Convention as "every human being below the age of eighteen years, unless under the laws applicable to the child majority is attained earlier." The Preamble to the Convention states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'"[359]

231. Articles 1 and 6(1) of the Convention on the Rights of the Child do not refer explicitly to protection of the unborn child. The Preamble refers to the need to provide "special safeguards and care […] before […] birth." However, the preparatory work shows that this phrase was not intended to extend the provisions of the Convention, particularly the right to life, to the unborn child. In fact, the preparatory work indicates that this phrase did not

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violated. *Case of L.M.R. v. Argentina*, HRC, Communication No. 1608/2007, Doc. UN CCPR/C/101/D/1608/2007 (2011).

356 *Case of L.C. v. Peru*, CEDAW, Communication No. 22/2009, para. 8.15, UN Doc. CEDAW/c/50/D/22/2009 (2011).

357 *Cf.* CEDAW, Concluding comments on: Belize, para. 56, Doc. UN A/54/38/Rev. 1, GAOR, fifty-fourth session, Supl. No. 38 (1999); Chile, para. 228, Doc. UN A/54/38/Rev. 1, GAOR, fifty-fourth session, Supl. No. 38 (1999); Colombia, para. 393, Doc. UN A/54/38/Rev. 1, GAOR, fifty-fourth session, Supl. No. 38 (1999); Dominican Republic, para. 337, Doc. UN A/53/38/Rev.1, GAOR, fifty-third session, Supl. No. 38 (1998); Paraguay, para. 131, Doc. UN A/51/38, GAOR fifty-first session, Supl. No. 38 (1996).

358 *Cf.* CEDAW, Concluding comments: Chile, para. 228, Doc. UN CEDAW/A/54/38/Rev.1 (1999), and CEDAW Committee, Concluding comments: Nepal, para. 147, Doc. UN CEDAW/A/54/38/Rev.1 (1999).

359 Cf. Convention on the Rights of the Child, para. 9 of the Preamble.

intend to extend to the unborn child the provisions of the Convention, especially the right to life. Indeed, although the preamble of the revised draft of a convention on the rights of the child presented by Poland made no mention of prenatal life,[360] the Vatican requested that the expression "before and after birth" be included in the preamble,[361] which prompted conflicting opinions among the States. As a compromise, the delegations agreed to use an expression taken from the 1959 Declaration on the Rights of the Child.[362]

232. Faced with the difficulty of finding a definition of "child" in article 1 of the draft convention, the reference to birth as the beginning of childhood was eliminated.[363] Subsequently, during the deliberations, the Philippines requested the inclusion of the expression "both before and after birth" in the preamble,[364] which was opposed by several States.[365] As a compromise, it was agreed to include this reference in the preamble, but the preparatory work made it clear that the preamble would not determine the interpretation of Article 1 of the Convention.[366]

233. The Committee on the Rights of the Child has not issued any comments from which the existence of a right to prenatal life can be inferred.

C.2.c) European human rights system

234. Article 2(1) of the European Convention on Human Rights states that "[e]veryone's right to life shall be protected by law."[367] The authors of the Convention based their wording on the Universal Declaration of Human Rights, owing to its "moral authority and technical value."[368]

235. The former European Commission on Human Rights and the European Court of Human Rights (hereinafter "the ECHR") have ruled on the non-absolute scope of the protection of prenatal life in the context of cases of abortion and medical treatments related to *in vitro* fertilization.

236. In the 1980 *Case of Paton v. United Kingdom*, concerning the alleged violation of Article 2 of the European Convention to the detriment of the unborn child owing to an abortion carried out at the request of the mother in accordance with domestic law, the European Commission on Human rights held that the wording of the Convention "tends to

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360 *Cf.* UN Doc. E/CN.4/1349 (1979).

361 *Cf.* UN Doc. E/CN.4/1408, para. 91 (1980).

362 *Cf.* UN Doc. E/CN.4/1408, paras. 95 and 96 (1980) ("Recognizing that, as indicated in the Declaration of the Rights of the Child adopted in 1959, the child due to the needs of his physical and mental development requires […] legal protection in conditions of freedom, dignity and security").

363 *Cf.* UN Doc. E/CN.4/1408, para. 97 (1980).

364 *Cf.* UN Doc. E/CN.4/1989/48, para. 34 (1989).

365 *Cf.* UN Doc. E(CN.4/1989/48, para. 36 (1989).

366 UN Doc. E(CN.4/1989/48, paras. 39, 41 and 43 (1989) ("In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by State Parties").

367 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2(1), approved on November 4, 1950, 213 STNU 222, S.T.Eur. No. 5 (in force as of 3 September 1953). ("The Committee considered that it was preferable […], as by reason of the moral authority and technical value of the document in question, to make use, as far as possible, of the definitions set out in the 'Universal Declaration of Human Rights.'")

368 Committee on Legal and Administrative Questions Report, Section 1, Para. 6, 5 September 1949, in Collected Edition of the Preparatory Work, Vol. 1 (1975), p.194.

support the view that [Article 2] does not include the unborn child."[369] It added that recognizing an absolute right to prenatal life would be "contrary to the object and purpose of the Convention."[370] It indicated that "[t]he 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman."[371] The Commission confirmed this position in the cases of *R.H. v. Norway* (1992) and *Boso v. Italy* (2002), concerning the presumed violation of the right to life to the detriment of the unborn child owing to State laws that permitted abortion.[372]

237. In the Case of *Vo. v. France*, in which the petitioner had to undergo a therapeutic abortion due to the danger to her health as a result of inadequate medical treatments, the European Court stated that:

> Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected "in general, from the moment of conception", Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" […] whose "life" is protected by the Convention. The Court has yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of this provision and whether the unborn child has such a right." […]
> The issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" […]. The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate […] and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life. […]
> At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or fetus […], although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. **At best, it may be regarded as common ground between States that the embryo/fetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom […] – require protection in the name of human dignity, without making it a "person" with the "right to life"** for the purposes of Article 2. […]

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369 Case *Paton v. United Kingdom*, Application No. 8416/79, European Commission of Human Rights, Dec. & Rep. 244 (1980), para. 9. (Thus both the general usage of the term 'everyone' ('toute personne') of the Convention (para. 7 above) and the context in which this term is employed in Article 2 (para. 8 above) tend to support the view that it does not include the unborn.)

370 Case of *Paton v. United Kingdom*, Application No. 8416/79, European Commission of Human Rights, Dec. & Rep. 244 (1980), para. 20. (The Commission finds that such an interpretation would be contrary to the object and purpose of the Convention.)

371 Case of *Paton v. United Kingdom*, Application No. 8416/79, European Commission of Human Rights, Dec. & Rep. 244 (1980), para. 19. (The 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman.)

372 *Cf.* R.H. *v.* Norway, Decision on Admissibility, Application No. 17004/90, 73. European Commission on Human Rights Dec. & Rep. 155 (1992), Boso v. Italy, Application No. 50490/99, European Commission on Human Rights (2002).

> It is neither desirable, nor even possible as matters stand, to answer in the abstract the question of whether the unborn child is a person for the purposes of Article 2 of the Convention […].[373] (bold type and underlining added)

238. In the case *A, B and C v. Ireland,*[374] the European Court reiterated that:

> The question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the fetus and those of the mother are inextricably interconnected […], the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.

239. However, the ECHR made it clear that "this margin of appreciation is not unlimited" and that "the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved […]. A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature."[375]

240. Regarding cases relating to the practice of *in vitro* fertilization, in the case of *Evans v. United Kingdom*, the ECHR had to rule on the presumed violation of the right to life of preserved embryos because domestic law required their destruction after the partner of the applicant had withdrawn his consent for their implantation. The Grand Chamber of the ECHR reiterated its case law established in the case of *Vo. v. France*, stating that:

> In the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. Under English law, as was made clear by the domestic courts in the present applicant's case […], an embryo does not have independent rights or interests and cannot claim—or have claimed on its behalf—a right to life under Article 2.[376]

241. The Grand Chamber of the ECHR confirmed the decision regarding the non-violation of the right to life, recognized in Article 2, when indicating that "the embryos created by the applicant and [her partner] do not have a right to life within the meaning of Article 2 of the Convention, and that there has not, therefore, been a violation of that provision."[377]

242. In the *cases of S.H. v. Austria*[378] and *Costa and Pavan v. Italy,*[379] which related respectively, to the regulation of IVF with respect to egg and spermatozoid donation by third parties, and pre-implantation genetic diagnosis, the ECHR did not even refer to an alleged violation of a specific right of the embryos.

C.2.d) African human rights system

243. Article 4 of the African Charter on Human and People's Rights establishes that "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life

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373 ECHR, *Case of Vo. v. France*, (No. 53924/00), GC, Judgment of 8 July 2004, paras. 75, 82, 84 and 85.

374 ECHR, *Case of A, B and C v. Ireland*, (No. 25579/05), Judgment of 16 December 2010, para. 237.

375 ECHR, *Case of A, B and C v. Ireland*, (No. 25579/05), Judgment of 16 December 2010, para. 238.

376 ECHR, *Case of Evans v. United Kingdom*, (No. 6339/05), Judgment of 10 April 2007, para. 54.

377 ECHR, *Case of Evans v. United Kingdom*, (No. 6339/05), Judgment of 10 April 2007, para. 56.

378 *Cf.* ECHR, *Case of S.H. et al. v. Austria*, (No. 57813/00), Judgment of 3 November 2011.

379 *Cf.* ECHR, *Case of Costa and Pavan v. Italy*, (No. 54270/10). Judgment of 28 August 2012.

and for the integrity of his person."[380] The authors of the Charter expressly ruled out the use of terminology that would protect the right to life from the moment of conception.[381] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol of Maputo), does not refer to the beginning of life, and establishes that the States must take all appropriate measures to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus."[382]

C.2.e) Conclusion concerning systematic interpretation

244. The Court concludes that the Constitutional Chamber based its decision on Article 4 of the American Convention, Article 3 of the Universal Declaration, article 6 of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the 1959 Declaration on the Rights of the Child. However, it is not possible to use any of these articles or treaties to substantiate that the embryo can be considered a person in the terms of Article 4 of the Convention. Similarly, it is not possible to reach this conclusion from the preparatory work or from the systematic interpretation of the rights recognized in the American Convention or in the American Declaration.

C.3) Evolutive interpretation

245. This Court has indicated on other occasions[383] that human rights treaties are living instruments, whose interpretation must keep abreast of the passage of time and current living conditions. This evolving interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties.[384] In making an evolutive interpretation, the Court has granted special relevance to comparative law, and has therefore used domestic norms[385] or the case law of domestic courts[386] when analyzing specific disputes in contentious cases. For its part, the European Court[387] has used comparative law as a mechanism to identify the

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[380] African Charter of Human and People's Rights, approved on June 27 1981, Art. 4, Doc. OUA CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (in force since October 21, 1986).

[381] Proposal for an African charter of human and peoples' rights, Art. 17, Doc. OUA CAB/LEG/67/1 (1979) (where the wording of Art. 4(1) of the American Convention on Human Rights is adopted, replacing "moment of conception" for "moment of birth" – "This right shall be protected by law and, in general, from the moment of his birth").

[382] Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, adopted by the second ordinary session of the Assembly of the African Union, on July 11, 2003, Art. 14.2.c.

[383] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15, para. 114, and *Case of Atala Riffo and daughters v. Chile*, para. 83.

[384] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 113, and *Case of Atala Riffo and daughters v. Chile*, para. 83.

[385] In its analysis in the *Case of Kawas Fernández v. Hondura*s, the Court took into account that: it can be seen that a considerable number of States Parties to the American Convention have adopted constitutional provisions that expressly recognize the right to a healthy environment.

[386] In the cases of *Heliodoro Portugal v. Panama* and *Tiu Tojín v. Guatemala*, the Court took into account the judgments of the domestic courts of Bolivia, Colombia, Mexico, Panama, Peru, and Venezuela on the inapplicability of the statute of limitations for permanent crimes such as enforced disappearance. In addition, in the case of *Anzualdo Castro v. Peru*, the Court used rulings of constitutional courts of the countries of the Americas to support its definition of the concept of enforced disappearance. Other examples are the Case of *Atala Riffo and daughters v. Chile* and the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*.

[387] For example, in the Case of *TV Vest As & Rogaland Pensioners Party v. Norway*, the European Court took into account a document of the European Platform of Regulatory Authorities which compared 31 countries in the

subsequent practice of States; in other words, to determine the context of a particular treaty. In addition, for the purposes of interpretation, Article 31(3) of the Vienna Convention authorizes the use of means such as agreements or practice[388] or relevant rules of international law[389] that States have mentioned in relation to the treaty, which is related to an evolutive view of the interpretation of the treaty.

246. In the instant case, the evolutive interpretation is particularly relevant, bearing in mind that IVF is a procedure that did not exist when the authors of the Convention adopted the content of Article 4(1) of the Convention (*supra* para. 179). Therefore, the Court will analyze two issues in the context of the evolutive interpretation: (i) the pertinent developments in international and comparative law concerning the specific legal status of the embryo, and (ii) the regulations and practice of comparative law in relation to IVF.

C.3.a) The legal status of the embryo

247. It has been noted that, in the Case of *Vo. v. France*, the European Court of Human Rights indicated that the potentiality of the embryo and its capacity to become a person requires a protection in the name of human dignity, without making it a "person" with the "right to life" (*supra* para. 237).

248. For its part, article 18 of the Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (hereinafter "the Oviedo Convention"), adopted within the framework of the European Union,[390] establishes the following:

> Article 18. Research on embryos *in vitro*:
>
> 1. Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo.
> 2. The creation of human embryos for research purposes is prohibited.

249. Consequently, this treaty does not prohibit IVF, but rather the creation of embryos for research purposes. Regarding the status of the embryo in this Convention, the ECHR has indicated that:

> The Oviedo Convention on Human Rights and Biomedicine […] is careful not to give a definition of the term "everyone", and its explanatory report indicates that, in the absence of unanimous agreement on the definition, the member States decided to allow domestic law to provide clarification for the purposes of the application of that Convention […] The same is true of the Additional Protocol on the

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region to determine which of them permitted either paid or unpaid political advertising and in which countries such publicity was free. Likewise, in the case of Hirst v. United Kingdom, the Court took into account the "Law and practice in the Contracting States" in order to determine which countries suspended the right to vote of a person convicted of a crime, for which purpose it surveyed the legislation of 48 European countries.

388 *Cf.* ECHR, *Case of Rasmussen v. Denmark* (No. 8777/79), Judgment of 28 November 1984, para. 41; *Case of Inze v. Austria*, (No. 8695/79) Judgment of 28 October 1987, para. 42, and *Case of Toth v. Austria*, (No. 11894/85), Judgment of 25 November 1991, para. 77.

389 *Cf.* ECHR, *Case of Golder v. United Kingdom*, (No. 4451/70), Judgment of 12 December 1975, para. 35.

390 The Oviedo Convention establishes that States Parties "shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine" and adds that "[e]ach Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention." The Oviedo Convention was adopted on April 4, 1997, in Oviedo, Asturias, and entered into force on December 1, 1999. It was ratified by 29 Member States of the Council of Europe, with six reservations.

> Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research, which do not define the concept of "human being."[391]

250. For its part, the Court of Justice of the European Union[392] in the *Case of Oliver Brüstle v. Greenpeace eV*[393] indicated that the purpose of Directive 98/44/CE of the European Parliament and of the Council, of July 6, 1998, on the legal protection of biotechnological inventions, was "not to regulate the use of human embryos in the context of scientific research, [and that it was] limited to the patentability of biotechnological inventions."[394] However, it clarified that "although the purpose of scientific research must be distinguished from industrial or commercial purposes, the use of human embryos for research, which constitutes the reason for the application for a patent, cannot be separated from the patent itself and the rights attaching to it."[395] Consequently "the exclusion from patentability concerning the use of human embryos for industrial or commercial purposes in Article 6(2)(c) of the Directive also covers use for purposes of scientific research, only use for therapeutic or diagnostic purposes which is applied to the human embryo and is useful to it being patentable."[396] In this decision the European Court of Justice reaffirmed the exclusion of the patentability of human embryos, understood in a broad sense,[397] for ethical and moral reasons,[398] when it is associated with industrial or commercial purposes. However, neither the Directive, nor the judgment state that human embryos should be considered as "persons" or that they have a subjective right to life.

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[391] ECHR, *Case of Vo. v. France* (No. 53924/00), GC, Judgment of 8 July 2004, para. 84. (The Oviedo Convention on Human Rights and Biomedicine […] is careful not to give a definition of the term "everyone", and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member States decided to allow domestic law to provide clarification for the purposes of the application of that Convention […] The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research, which do not define the concept of "human being).

[392] The Court of Justice of the European Union is an institution of the European Union (EU) entrusted with the jurisdictional powers or judicial authority in the Union. Its mission is to interpret and apply the law of the European Union and it is characterized by its structure and composition and its supranational authority and functioning. Its seat is in Luxembourg.

[393] *Cf.* European Court of Justice, Grand Chamber, Judgment of 18 October 2011, Case C-34/10, Oliver Brüstle v. Greenpeace eV.

[394] European Court of Justice, Grand Chamber, Judgment of 18 October 2011, Case C-34/10, Oliver Brüstle *v*. Greenpeace eV, para. 40.

[395] European Court of Justice, Grand Chamber, Judgment of 18 October 2011, Case C-34/10, Oliver Brüstle *v*. Greenpeace eV, para. 43.

[396] European Court of Justice, Grand Chamber, Judgment of 18 October 2011, Case C-34/10, Oliver Brüstle *v*. Greenpeace eV, para. 46.

[397] *Cf.* European Court of Justice, Grand Chamber, Judgment of 18 October 2011, Case C-34/10, Oliver Brüstle *v.* Greenpeace eV, para. 38 ("any human ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo' within the meaning of Article 6(2)(c) of the Directive." Article 6 of the Directive states: 1. Inventions shall be considered unpatentable where their commercial exploitation is contrary to public order or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation. 2. On the basis of paragraph 1, the following, in particular, shall be considered unpatentable: […] (c) uses of human embryos for industrial or commercial purposes").

[398] *Cf.* European Court of Justice, Grand Chamber, Judgment of October 18, 2011, Case C-34/10, Oliver Brüstle *v*. Greenpeace eV, para. 6, stating that the "preamble to the Directive states the following: […] whereas public order and morality correspond in particular to the ethical and moral principles recognized in a Member State, respect for which is particularly important in the field of biotechnology, in view of the potential scope of inventions in this field and their inherent relationship to living matter; whereas such ethical and moral principles supplement the standard legal examinations under patent Law, regardless of the technical field of the invention."

251. Furthermore, in the *Case of S.H. et al. v. Austria*, the ECHR considered permissible the ban on practicing IVF with eggs and spermatozoids donated by third parties, emphasizing that:

> The Austrian legislature has not completely ruled out artificial procreation. […] The legislature tried to reconcile the wish to make medically assisted procreation available and the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine, which raises issues of a morally and ethically sensitive nature.[399]

252. Also, in the case of *Costa and Pavan v. Italy*, the ECHR, in its prior considerations on European law relevant for the analysis of the case, emphasized that in "the case of Roche v. Roche and others ([2009] IESC 82 (2009)), the Supreme Court of Ireland established that the concept of the unborn child is not applicable to embryos obtained within the framework of *in vitro* fertilization, and the latter do not benefit from the protection provided by article 40.3.3 of the Irish Constitution that recognizes the right to life of the unborn child. In this case, the petitioner, who already had a son as a result of the technique of *in vitro* fertilization, applied to the Supreme Court in order to obtain the implantation of another three embryos obtained during the same fertilization, despite the absence of the consent of her partner from whom, in the meantime, she had separated.[400]

253. Accordingly, the Court observes that the regulatory trends in international law do not lead to the conclusion that the embryo should be treated in the same way as a person, or that it has a right to life.

C.3.b) IVF regulations and practice in comparative law

254. Based on the expert opinions presented by the parties at the public hearing, it was established that Costa Rica is the only country in the region that prohibits and, therefore, does not practice IVF (*supra* para. 67).

255. Nevertheless, from the evidence provided by the parties to the case file, the Court observes that, although IVF is performed in many countries,[401] this does not necessarily mean that it is regulated by law. In this regard, the Court notes that the comparative legislation on assisted reproduction techniques submitted by the parties (Brazil, Chile, Colombia, Guatemala, Mexico, Peru and Uruguay) reveals that there are norms that regulate some practices in this area. The Court notes that, for example: (i) human cloning is

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399 *Cf.* ECHR, *Case of S.H. et al. v. Austria* (No. 57813/00), Judgment of 3 November 2011, para. 104.

400 ECHR, *Case of Costa and Pavan v. Italy* (No. 54270/10). Judgment of 28 August 2012, para. 33 ("33. Furthermore, the Court emphasizes that, in the case of Roche *v.* Roche and others ([2009] IESC 82 (2009)), the Supreme Court of Ireland established that the notion of unborn child was not applicable to embryos obtained from *in vitro* fertilization; thus the latter do not benefit from the protection established in article 40.3.3 of the Irish Constitution, which recognizes the right to life of the unborn child. In that case, the applicant, having already had one child as the result of *in vitro* fertilization, had seized the Supreme Court in order to obtain the implantation of three other embryos obtained in the context of the same fertilization, despite the lack of agreement of her former companion, from whom she had separated meanwhile)." The Court takes note that on November 28, 2012, the Italian Government filed a request for review of this case before the Grand Chamber of the European Court of Human Rights, "because the original application was filed directly before the European Court of Human Rights without previously having exhausted […] all the domestic remedies and without, of necessity, taking into consideration the margin of appreciation that each State has in the adoption of its own legislation." Available at: http://www.governo.it/Presidenza/Comunicati/dettaglio.asp?d=69911 (last visited November 28, 2012).

401 The 2009 Report of the *Registro Latinoamericano de Reproducción Asistida* (RLA) indicated that, during this period, "135 centers from 11 countries reported. The majority of the centers that reported are in Brazil and Mexico, and the majority of the cycles were carried out in Brazil and Argentina." *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2825).

prohibited in Chile[402] and Peru;[403] (ii) the laws of Brazil,[404] Chile[405] and Peru[406] prohibit the use of assisted reproductive techniques for purposes other than human procreation; (iii) Brazil stipulates that the ideal number of eggs and pre-embryos to be transferred may be no more than four, to avoid increasing the risk of multiple births,[407] and prohibits the use of procedures "aimed at embryonic reduction"[408] and the commercialization of biological material is a crime,[409] and (iv) there are different types of regulations on cryopreservation. For example, Chile prohibits the freezing of embryos for deferred transfer,[410] while Brazil[411] and Colombia[412] allow the cryopreservation of embryos, spermatozoids and eggs. In addition, some countries, such as Argentina,[413] Chile[414] and Uruguay,[415] are trying to take

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402 *Cf.* Law 20,120 of 2006, Ministry of Health of Chile, article 5 (file of attachments to the answering brief, volume IV, annex 2, folios 8424 to 8426).

403 *Cf*. General Health Law of Peru No. 26,842 of July 15, 1997, article 7 (file of attachments to the answering brief, volume IV, annex 2, folio 8357).

404 *Cf*. Decision of the Federal Medical Board No. 1,358 of 1992, General Principle No. 5 (file of attachments to the merits report volume I, annex 18, folios 425 a 428).

405 *Cf*. Bill on Assisted Human Reproduction, article 1 (file of attachments to the answering brief, volume IV, annex 2, folios 8437 to 8443).

406 *Cf*. General Health Law of Peru No. 26,842 of July 15, 1997, article 7 (file of attachments to the answering brief, volume IV, annex 2, folio 8357).

407 *Cf*. Decision No. 1,358 of 1992 of the Federal Medical Board, General Principle No.6 (file of attachments to the merits report volume I, annex 18, folios 425 to 428). Regarding embryo transfer, expert witness Garza explained that "the guidelines issued by the American Society of Reproductive Medicine (ASRM) in 1999 recommend that no more than two embryos be transferred to the women who have the greatest probability of becoming pregnant and no more than five to patients with a lower probability of pregnancy. In 2006, in an effort to reduce even more the occurrence of high-order multiple pregnancy, ASRM and the Society for Assisted Reproduction Technologies (SART) developed guidelines to help ART programs and patients determine the appropriate number of cleavage stage (usually 2 or 3 days after fertilization) embryos or blastocysts (usually 5 or 6 days after fertilization) to transfer. These guidelines recommend that: women under the age of 35, who have a greater probability of becoming pregnant, should be encouraged to consider single-embryo transfer; women aged from 35 to 37 who have a favorable prognosis, should not receive more than two embryos; women aged from 38 to 40 who have a favorable prognosis should not receive more than three cleavage-stage embryos or no more than two blastocysts. Women aged 40, and those with less probability of becoming pregnant can have more embryos transferred." Affidavit prepared by expert witness Garza (merits report, volume V, folios 2566 and 2567).

408 General Principle No. 7, Decision of the Federal Medical Board No. 1,358 of 1992 (file of attachments to the merits report volume I, annex 18, folios 425 to 428).

409 Article 5 of Law No. 11,105, of March 24, 2005, Brazil (merits file, volume I, annex 20, folios 249 to 262).

410 *Cf*. Regulations applicable to *in vitro* fertilization and embryonic transfer, No. 1072 of June 28, 1985, Santiago, Ministry of Health, Republic of Chile (file of attachments to the answering brief, volume IV, annex 2, folios 8456 to 8459). Article 8 establishes that: "the Institution and the respective team of experts must keep and provide to the authorities of the Ministry of Health complete and reliable information on: (a) Place or site where IVF and ET are performed; (b) the institution that sponsors and is responsible for the IVF and ET program, clearly defining the program's objectives and procedures; (c) the experts and professionals who perform and assist with the IVF and ET procedures, their training and suitability; (d) work protocols in which the details of IVF and ET procedures are recorded, indicating the number of eggs obtained, fertilized or implanted. In this regard, the protocols must establish that all normal fertilized eggs must be transferred to the mother and prohibit the freezing of embryos for deferred transfer, much less for research purposes."

411 *Cf*. Decision of the Federal Medical Board No. 1,358 of 1992 (file of attachments to the merits report, volume I, annex 18, folios 425 to 428).

412 *Cf*. Decree No. 1546 of 1998, President of the Republic of Colombia, article 48 (file of attachments to the answering brief, volume IV, annex 2, folios 8277 to 8303).

413 Bill approved by the Chamber of Deputies on June 28, 2012, establishing that social welfare agencies, pre-paid medicine entities and the public health system must include as obligatory services full and interdisciplinary coverage of the procedures that the World Health Organization defines as "Assisted Human Reproduction." Text of the six article available [in Spanish] at: http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=0492-D-2010

measures so that assisted reproduction treatments will be covered by State health care programs and policies.

256. The Court considers that, even though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court considers that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice[416] is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understand as a person.

C.4) The principle of the most favorable interpretation, and the object and purpose of the treaty

257. In a teleological interpretation, the purpose of the norms involved is examined and, to this end, it is pertinent to analyze the object and purpose of the treaty itself and, if relevant, the purposes of the regional protection system. Thus, there is a direct relationship between the systematic and the teleological interpretations.[417]

258. The precedents examined so far allow it to be inferred that the purpose of Article 4(1) of the Convention is to safeguard the right to life, without this entailing the denial of other rights protected by the Convention. Thus, the object and purpose of the expression "in general" is to permit, should a conflict between rights arise, the possibility of invoking exceptions to the protection of the right to life from the moment of conception. In other words, the object and purpose of Article 4(1) of the Convention is that the right to life should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights.

259. Consequently, it is not admissible that the State argue that its constitutional norms grant a greater protection to the right to life and, therefore, proceed to give this right absolute prevalence. To the contrary, this approach denies the existence of rights that may be the object of disproportionate restrictions owing to the defense of the absolute protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty. In other words, in application of the principle of the most favorable interpretation, the alleged "broadest protection" in the domestic sphere cannot allow or justify the suppression of the enjoyment and exercise of

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414 Expert witness Zegers-Hochschild stated that, even though Chile "has not formally discussed the coverage of infertility treatments at the legislative level; nevertheless, the Government has allocated special financial resources to the National Health Fund to cover ART treatments to a growing number of women with limited means." Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2824).

415 *Cf.* Bill "Assisted reproduction techniques" approved by the Chamber of Representatives on October 9, 2012, and currently being examined by the Senate's Public Health Committee. Available at: http://www0.parlamento.gub.uy/indexdb/Distribuidos/ListarDistribuido.asp?URL=/distribuidos/contenido/camara/D20120417-0218-0997.htm&TIPO=CON (last visited November 28, 2012).

416 Article 31.3 b) of the Vienna Convention establishes that: "[t]here shall be taken into account, together with the context: any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

417 *Case of González et al. ("Cotton field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 59.

the rights and freedoms recognized in the Convention or limit them to a greater extent that the Convention establishes.

260. In this regard, the Court considers that other judgments in comparative constitutional law endeavor to find an adequate balance between possible competing rights and, consequently, constitute a relevant reference to interpret the scope of the expression "in general, from the moment of conception" contained in Article 4(1). The Court will now refer to some examples of case law in which a legitimate interest in protecting prenatal life is recognized, but where this interest is differentiated from entitlement of the right to life, stressing that any intent to protect the former interest must be harmonized with the fundamental rights of other individuals, especially the mother.

261. In the European sphere, for example, the German Constitutional Court, stressing the State's general obligation to protect the unborn child, has established that "[t]he protection of life, […] is not so absolute to the extent that, without any exception, it enjoys prevalence over all the other rights,"[418] and that "[t]he fundamental rights of women […] subsist in the face of the right to life of the *nasciturus* and, consequently, must be protected."[419] Moreover, according to the Constitutional Court of Spain, "[t]he protection that the Constitution provides to the *nasciturus* […] does not mean that the said protection must be of an absolute nature."[420]

262. In the Americas, the United States Supreme Court has indicated that "[i]t is reasonable and logical for a State, at certain times, to protect other interests […] such as, for example, those of the potential human life," which should be weighed with the personal intimacy of the woman – which cannot be understood as an absolute right – and "other circumstances and values."[421] Furthermore, according to the Constitutional Court of Colombia, "[a]lthough it corresponds to Congress to adopt appropriate measures to comply with the obligation to protect life, […] this does not mean that all the measures that it takes to this end are justified, because, despite its constitutional relevance, life does not have the nature of an absolute value or right and must be weighed with the other constitutional values, principles and rights."[422] The Argentine Supreme Court of Justice has indicated that no mandate is derived from either the American Declaration or the American Convention under which the scope of the criminal norms that permit abortion in certain circumstances must be interpreted restrictively, "because the wording of the pertinent provisions of these instruments was expressly delimited so that the invalidity of a supposed abortion [such as the one established in the Argentine Penal Code] could not be derived from them."[423] Similarly, the Supreme Court of Justice of Mexico has declared that, based on the fact that life is a necessary condition for the existence of other rights, it cannot be validly concluded that life should be considered more valuable than any of those other rights.[424]

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[418] BVerfG, Judgment BVerfGE 88, 203, 28 May 1993, 2 BvF 2/90 and 4, 5/92, para. D.I.2.b.

[419] BVerfG, Judgment BVerfGE 88, 203, 28 May 1993, 2 BvF 2/90 and 4, 5/92, para. D.I.2.c.aa.

[420] Constitutional Court of Spain, Judgment on action on unconstitutionality 53/1985, 11 April 1985, paras. 8 and 12.

[421] United States Supreme Court, *Case of Roe v. Wade*, 410 U.S. 115, 157 (1973)

[422] Constitutional Court of Colombia, Judgment C-355 of 2006, VI.5.

[423] Supreme Court of Justice of Argentina, "F., A.L. ref/ self-realization measure" Judgment of March 13, 2012, F. 259. XLVI., Considering paragraph 10.

[424] *Cf.* Judgment of the Supreme Court of Justice of the Nation of August 28, 2008, action on unconstitutionality 146/2007 and joindered action 147/2007. In particular, the judgment indicated that: "In other words, we can accept as true that unless one is alive, one is unable to exercise any right; but, we cannot infer from this that the right to life enjoys pre-eminence in the face of any other right. To accept a similar argument would force us to accept also, for example, that the right to food is more important than the right to life, because the

263. Consequently, the Court concludes that the object and purpose of the expression "in general" in Article 4(1) of the Convention is to allow, as appropriate, an adequate balance between competing rights and interests. In the case that the Court is examining, it is sufficient to indicate that the said object and purpose implies that the absolute protection of the embryo cannot be alleged, annulling other rights.

C.5) Conclusion on the interpretation of Article 4(1)

264. The Court has used different methods of interpretation that have led to similar results according to which the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention. In addition, after analyzing the available scientific data, the Court has concluded that "conception" in the sense of Article 4(1) occurs at the moment when the embryo becomes implanted in the uterus, which explains why, before this event, Article 4 of the Convention would not be applicable. Moreover, it can be concluded from the words "in general" that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible.

D) Proportionality of the prohibition

Arguments of the Commission and allegations of the parties

265. The Commission indicated that the requirements of legality, necessity and suitability had been met. However, the Commission considered that, when analyzing suitability, the scientific evidence "that the assisted reproduction technique of [IVF] imposes a risk of embryo loss [… that] is comparable to the natural reproduction process" "may be relevant." Regarding the need for the measure, the Commission indicated that "there were less restrictive ways to accomplish the State's objective and to reconcile the interests at stake; for example, by some other form of regulation that could produce results that more closely resembled the natural process of conception, such as a regulation that reduced the number of eggs fertilized." Lastly, it argued that "sufficient elements exist to conclude that: (i) "the rights affected, […] are particularly relevant for the identity of a person and his or her autonomy"; (ii) "the protection of life in the comparative constitutional and international sphere is usually subject to degrees of protect that are applied incrementally"; (iii) "the severe nature of the impact on the rights involved" should be considered, because "[t]he effect was equivalent to an annulment of the exercise of their rights; (iv) "it is feasible to consider that, in the practice, the ban on [IVF] does not contribute to a significant protection of the life of the embryos, if it is compared to the high frequency [of embryonic loss] in the natural conception process," and (v) it is important to mention "the consistency and coherence of the State's action in relation to the embryo," because there are "practices that are currently allowed in Costa Rica [… that] entail a risk of fertilization of the said eggs, of embryonic loss, and of multiple pregnancies." The Commission observed that the ban on IVF "had two effects that fall within the scope of the right to equality: (i) it prevented the [presumed] victims from overcoming their situation of disadvantage by benefitting from scientific progress, in particular, from a medical treatment, and (ii) it had a specific and disproportionate impact on women."

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former is a condition for the latter." For its part, the Federal Supreme Court of Brazil has indicated that "in order for an embryo – *in vitro* – to be recognized the full right to life, it would be necessary to recognize the right to a uterus; a view that is not established in the Constitution." Federal Supreme Court. Action on unconstitutionality No. 3,510 of May 29, 2008, p. 5.

266. Representative Molina concurred with the Commission and added, with regard to the legality of the measure, that the Constitutional Chamber "exceeded its authority, limiting the Legislature's exercise of its primordial function." In addition, he argued that "the ambiguity" in the way the Constitutional Chamber formulated the prohibition "g[ave] rise to uncertainty and open[ed] the way to arbitrariness by the authorities." He added that the purpose of the judgment was "the absolute protection [of the] right to life of human embryos," and therefore considered it a "supposed legitimate purpose." However, he refuted the suitability of the measure, considering the judgment "a discriminatory" and "arbitrary measure" that "failed to weigh or gauge the different convention-based rights." Furthermore, he argued that "[t]he State chose the most harmful measure of all; the measure that completely annulled the only possibility that the couples had to achieve their private decision to become biological parents."

267. Representative Molina argued that realization of the right to life does not justify the presumed restriction of the rights of the family, to honor and dignity, and to equality before the law. He characterized the presumed victims' infertility as a "disability for which they had been discriminated against as regards having a family." He also argued that 'no benefits were obtained from the measure, while the maximum harm was caused by the prohibition, [so that] it cannot be said that the ban on IVF is a proportionate measure." In addition, he argued that "the Constitutional Chamber's decision […] resulted in discrimination owing to reproductive incapacity," considering that the "judgment establishes a clear differentiation between […] couples […] who are able to conceive naturally and […] couples who can only do so by using assisted reproduction methods," and that "[t]he discrimination made by the Chamber is evident not only in the judgment as such, but also in its effects on the individuals and couples who sought to conceive using assisted reproduction methods." Lastly, he considered the judgment was a "form of discrimination based on their financial possibilities."

268. Representative May argued that "[i]nfertility is a disease, a disability, and, consequently, an inability of the human being to fertilize or to conceive; in sum, an inability to procreate." He argued that, even though "the absolute ban" on the practice of IVF "could appear to be neutral," "it does not have the same effect on each individual, [but …] has a disproportionate impact on those who are infertile, denying them the opportunity to overcome their physical condition and to conceive biologically."

269. The State alleged that the Commission "has not questioned the legality of the measure adopted by the Constitutional Court" and "has accepted that the restriction […] constitutes a limitation established by law and under the legal system." It argued that "the purpose sought by the Costa Rican State when prohibiting [IVF] is legitimate, because it was intended to protect the right to life of the embryos." It asserted that "the legitimacy of the purpose depends on how the word 'conception' is defined, because if it is equated to the word 'fertilization,' the measure adopted by the State when prohibiting [IVF] would be suitable." Regarding the need for the measure, it argued that "the Commission bases its arguments on a false premise, which is to indicate that, in this case, the Costa Rican State could have adopted a less restrictive measure." In this regard, it argued that "it has been shown that in the actual state of science, there is no evidence that [IVF] offers guarantees of protection of life to the unborn child fertilized *in vitro*."

270. Regarding the proportionality of the measure, the State argued that "when weighing the harm that the restrictive measure causes to the holder of the freedom, and the benefit that the collectivity obtains from it by protecting society's most fundamental value, which is the right to life, the State must necessarily incline the balance in favor of the latter." It

indicated that the "problems associated with *in vitro* fertilization are the high death rate of the human embryos that are transferred to the uterine cavity by artificial means." It cited some phenomena "to explain some of the problems that may be involved in the high inefficiency of IVF": (i) the state of development of the ovules used: the induction of multi-ovulation, which is usually carried out in order to practice IVF, is carried out using gonadotropins, but the state of development of the ovules obtained by this procedure is often inadequate"; (ii) "since the procedure of the selection of normal and mature spermatozoids that occurs naturally does not occur in [IVF], conception occurs with defective spermatozoids in many cases"; (iii) "the percentage of embryos whose development ceases between the stages of zygote and blastocyst is higher when their development is generated *in vitro* rather than *in vivo* […]. The embryo that is generated has a better intrinsic viability than the one created *in vitro*; in other words, the embryos created in the laboratory are less healthy," and (iv) "it has been demonstrated that the embryo sends signals to prepare the endometrium for the implantation, which could provide a partial explanation why the rate of implantation is so low in the case of IVF, since the pre-implanted embryo is not present in the woman's body." Thus the State argued that "[t]he only solution is to prohibit the technique, because this is the only way to guarantee the life of the embryo as of fertilization" and that, therefore, "it could not be obliged to weigh the rights involved differently in this case, because there is no way to do so." In addition, the State asserted that "the Constitutional Chamber's judgment […] is not omissive as regards weighing the factors involved, [because] it considered that the constitutional prohibition of the *in vitro* technique was necessary to protect the right to life of the embryo." It added that "[t]he fact that, in Costa Rica, the Constitutional Chamber has endorsed the existence of therapeutic abortion […] is not contrary to the prohibition of" IVF, because, in that case, "the weighing up process must be made between the right to life of the mother and the right to life of the embryo."

271. Finally, regarding the alleged indirect discrimination, the State indicated that "[i]nfertility is a natural condition that is not induced by the State." In addition, it argued that "there is no consensus that infertility is, *per se*, a disease" or that it can "be considered a disability." In this regard, the State argued that "[a]ssisted conception is different from the treatment of an illness"; IVF does not "cure" infertility, because "it does not constitute a treatment to change the situation that causes a couple or an individual to be infertile, but constitutes a means to substitute the natural fertilization process." In addition, it argued that the prohibition of IVF "is not designed to establish discrimination against those who are unable to have children naturally, and especially against women," because the prohibition "was addressed at everyone irrespective of their condition: single, married, women or men, fertile or infertile." Consequently, it argued the ban on IVF has not had a "special intensity" in relation to women, thus it does not discriminate indirectly, because "it does not originate only from problems suffered by women."

Considerations of the Court

272. The Court has indicated that the decision to have biological children using assisted reproduction techniques forms part of the sphere of the right to personal integrity and to private and family life. In addition, the way in which this decision is arrived at is part of the autonomy and identity of a person, in both the individual dimension and as part of a couple. The Court will now analyze the State's interference in relation to the exercise of these rights.

273. In this regard, in its case law, the Court has established that a right may be restricted by the States provided that the inferences are not abusive or arbitrary;

consequently, they must be substantively and formally established by law,[425] pursue a legitimate aim, and comply with the requirements of suitability, necessity and proportionality.[426] In the instant case, the Court has underlined that the "absolute right to life of the embryo" as grounds for the restriction of the rights involved, is not supported by the American Convention (*supra* para. 264); thus, it is not necessary to make a detailed analysis of each of these requirements, or to assess the disputes regarding the declaration of unconstitutionality in the formal sense based on the presumed violation of the principle of legal reserve. Despite the foregoing, the Court considers it appropriate to indicate the way in which the sacrifice of the rights involved in this case was excessive in comparison to the benefits referred to with the protection of the embryo[427].

274. To this end, the restriction would have to protect prenatal life significantly, without annulling the rights to private life and to found a family. In order to weigh these factors the Court must analyze: (i) the level of harm to one of the rights at stake, determining whether the level of this harm was serious, intermediate or moderate; (ii) the importance of ensuring the contrary right, and (iii) whether ensuring the latter justifies restricting the former.[428]

275. The European Court of Human Rights has indicated that the possible conflict between the right to private life, which includes the rights to autonomy and to the free development of the persona, and "the possibility that, in certain circumstances, safeguards may be extended to the unborn child [must be] determined by weighing various […] rights or freedoms claimed by a mother and a father involved in a relationship with one another or *vis-à-vis* the foetus."[429] "This Court has stated that "undue deference for the protection of prenatal life or on the basis that the right of the future mother to respect for her private life is of a lower rank, does not constitute a reasonable and proportionate weighing up of competing rights and interests."[430] Also, in the case of *Costa and Pavan v. Italy*, the European Court considered that the absolute prohibition of pre-implantation diagnosis was not proportionate, owing to the inconsistent domestic legislation concerning reproductive rights that, while prohibiting the pre-implantation diagnosis, permitted the termination of the pregnancy if the fetus subsequently revealed symptoms of a grave illness detectable by pre-implantation diagnosis.[431]

276. The Court will weigh up the factors analyzing: (i) the severity of the interference that took place in the rights to private and family life and the other rights involved in the instant case. In addition, this severity is analyzed based on the disproportionate impact in relation to: (ii) disability, (iii) gender, and (iv) socio-economic situation. Lastly, the Court will analyze (v) the dispute on the alleged embryonic loss.

D.1) <u>Severity of the limitation of the rights involved in this case</u>

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425 *Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 35 and 37.

426 *Cf. Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009. Series C No.193, para. 56, and *Case of Atala Riffo and daughters v. Chile*, para. 164.

427 *Case of Kimel v. Argentina*, para. 83, and *Case of Chaparro Álvarez and Lapo Íñiguez*, para. 93.

428 *Case of Kimel v. Argentina*, para. 84.

429 *Cf.* ECHR, *Case of Vo. v. France* (No. 53924/00), Judgment of 8 July 2004, para. 80, Case of *RR v. Poland* (No. 27617/04), Judgment of 26 May 2011, para. 181

430 *Cf.* ECHR, *Case of A, B and C v. Ireland* (No. 25579/05), Grand Chamber. Judgment of 16 December 2010, para. 238.

431 *Cf.* ECHR, *Case of Costa and Pavan v. Italy*, (No. 54270/10), Judgment of 28 August 2012, para. 71.

277. As previously indicated (*supra* para. 144), the scope of the right to private and family life bears a close relationship to personal autonomy and reproductive rights. The Constitutional Chamber's judgment had the effect of interfering in the exercise of these rights of the presumed victims, because the couples had to change their course of action in relation to a decision to try and have children using IVF. Indeed, the Court considers that one of the direct interferences in private life is related to the fact that the Constitutional Chamber's decision prevented the couples from deciding whether or not they wished to submit to this treatment to have children in Costa Rica. The interference was even more evident when it is considered that IVF, in most cases, is the technique that individuals or couples resort to after having tried other treatments to overcome infertility (for example, Mr. Vega and Ms. Arroyo underwent 21 artificial inseminations) or, in other circumstances, it is the only option the person has in order to be able to have biological children, as in the case of Mr. Mejías Carballo and Ms. Calderón Porras (*supra* paras. 85 and 117).

278. The Court has indicated that the interference in this case is not related to the fact of not being able to have children (*supra* para. 161). It will now analyze the degree of severity of the harm to the right to private life and to found a family, and to the right to personal integrity, taking into account the impact of the prohibition of IVF on the intimacy, autonomy, mental health and reproductive rights of those concerned.

279. First, the prohibition of IVF had an impact on the intimacy of the individuals, because, in some cases, one of the indirect effects of the prohibition was that, since it was not possible to practice this technique in Costa Rica, the procedures undergone in order to obtain medical treatment abroad required revealing aspects that were part of private life. In this regard, Ms. Bianchi indicated that:

> For the couple, for us – as husband and wife – taking out this amount of money as quickly as possible signified great financial stress; because here time is also very important, since one already has a diagnosis […] and one does not know how much time it will take to collect this amount; especially if it will have to be collected several times; this kind of stress that a couple has to endure – many couples separate owing to normal financial stress. The lack of privacy is tremendous because, in the workplace, all my employers had to realize that I was submitting to this treatment because I was constantly asking for leave; at the same time I told myself that I had to resign just before I had to travel because no one was going to give me leave to travel at 24 hours' notice. The monitoring continued until 24 hours before I travelled. Afterwards I had to travel with 24 hours' notice to Colombia and then I continued the procedure for five days and then I had to return to Costa Rica and 10 days later do a pregnancy test and then monitor the pregnancy. This meant that everyone knew […]. One's intimacy is totally violated; everyone not only knows that, even if it is the woman who is infertile, everyone assumes that the couple is also infertile or that they have not been capable of procreating. He found that very difficult; also having to support me constantly in things that he really doesn't understand […]. I was subject to social and family stress because my family was suddenly divided.[432]

280. Thus, Ms. Henchoz Bolaños explained similar additional problems that it can be inferred would not have arisen if she had been able to access IVF in her own country. She indicated that, regarding her trip to Europe to undergo IVF, "the day [they] arrived [they] had to look for a hotel, [they] had to look for the clinic, the doctor; [they] had never been to Europe before, […] it is a totally strange place; [she] did not have [her] family, [her] loved ones; [they] were alone; [she] felt like an exile. [They] arrived, [they] found the doctor, but a doctor that did not know [them], who did not know who [they] were."[433]

281. Second, regarding the harm to personal autonomy and the life project of the couples, the Court observes that IVF is usually used as a last resort to overcome serious

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[432] Statement made by Bianchi Bruna during the hearing held before the Inter-American Commission on October 28, 2008.

[433] Statement made by Ileana Henchoz during the public hearing held in this case.

reproductive difficulties. Its ban had a greater impact on the life plans of the couples whose only option to procreate was IVF, as in the case of Mr. Mejías and Ms. Calderón Porras. In this context, Ms. Arroyo Fonseca, who had attempted several inseminations and who subsequently was able to have children, indicated that, at the time, she "was unable to overcome [her] infertility problems with an assisted reproduction technique that [at that time] would have allowed [her] to have more children."[434]

282. Third, the psychological integrity of the individual is harmed by denying him or her the possibility of acceding to a procedure that makes it possible to exercise the desired reproductive freedom. In this regard, one of the victims stated that, following the prohibition, he and his partner, "became extremely depressed; she cried all the time, she shut herself up in her room and refused to come out; she continually reminded [him] of the desire to have [their] own child, of the names [they] had chosen […]. [They] also underwent unpleasant experiences; for example, [they] stopped going to church because each Sunday it was painful to go to mass and to hear the priest refer to those who wanted [IVF] as people who killed children and that God rejected and abominated those children […]. [They] did not go back to any church and [they] felt abandoned by God himself."[435]

283. Meanwhile, Ms. Carro Maklouf stated that she "felt indescribable interference in [her] private life" and stressed that, her other children, "also wanted to have a baby brother or sister, because they were adults, and the matter had become a family project; they also suffered with [her] all the pain caused by the Constitutional Chamber's decision.[436] For her part, Andrea Bianchi Bruna explained that when IVF, as her "final option, […] had been banned, [… she] felt a whirlwind of pain and incredulity in [her] mind." Ms. Artavia Murillo testified that the State's decision "led to the failure of [her] marriage owing to the depressions that both [her] former husband and [she], suffered because of this ban [on *in vitro* fertilization], so [they] decided it was better to end the relationship, leaving an even greater wound, and with incalculable moral damage."[437]

284. Thus, for the said reasons, the couples suffered a severe interference in relation to their decision-making concerning the methods or practices they wished to attempt in order to procreate a biological child. However, differentiated impacts also existed in relation to the situation of disability, gender and financial situation, aspects related to the factors alleged by the parties regarding possible indirect indiscrimination in the instant case.

D.2) Severity of the interference as a result of indirect discrimination owing to the disproportionate impact in relation to disability, gender and financial situation

285. The Inter-American Court has indicated repeatedly that the American Convention does not prohibit all differentiation in treatment. The Court has signaled the difference between "differentiation" and "discrimination,"[438] so that the former are differences that are

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[434] Affidavit of Joaquinita Arroyo Fonseca (file of annexes to the pleadings and motions brief, volume IV, annex XI, folio 5266).

[435] Affidavit (file of annexes to the pleadings and motions brief, volume IV, annex XXI, folio 5620).

[436] *Cf.* Affidavit of Claudia María Carro Maklouf, "Life story" (file of annexes to the pleadings and motions brief, volume I, folio 4140).

[437] Brief of Ms. Artavia and Mr. Mejías of December 19, 2011 (file of annexes to the pleadings and motions brief, volume I, folio 4077).

[438] Regarding the concept of "discrimination," although neither the American Convention nor the International Covenant on Civil and Political Rights include a definition of this term, the Commission, the Court and the United Nations Human Rights Committee have taken as a basis the definitions contained in the International Convention on the Elimination of All Forms of Racial Discrimination and in the International Convention on the Elimination of All Forms of Discrimination against Women in order to maintain that discrimination constitutes "any distinction,

compatible with the American Convention because they are reasonable and objective, while the latter constitute arbitrary differences that result in harm to human rights. In the instant case, the effects of the ruling on unconstitutionality are related to the protection of the right to private and family life, and the right to found a family, and not to the application or interpretation of a specific domestic law that regulates IVF. Consequently, the Court will not analyze the presumed violation of the right to equality and non-discrimination under Article 24,[439] but rather in light of Article 1(1)[440] of the Convention in relation to Articles 11(2) and 17 thereof.[441]

286. The Court has indicated that the principle of the peremptory right to equal and effective protection of the law and non-discrimination means that the States must abstain from producing discriminatory regulations or those with discriminatory effects on the different groups of the population when exercising their rights.[442] The Human Rights Committee,[443] the Committee on the Elimination of Racial Discrimination,[444] the Committee on the Elimination of Discrimination against Women,[445] and the Committee on Economic, Social and Cultural Rights[446] have all recognized the concept of indirect discrimination. This concept implies that a law or practice that appears to be neutral has particularly negative repercussions on a person or group with specific characteristics.[447] It is possible that

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exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"; *Cf.* United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, 10 November 1989, CCPR/C/37, para. 7; ICourtHR, Juridical Status and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 92;

439 Article 24 of the Convention (Right to Equal Protection) stipulates than:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

440 Article 1(1) of the American Convention (Obligation to Respect Rights) establishes that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition..

441 The Court has indicated that if a State discriminates in the respect or guarantee of a convention-based right, it would violate Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to an unequal protection under domestic law, it would violate Article 24. *Cf. Case of Apitz Barbera et al. ("First Administrative Law Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 272.

442 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic*, para. 141, and *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, para. 88.

443 *Cf.* Human Rights Committee, Communication No. 993/2001, Althammer v. Austria, 8 August 2003, para. 10.2. ("that a violation of article 26 [equality before the law] can also result from the discriminatory effect of a rule or measure that is neutral at face value and without intent to discriminate." Human Rights Committee, General Comment No. 18, Non-discrimination.

444 *Cf.* Committee on the Elimination of Racial Discrimination, Communication No. 31/2003, *L.R. et al. v. Slovakia*, 7 March 2005, para. 10.4.4.

445 *Cf.* Committee on the Elimination of Discrimination against Women, General Recommendation No. 25 on temporary special measures (2004), note 1 ("Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women").

446 *Cf.* Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009.

447 *Case of Nadege Dorzema et al. v. Dominican Republic*. *Merits, reparations and costs*. Judgment of October 24, 2012 Series C No. 251, para. 234.

whoever established this law or practice was unaware of these practical consequences and, in that case, the intention to discriminate is not essential, and an inversion of the burden of proof is in order. In this regard, the Committee on the Rights of Persons with Disabilities has indicated that "a law that is applied impartially may have a discriminatory effect if it does not take into consideration the particular circumstances of the persons to which it is applied."[448] For its part, the European Court of Human Rights has also developed the concept of indirect indiscrimination establishing that, when a general policy or measure has an effect that is disproportionately prejudicial to a particular group, this may be considered discriminatory even if it was not specifically addressed at that group.[449]

287. The Court considers that the concept of disproportionate impact is related to that of indirect discrimination, and will therefore analyze whether there was a disproportionate impact in relation to disability, gender and financial situation.

D.2.a) Indirect discrimination in relation to the condition of disability

288. The Court takes note that the World Health Organization (hereinafter "WHO") has defined infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse" (*supra* para. 62). According to expert witness Zegers-Hochschild, "infertility is a disease that has numerous effects on the physical and psychological health of the individual, as well as social consequences, which include unstable marriages, anxiety, depression, social isolation and loss of social status, loss of gender identity, ostracism and abuse […]. [I]t results in anguish, depression and isolation and weakens the family ties." Expert witness Garza testified that "[i]t is more exact to consider infertility as a symptom of an underlying disease. The diseases that cause infertility have a two-fold effect […] preventing fertility from functioning, but also causing, in both the short- and the long-term, health problems for men and women." Similarly, the World Medical Association has recognized that assisted conception "differs from the treatment of illness in that the inability to become a parent without medical intervention is not always regarded as an illness. While it may have profound psychosocial, and thus medical, consequences, it is not in itself life limiting. It is, however, a significant cause of major psychological illness and its treatment is clearly medical."[450]

289. The right of persons with disabilities to have access to the necessary techniques to resolve reproductive health problems can be inferred from Article 25 of the Convention on the Rights of Persons with Disabilities (hereinafter "CRPD").[451] While expert witness Caruso

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[448] *Cf.* Committee on the Rights of Persons with Disabilities, Communication No. 3/2011, *Case of H. M. v. Sweden*, CRPD/C/7/D/3/2011, 19 April 2012, para. 8.3.

[449] ECHR, *Case of Hoogendijk v. The Netherlands,* No. 58641/00, First Section, 2005; ECHR, Grand Chamber, *D. H. et al. v. Czech Republic*, No. 57325/00, 13 November 2007, para. 175, and ECHR, *Case of Hugh Jordan v. United Kingdom*, No. 24746/94, 4 May 2001, para. 154.

[450] The World Medical Association, Statement on Assisted Reproductive Technologies, adopted by the WMA General Assembly, Pilanesberg, South Africa, October 2006, Available at: http://www.wma.net/e/policy/r3.htm, para 6. Statement cited in the Inter-American Commission's merits report (merits report, volume I, footnote 36) and in the answering brief (merits report, volume III, folio 1086).

[451] Article 25(1) establishes: Health: States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall: (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes."

considered that infertility can only be referred to as a disability under certain conditions and presumptions and, thus, only in determined cases,[452] expert witness Paul Hunt observed that "involuntary infertility is a disability,"[453] considering that:

> "The Preamble to the Convention on the Rights of Persons with Disabilities, to which Costa Rica is a party, recognizes that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.' According to the WHO biopsychosocial model on disability, this entails one or more of the three levels of difficulty in human functions: a physical-psychological impairment; a limitation of activity owing to an impairment (activity limitation), and a participation restriction owing to an activity limitation. According to the WHO International Classification of Functioning, Disability and Health, impairments are problems in body functions; activity limitations are difficulties an individual may have in executing activities, and participation restrictions are problems an individual may experience in involvement in life situations."[454]

290. Article 18 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") states that "[e]veryone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality." The Inter-American Convention for the Elimination of all Forms of Discrimination against Persons with Disabilities (hereinafter "ICEFDPD") defines the term "disability" as "a physical, mental or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment." For its part the, the CRPD establishes that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." The disability results from the interaction between an individual's functional limitations and the barriers that exist in the environment that prevent the full exercise of his rights and freedoms.[455]

291. The above-mentioned Conventions take into account the social model in their approach to disabilities, which means that the disability is not defined exclusively by the presence of a physical, mental, intellectual or sensorial impairment, but that it is interrelated to the barriers or limitations that exist in society for the individual to be able to exercise his rights effectively.[456] The types of limits or barriers that are commonly encountered in society by individuals with functional diversity include those that are attitudinal[457] or socio-economic.[458]

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[452] Opinion provide by expert witness Anthony Caruso at the public hearing held in this case.

[453] Affidavit provided by expert witness Paul Hunt (merits report, volume VI, folio 2650).

[454] Affidavit of expert witness Paul Hunt, folio 2650.

[455] The Preamble of the CRPD recognizes that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."

[456] *Case of Furlan and family v. Argentina*, para. 133.

[457] *Case of Furlan and family v. Argentina*, para. 133. *Cf.* UN General Assembly, ONU, Standard rules on the equalization of opportunities for persons with disabilities, GA/RES/48/96, 4 March 1994, forty-eighth session, para. 3 ("In the disability field, however, there are also many specific circumstances that have influenced the living conditions of persons with disabilities. Ignorance, neglect, superstition and fear are social factors that throughout the history of disability have isolated persons with disabilities and delayed their development").

[458] *Cf. Case of Ximenes Lopes v. Brazil. Merits, reparations and costs.* Judgment of July 4, 2006. Series C No. 149, para. 104, and *Case of Furlan and family v. Argentina*, para. 133. *Cf. also* Article III.2 of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities, and Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with Disabilities, U.N. Doc. E/C.12/1994/13 (1994), 12 September 1994, para. 9.

292. Anyone in a situation of vulnerability is subject to special protection owing to the special duties that the State must comply with in order to satisfy the general obligation to respect and guarantee human rights. The Court recalls that it is not sufficient that the States abstain from violating rights; rather it is essential that they adopt positive measures, to be determined based on the specific needs for protection of the subject of law, either owing to his personal condition or to the specific situation in which he finds himself,[459] such as with a disability.[460] In this regard, States are obliged to facilitate the inclusion of persons with disabilities by means of equality of conditions, opportunities and participation in all spheres of society,[461] in order to guarantee that the said limitations are dismantled. Thus, the States must promote social inclusion practices and adopt measures of positive differentiation to remove the said barriers.[462]

293. Based on these considerations and taking into account the definition developed by the WHO according to which infertility is a disease of the reproductive system (*supra* para. 288), the Court considers that infertility is a functional limitation recognized as a disease and that persons with infertility in Costa Rica, faced with the barriers created by the Constitutional Chamber's decision, should consider that they are protected by the rights of persons with disabilities, which include the right to have access to the necessary techniques to resolve reproductive health problems. This condition requires special attention in order haves reproductive autonomy.

D.2.b) Indirect discrimination in relation to gender

294. The Court considers that the ban on IVF can affect both men and women and may have differentiated disproportionate impacts owing to the existence of stereotypes and prejudices in society.

295. Regarding the situation of infertile women, expert witness Hunt explained that "in many societies infertility is attributed mainly and disproportionately to women owing to the persisting gender stereotype that defines a woman as the basic creator of the family." Citing the conclusions of research by the WHO Department of Reproductive Health and Research (RHR), he indicated that:

> Responsibility for infertility is usually shared by the couple […]. However, for biological and social reasons, the blame for infertility is not shared equally. In most societies, the psychological and social burden of fertility is borne especially by women. A woman's situation is frequently identified with her fertility, and the absence of children may be seen as a social disgrace or cause for divorce. The suffering of the infertile woman can be very real."[463]

296. The Court observes that the WHO has indicated that, while the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood. In these situations, the personal suffering of the infertile

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459 *Cf. Case of the "Mapiripán Massacre" v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 134, paras. 111 and 113, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 244.

460 *Cf. Case of Ximenes Lópes v. Brazil*, para. 103, and *Case of Furlan and family v. Argentina*, para. 134.

461 *Cf. Case of Furlan and family v. Argentina*, para. 134. *Cf.* Article 5 of the Standard rules on the equalization of opportunities for persons with disabilities.

462 *Cf. Case of Furlan and family v. Argentina*, para. 134, and Committee on Economic, Social and Cultural Rights, General Comment No. 5, para. 13.

463 Affidavit provided by expert witness Paul Hunt (merits report, volume VI, folio 2206).

woman is exacerbated and can lead to unstable marriage, domestic violence, stigmatization and even ostracism."[464] According to data from the Pan-American Health Organization, there is a gender gap with regard to sexual and reproductive health, because ailments related to sexual and reproductive health affect around 20% of women and 14% of men.[465]

297. The Committee on the Elimination of Discrimination against Women has indicated that, when a decision to postpone "[s]urgery due to pregnancy is influenced by the stereotype that protection of the fetus should prevail over the health of the mother," this is discriminatory.[466] The Court considers that the instant case reveals a similar situation of the influence of stereotypes, in which the Constitutional Chamber gave absolute prevalence to the protection of the fertilized eggs without considering the situation of disability of some of the women.

298. Meanwhile, expert witness Neuburger explained that "[t]he gender identity model is socially defined and molded by the culture; its subsequent naturalization responds to socio-economic, political, cultural and historic determinants. According to these determinants, women are raised and socialized to be wives and mothers, to take care of and attend to the intimate world of affections. The ideal for women, even nowadays, is embodied in sacrifice and dedication, and the culmination of these values is represented by motherhood and the ability to give birth. […] A woman's fertility is still considered by much of society to be something natural that admits no doubts. When a woman has fertility problems or is unable to become pregnant, the reaction of society tends to be skepticism, disgrace and, at times, even ill-treatment. […] The impact of infertility in women is usually greater than in men because […] motherhood has been assigned to women as an essential part of their gender identity, transformed into their destiny. The burden of their self-blame increased exponentially when the ban on IVF arose. […] The pressure of the family and society constitute an additional burden that increases the self-blame."[467]

299. In addition, although infertility can affect both men and women, the use of assisted reproduction technologies is especially related to a woman's body. Even though the ban on IVF is not expressly addressed at women, and thus appears neutral, it has a disproportionately negative impact on women.

300. In this regard, the Court underlines that the initial IVF procedure (induction of ovulation) was interrupted for some of the couples; for example, the couples consisting of Ms. Artavia Murillo and Mr. Mejías Carballo (*supra* para. 87), Mr. Yamuni and Ms. Henchoz (*supra* para. 92), Ms. Arroyo and Mr. Vega (*supra* para. 108), Mr. Vargas and Ms. Calderón (*supra* para. 118) and Mr. Acuña and Ms. Castillo (*supra* para. 121). This type of interruption in the continuity of a treatment has a differentiated impact on women because interventions, such as ovary induction and other interventions destined to achieve the family project associated with IVF were being performed on their bodies. Moreover, women may resort to IVF without the need for a partner. The Court concurs with CEDAW when it has emphasized that it is necessary to consider "the health rights of women from the

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[464] Preamble, *Current Practices and Controversies in Assisted Reproduction: Report of the meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction",* Geneva: WHO (2002) XV-XVII to XV. Cited in the affidavit provided by expert witness Paul Hunt (merits report, volume VI, folio 2206).

[465] *Cf.* Pan-American Health Organization (PAHO), 'Chapter 2: Health Conditions and Trends' in Health in the Americas 2007, Volume I Regional, Washington, 2007. Cited in the affidavit provided by expert witness Paul Hunt (merits report, volume VI).

[466] Committee on the Elimination of Discrimination against Women, *Case of L.C. v. Peru*, Communication No. 22/2009, para. 8.15, Doc. UN CEDAW/c/50/D/22/2009 (2011).

[467] Affidavit provided by expert witness Alicia Neuburger (merits report, volume V, folios 2519 and 2520).

perspective of women's needs and interests in view of the distinctive features and factors that differentiate women from men, namely: (a) biological factors […], such as […] their reproductive function."[468]

301. For his part, regarding the situation of infertile men, Mr. Mejías Carballo declared that he "is fearful of forming part of a couple again." He added that "it was very hard following [the ban on IVF]; they began to have problems when it was like a requirement wanting to have a child, and the years passed, birthdays came and went, Mother's Day, Father's Day, Christmas, when all [his] siblings and nephews and nieces gave presents to their children, and […] another Mother's Day, and yet another one, and [he] still did not have a child; in other words, all this troubles one morally."[469] Meanwhile, Mr. Vargas stated that "for years [he] felt diminished, [he] did not feel like a man, and thought that [his] inability to conceive a child was unmanly. Thus, [he] punished [him]self in the silence of [his] own thoughts, in the pain of swallowing thousands of tears so nobody could see [him] cry."[470] For his part, Mr. Sanabria León explained that he received "the message of impossibility and, together with this, [he] felt disabled, [his] perception of [him]self was negatively affected and [he] became angry with and resentful of his body; [he] rejected [him]self; in brief, [his] self-image was severely diminished."[471] Expert witness Neuburger explained that "fertile disability causes men to feel a strong sense of impotence and, consequently, a questioning of their gender identity. Concealing their fertile dysfunction socially is the usual defensive strategy because they fear being laughed at or questioned by other men."[472]

302. The Court emphasizes that these gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them. The Court is not validating these stereotypes and only recognizes them and defines them in order to describe the disproportionate impact of the interference caused by the Constitutional Chamber's judgment.

D.2.c) Indirect discrimination in relation to financial situation

303. Finally, the ban on IVF had a disproportionate impact on the infertile couples who did not have the financial resources to undergo IVF abroad.[473] The case file shows that Grettel Artavia Murillo, Miguel Mejías Carballo, Oriéster Rojas, Julieta Gonzalez, Ana Cristina Castillo León, Enrique Acuña, Geovanni Vega, Joaquinita Arroyo, Carlos Eduardo de Jesús Vargas Solórzano and María del Socorro Calderón Porras did not have the financial resources to undergo IVF treatment abroad.[474]

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[468] *Cf.* Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, para. 12.

[469] *Cf.* Statement made by Mr. Mejías Carballo at the public hearing held in this case.

[470] *Cf.* Affidavit of Giovanni Vargas (file of annexes to the pleadings and motions briefs, volume IV, folio 5281).

[471] Affidavit of Viktor Sanabria León (file of annexes to the pleadings and motions brief, volume II, folio 4937).

[472] Affidavit provided by expert witness Alicia Neuburger (merits report, volume V, folios 2519 and 2520).

[473] *Cf.* Article 1(1) of the American Convention ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of […] economic status").

[474] *Cf.* Affidavit of Oriéster Rojas (file of annexes to the pleadings and motions brief, volume II, folio 4516).

304. In his testimony during the public hearing before this Court, Mr. Mejías Carballo declared that he and his former wife felt "very sad […] because they could not travel to another country because they did not have the resources; and they could not do it here in Costa Rica because it had been banned."[475] In her affidavit, Grettel Artavia Murillo indicated that she and her former partner, Miguel Mejías, felt "totally desperate and tremendously frustrated, and [their] relationship began to have many problems on seeing the hopes of becoming parents curtailed, together with the impossibility of going abroad to undergo this practice owing to a lack of resources, which effectively resulted in a lessening of their individual usefulness and, thus, a net loss of [their] social well-being."[476] Ana Cristina Castillo León explained that they "did not have the necessary financial resources to go abroad to obtain" IVF.[477] Furthermore Mr. Vargas stated that "the only alternative was to consider traveling to Spain or Colombia to undergo IVF; however, the corresponding costs had tripled for [them], and [they] simply felt defeated, discriminated against and punished by a court that had curtailed the possibility of having access to a medical treatment that was permitted in every other country in the world."[478]

D.3) Dispute regarding the alleged embryonic loss

305. As indicated previously (*supra* para. 76), the Constitutional Chamber justified the prohibition of IVF based on the "high loss of embryos," their "disproportionate risk of death," and the inadmissibility of comparing the loss of embryos in a natural pregnancy with the loss in IVF. The State considered that "to date, the [IVF] technique entails discarding, by act or omission, embryos that, otherwise, could come to term." The Constitutional Chamber indicated that:

> The argument that, under natural circumstances, there are also embryos that do not become implanted or even if they achieve implantation do not develop up until birth […] is irreceivable, simply due to the fact that the application of [IVF] entails a conscious and voluntary manipulation of male and female reproductive cells in order to obtain a new human life, during which a situation is promoted in which it is known in advance that human life has no possibility of continuing in a significant percentage of cases.[479]

306. In this regard, the Court observes that the Decree that the Chamber declared unconstitutional included measures of protection for the embryo, because it established the number of eggs that could be fertilized. In addition, it prohibited "discarding or eliminating embryos, or preserving them for transfer in subsequent cycles of the same patient or other patients." In this regard, there were measures to ensure that a "disproportionate risk" for the life expectation of the embryos was not created. In addition, according to the said decree, the only possibility of loss of viable embryos was if they failed to become implanted in the woman's uterus once the embryonic transfer had taken place.

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[475] Likewise, Mr. Mejías declared that he wanted to go abroad to undergo the treatment but he "did not have the money and had already spend a great deal and [he] subsist[ed] on a State pension, and everyone knows that State pensions are not sufficient to cover an expenses like that; therefore [they] could not go." *Cf.* Statement made by Mr. Mejías Carballo at the public hearing held in this case.

[476] *Cf.* Affidavit of Grettel Artavia Murillo (file of annexes to the pleadings and motions brief, volume I, folio 4077)

[477] *Cf.* Testimony of Ana Cristina Castillo León (file of annexes to the pleadings and motions brief, volume I, folio 4102).

[478] *Cf.* Affidavit of Giovanni Vargas (file of annexes to the pleadings and motions briefs, volume IV, folio 5280).

[479] Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folio 85).

307. The Court finds it necessary to examine this aspect further based on the evidence provided in these proceedings in relation to the similarities and differences concerning the loss of embryos in both natural pregnancies and in IVF.

308. The Constitutional Chamber based the prohibition of IVF on the difference in the loss of embryos transferred by IVF and embryonic loss in a natural pregnancy, considering that when applying IVF there was a "conscious [and] voluntary manipulation" of the embryos. The Court observes that a scientific debate exists about the rates of embryonic loss in the natural process and in assisted reproduction. In the proceedings before the Court, different medical positions have been presented concerning the cause of embryonic loss in both the application of IVF and in natural pregnancy, as well as the percentage of losses in both cases. Expert witness Zegers-Hochschild indicated that "[t]he scientific information that has been produced indicates that 'the embryonic death that occurs in IVF procedures does not occur as a direct result of the technique, [but rather] it occurs as part of the process expressed by our nature,"[480] and that "[i]n women with healthy eggs, the possibility of conceiving from an embryo generated *in vitro* is no different from one generated spontaneously."[481] For her part, expert witness Garza stated that "embryo mortality is around 30% in natural circumstances and, for IVF, it is calculated that embryonic loss is around 90%." However, she clarified that "it is difficult to estimate the exact embryonic mortality in natural circumstances, because some losses cannot be detected in early pregnancy." Expert witness Caruso stated that "the percentage of losses is much higher" in IVF than "in natural conception."[482]

309. It is not incumbent on the Court to determine which scientific theory should prevail on this issue; nor must it make a thorough analysis of which expert witness is right on these matters that are outside the Court's expertise. For the Court, it is sufficient to verify that the evidence in the case file is consistent in indicating that there is embryonic loss in both a natural pregnancy and in the context of IVF. In addition, both expert witness Zegers-Hochschild and expert witness Caruso indicated that it is difficult to measure embryonic loss in natural pregnancies compared to the measurement of losses in IVF, and this places limits on the implications that it has been attempted to give to some of the statistics submitted to the Court.[483]

310. Bearing in mind that embryonic loss occurs in both natural pregnancies and when IVF is applied, the argument of the existence of conscious and voluntary manipulation of cells in the context of IVF can only be understood in relation to the argument developed by the Constitutional Chamber concerning the absolute protection of the right to life of the embryo, which has been invalidated in preceding sections of this Judgment (*supra* para.

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480 Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2835).

481 Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2839).

482 Affidavit prepared by expert witness Garza.

483 During the public hearing, the Commission questioned expert witness Caruso on this point, indicating that in both IVF and in the natural conception process there is embryonic loss, and stressing that the difference would be that, in IVF, it is possible to measure those losses. The Commission inquired whether the difference would therefore be that, in IVF, it was simply possible to measure these losses. Expert witness Caruso answered that "In IVF you can say to a certain extent; you can answer that question somewhat. The differences, as I've said before is that there is a very big difference between the environment of the natural process in the Fallopian tube and the dish with a medium in an incubator at 95 degrees and 5% CO2 in an IVF lab. So yes, you are going to see in IVF you can quantify the loss of the embryos that you have. Number one, you cannot extrapolate that back to compare it to natural pregnancy laws. And two: there may be reasons beyond nature that those embryos are lost". *Cf.* Opinion provided by expert witness Anthony Caruso at the public hearing held in this case.

264). To the contrary, the Court observes that expert witness Zegers-Hochschild emphasized that "[t]he process that generates human life includes embryonic death as part of a natural and necessary process. Of every 10 embryos spontaneously generated in the human species, no more than 2 to 3 are able to survive natural selection and be born as a person. The remaining 7 or 8 embryos die in the female genital tract, generally without the parents' knowledge."[484]

311. Bearing in mind the above, the Court finds it disproportionate to aspire to an absolute protection of the embryo in relation to a risk that is common and even inherent in processes where the IVF technique has not been used. The Court shares the opinion of expert witness Zegers-Hochschild that "[f]rom a biomedical perspective, it is essential to differentiate the meaning of *protecting* the right to life from the meaning of *ensuring* the right to life of cellular structures that are regulated by mathematics and biology, which transcend any social or legal regulation. The institutions responsible for [assisted reproduction techniques] should provide the cellular structures (gametes and embryos) with the optimum conditions offered by medical and scientific knowledge so that potentiality of being a person can be expressed at birth […]." The Court reiterates that, precisely, one of the purposes of IVF is to contribute to the creation of life (*supra* para. 66).

312. The Court also observes that Costa Rica permits artificial insemination techniques even though the use of such techniques does not guarantee that each egg will result in a pregnancy, thus entailing the possible loss of embryos. The decision to become pregnant, even by natural fertilization may also be preceded by a conscious act that takes measures to increase the probability of the egg being fertilized. According to the State's final arguments:

> Artificial insemination is one of the treatments offered by the Costa Rican Social Security Institute. At times, as a result of hormone treatment and as an individual response, patients may present greater stimulation of the ovaries than expected; consequently, when this follicle production is 6 or more in both ovaries, the cycle is annulled.[485]

313. In brief, embryonic loss exists in both natural pregnancy and in techniques such as artificial insemination. The Court observes that scientific debate exists about the differences between the type of embryonic losses that occur in these processes and their reasons. But the analysis made above allows the Court to conclude that, taking into account the embryonic losses that occur in a natural pregnancy and in other reproduction techniques

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[484] Opinion provided by expert witness Zegers-Hochschild at the public hearing held in this case. He explained that "[t]he results of ART vary significantly according to the age of the woman and the number of embryos transferred and, in some cases, to the severity of the condition that gave rise to the disease. […] The proportion of chromosomally abnormal eggs is very high in the human species. This means that a large percentage of fertilized eggs do not advance in embryonic development and a high proportion of transferred embryos do not implant and do not result in a pregnancy. […] The analysis of these data reveals that […] the technique of IVF or [intracytoplasmic sperm injection] ICSI does not generate embryos of a lesser biological value than those generated spontaneously in a woman's body, [and] that embryonic death as part of a medical treatment, does not occur as a direct result of the technique, but as the result of the poor quality of the oocyte and embryo that are natural to both women and men. In women with healthy eggs, the possibility of conceiving from one embryo generated *in vitro* is no different from one generated spontaneously. In itself, the IVF/ICSI does not affect the possibility of implantation and conception. Hence, the lower rates of pregnancy in women with IVF are not due to the interference of the technique; but rather they are mainly the result of the underlying disease that determines a lower reproductive performance. […] The process that creates human life includes embryonic death as part of a natural and necessary process. Of every 10 embryos generated spontaneously in the human species, no more than 2 to 3 are able to survive natural selection and to be born as a person. The remaining 7 or 8 embryos die in the female genital tract, generally without the parent's knowledge. The question that must be answered is whether the ART, such as IVF or ICSI contribute to the death of embryos because they have been fertilized outside a woman's body and then transferred to her. The answer to this question is that neither IVF or ICSI affect the possibility of survival of embryos and, evidently, do not kill them."

[485] The State's final written arguments (merits report, volume XI , folio 5314).

permitted in Costa Rica, the protection of the embryo sought by banning IVF has a very limited and moderate scope.

D.4) Conclusion regarding the assessment of the severity of the interference in relation to the impact on the intended purpose

314. A weighing up of the severity of the limitation of the right to private life and to found a family compared to the importance of the treaty-based protection of prenatal life allows it to be affirmed that the effects on the right to private life, intimacy, reproductive autonomy, access to reproductive health services, and to found a family is severe because, in the practice, these rights are annulled for those persons whose only possible treatment for infertility is IVF. In addition, the interference had a differentiated impact on the victims owing to their situation of disability, gender stereotypes and, for some of the victims, their financial situation.

315. In contrast, the impact on the protection of prenatal life is very slight, because the risk of embryonic loss is present both in IVF and in natural pregnancy. The Court underlines that the embryo, prior to implantation, is not covered by the terms of Article 4 of the Convention, and recalls the principle of the gradual and incremental protection of prenatal life (*supra* para. 264).

316. Therefore, the Court concludes that the Constitutional Chamber based itself on an absolute protection of the embryo that, by failing to weigh up or take into account the other competing rights, involved an arbitrary and excessive interference in private and family life that makes this interference disproportionate. Moreover, the interference had discriminatory effects. In addition, taking into account these conclusions about the assessment and the considerations concerning Article 4(1) of the Convention (*supra* para. 264), the Court does not consider it pertinent to rule on the State's argument that it has a margin of appreciation to establish prohibitions such as the one established by the Constitutional Chamber.

E) Final conclusion of the merits of the case

317. Based on all the considerations in this chapter, the Court declares the violation of Articles 5(1), 7, 11(2) and 17(2), in relation to Article 1(1) of the American Convention, to the detriment of Gretel Artavia Murillo, Miguel Mejías Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchoz Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, Maria del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

VIII
REPARATIONS
(*Application of Article 63(1) of the American Convention*)

318. Based on the provisions of Article 63(1) of the American Convention,[486] the Court has indicated that every violation of an international obligation which causes damage entails

[486] Article 63(1) of the American Convention establishes that "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

the obligation to provide adequate reparation[487] and that this provision reflects a customary law that is one of the fundamental principles of contemporary international law on State responsibility.[488]

319. The reparation of the damage caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights infringed and to repair the consequences of the violations.[489] Consequently, the Court has considered the need to award different measures of reparation in order to redress the damage comprehensively, so that, in addition to pecuniary compensation, measures of restitution and satisfaction and guarantees of non-repetition have special relevance for the damage caused.[490]

320. The Court has established that reparations must have a causal nexus to the facts of the case, the violations declared, the damage proved, and the measures requested to repair the respective damage. Therefore, the Court must observe that these requirements have been met in order to rule appropriately and in keeping with the law.[491]

321. Based on the considerations on the merits and the violations of the American Convention declared in the preceding chapter, the Court will now analyze the claims arguments and recommendations presented by the Commission and the claims of the representatives, as well as the arguments of the State, in light of the criteria established in the Court's case law regarding the nature and scope of the obligation to make reparation,[492] in order to establish measures designed to redress the damage caused to the victims.

A) Injured party

322. The Court reiterates that, under Article 63(1) of the Convention, those persons who have been declared victims of the violation of a right recognized in the Convention are considered the injured party. Therefore, this Court considers as "injured party": Gretel Artavia Murillo, Miguel Mejías Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchoz Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, Maria del Socorro Calderón P., Joaquina Arroyo Fonseca, Giovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza, who, as victims of the violations declared in Chapter VII, will be considered beneficiaries of the reparations ordered by the Court.

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487 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 238.

488 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 238.

489 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012 Series C No. 250, para. 245.

490 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs,* para. 25, and *Case of the Río Negro Massacres v. Guatemala*, para. 248.

491 *Cf. Case of Ticona Estrada v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of the Massacres of El Mozote and nearby places v. El Salvador.* Merits, reparations and costs. Judgment of October 25, 2012 Series C No. 252.

492 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 25, and *Case of the Río Negro Massacres v. Guatemala*, para. 246.

323. The Court will determine measures that seek to repair the pecuniary and non-pecuniary damage, and will establish measures of public scope or repercussion.[493] International case law, and specifically that of the Court, has repeatedly established that the judgment constitutes *per se* a form of reparation.[494] However, considering the circumstances of the case *sub judice*, and based on the effects on the victims, as well as the intangible and non-pecuniary consequences of the violations of the Convention declared to their detriment, the Court finds it pertinent to establish measures of rehabilitation and satisfaction and guarantees of non-repetition.

B) Measures of rehabilitation and satisfaction and guarantees of non-repetition

B.1) Measures of psychological rehabilitation

Arguments of the parties

324. Representative Molina asked the Court to "order the State to provide psychological and/or psychiatric treatment to the victims who so wish, with trained professionals for the specific damage to their life project."

325. The State argued that this measure "should be rejected, given that […] the Costa Rican social security system already provides the service of psychological and psychiatric support and treatment to patients who have fertility problems."

Considerations of the Court

326. The Court has indicated that this case is not related to a presumed right to have children or a right to have access to IVF. To the contrary, the case has focused on the impact of a disproportionate interference in decisions regarding private and family life, and the other rights involved, and the impact that this interference had on mental integrity. Consequently, the Court finds, as it has in other cases,[495] that it is necessary to establish a measure of reparation that provides adequate attention to the psychological problems suffered by the victims, addressing their specific needs, provided they have requested this. The Court observes different problems suffered by the victims owing to the arbitrary interference in access to an assisted reproduction technique. Therefore, having verified the violations and the damage suffered by the victims in this case, the Court establishes the State's obligation to provide them with the psychological treatment they require, free of charge and immediately, for up to four years. In particular, the psychological treatment must be provided by State institutions and personnel specialized in attending victims of events such as those that occurred in this case. When providing this treatment, the specific circumstances and needs of each victim should also be considered, so that they are provided with family and individual treatment, as agreed with each of them, after an individual assessment.[496] The treatments must include the provision of medicines and, if

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493 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Vélez Restrepo and family v. Colombia*, para. 259.

494 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Vélez Restrepo and family v. Colombia*, para. 259.

495 *Cf. Case of Barrios Altos v. Peru. Reparations and costs.* Judgment of November 30, 2001. Series C No. 87, para. 42 and 45 and *Case of the Río Negro Massacres v. Guatemala*, para. 287.

496 *Cf. Case of the 19 Tradesmen v. Colombia*. Merits, reparations and costs. Judgment of July 5, 2004. Series C No. 109, para. 278, and *Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, para. 329.

appropriate, transportation and other expenses that are directly related and strictly necessary.

B.2) Measures of satisfaction: publication of the Judgment

Arguments of the parties

327. Representative Molina requested "the publication of the pertinent parts of the judgment in a newspaper with widespread national circulation, in its printed version, and the full text of the judgment online, as well as the summary," and "that the State create a summary of the judgment in simple terms, approved by the Court, so that the general public may understand what this case entailed, and that this version also be published in a national newspaper."

328. Representative May asked the Court to "declare that the State must publish, once, within six months of notification of this Judgment, the operative paragraphs of this Judgment in the Official Gazette and in two other newspapers with widespread circulation."

Considerations of the Court

329. The Court orders that State publish, within six months of notification of this Judgment: (a) the official summary of this Judgment prepared by the Court, once, in the Official Gazette; (b) the official summary of this Judgment prepared by the Court, once, in a newspaper with widespread national circulation, and (c) the full text of the Judgment, available for one year on an official web site of the Judiciary.

B.3) Guarantees of non-repetition

B.3.1) State measures that do not prevent the practice of IVF

Arguments of the Commission and claims of the parties

330. The Commission recommended that the State "lift the ban on *in vitro* fertilization in the country through the corresponding legal procedures" and "ensure that, once the ban is lifted, the regulation of the practice of *in vitro* fertilization is compatible with the State's obligation with regard to the rights recognized in Articles 11(2), 17(2) and 24, [in order that] couples that need and want the treatment have access to the technique of *in vitro* fertilization so that the treatment can serve its purpose."

331. Representative Molina asked the Court to order the State to approve "a formal and substantive law that weighed the rights to life and the rights [violated] in this case." In this regard, he proposed the "prohibition to discard embryos arbitrarily and to sell them; to allow the implanting of no more than three embryos to avoid multiple pregnancies, and to allow the freezing of eggs and not of embryos, as a measure of embryo protection." He stressed "the importance of permitting the law to adjust to the new methods of assisted reproduction that science discovers in a way that maintains a balance between rights." He asked the Court to "order the State to regulate and to establish all necessary mechanisms to offer the population existing and future assisted reproduction methods in order to assist couples with infertility problems."

332. Representative May asked that the State "adopt all legal, administrative or other measures to be able to provide full access progressively to IVF treatment within the social security system to sterile or infertile persons who are contributors of the Costa Rican Social

Security Institute, incorporating the technological advances available nowadays in countries with more experience, which permit not only better statistical results of success with this treatment, but also increased safety for the patients who undergo the procedure."

333. The State argued that "the Costa Rican Social Security Institute has a complete program of attention for those who have infertility problems, and the only procedure not offered at this time is [IVF]."

Considerations of the Court

334. The Court recalls that the State must prevent the recurrence of human rights violations such as those that have occurred and, therefore, adopt all necessary legal, administrative and other measures to prevent similar events from occurring in the future, in compliance with its obligation of prevention and to guarantee the fundamental rights recognized by the American Convention.[497]

335. In particular, and in accordance with Article 2 of the Convention, the State has the obligation to adopt the necessary measures to ensure the enjoyment of the rights and freedoms recognized in the Convention.[498] In other words, States have not only the positive obligation to adopt the necessary legislative measures to ensure the enjoyment of the rights established in the Convention, but must also avoid enacting those laws that prevent the free exercise of these rights, and avoid the elimination or amendment of laws that protect them.[499]

336. First, and taking into account the considerations in this Judgment, the pertinent State authorities must take the appropriate measures to ensure that the prohibition of the practice of IVF is annulled as rapidly as possible so that those who wish to use this assisted reproduction technique may do so without encountering any impediments to the exercise of the rights that this Judgment has found to have been violated (*supra* para. 317). The State must provide information on the measures taken in this regard within six months.

337. Second, the State must, as soon as possible, regulate those aspects it considers necessary for the implementation of IVF, taking into account the principles established in this Judgment. In addition, the State must establish systems for the inspection and quality control of the qualified professionals and institutions that perform this type of assisted reproduction technique. The State must provide information every year on the gradual implementation of these systems.

338. Third, in the context of the considerations made in this Judgment (*supra* paras. 285 to 303), the Costa Rica Social Security Institute must make IVF available within its health care infertility treatments and programs, in accordance with the obligation to respect and guarantee the principle of non-discrimination. The State must provide information every six months on the measures adopted in order to make these services available gradually to those who require them and on the plans that it draws up to this end.

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497 *Cf. Case of Velásquez Rodríguez. Merits,* para. 166, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* para. 221.

498 *Cf. Case of Gangaram Panday v. Suriname. Preliminary objections*. Judgment of December 4, 1991. Series C No. 12, para. 50, and *Case of Furlan and family v. Argentina,* para. 300.

499 *Cf. Case of Gangaram Panday v. Suriname. Preliminary objections*, para. 50, and *Case of Furlan and family v. Argentina*, para. 300.

B.3.2) Campaign on the rights of persons with reproductive disabilities

Claims of the parties

339. Representative Molina asked the Court to "order the implementation of a national information campaign on the rights of persons with reproductive disabilities."

340. The State argued that "it already has mechanisms to create awareness on reproductive health" and "that the determination of the contents of campaigns on reproductive health corresponds to the States, which are responsible for determining the use given to the health system's scarce financial resources."

Considerations of the Court

341. The Court observes that the State did not specify the existing mechanisms to raise awareness on reproductive health.[500] Therefore, it orders the State to implement permanent education and training programs and courses on human rights, reproductive rights and non-discrimination for judicial employees in all areas and at all echelons of the Judiciary.[501] These programs and training courses should make special mention of this Judgment and the different precedents in the *corpus iuris* of human rights relating to reproductive rights and the principle of non-discrimination.

B.3.3) Other measures requested

Claims of the parties

342. Representative May asked the Court to "ask the Permanent Council of the Organization of American States to request the Inter-American Juridical Committee […] to draft, within a reasonable time, an international norm on the embryo, bearing in mind the need to establish certain limits or the exclusion of human embryos from all commercial agreements. He also asked that "the Constitutional Chamber of the Supreme Court of Justice [carry out] a public act in order to apologize to the victims for the violation of their human rights and for the pain and suffering caused to them, acknowledging publicly that, because of its judgment, this judicial organ thwarted the life project of the victims." He also asked the Court to "declare that the Costa Rican Social Security Institute […] should establish a specialized IVF clinic named after Gerardo Trejos Salas."

343. The State argued that "there is no norm that grants the Inter-American Court competence to request the Juridical Committee to advise it or to draft normative documents; therefore, the request is irreceivable."

Considerations of the Court

344. Regarding the other measures of reparation requested, the Court considers that the delivery of this Judgment and the reparations ordered in this chapter are sufficient and adequate to remedy the violations suffered by the victims, and does not find it necessary to order the said measures.[502]

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[500] The State merely mentioned the existence of a "Workshop on monitoring the MDG in Latin America" (merits report, volume III, folio 1253).

[501] Similarly *Cf. Case of Atala Riffo and daughters v. Chile*, para. 271.

[502] *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 359, and *Case of Vélez Restrepo and family v. Colombia*, para. 287.

C) Compensation for pecuniary and non-pecuniary damage

C.1) Pecuniary damage

Arguments of the Commission and claims of the parties

345. The Commission asked the Court to order the State to "make full reparation to the victims of the instant case, for both the pecuniary and the non-pecuniary aspects."

346. Representative Molina indicated that consequential damage has been demonstrated "with evidence such as, although not limited to, medical prescriptions, invoices, epicrises, and medical reports." He pointed out that "the collection of evidence from all the victims permits an overall reconstruction of the expenses arising from the medical procedure that is the purpose of this claim." He requested the "payment of all expenses incurred by the victims in their attempts to found a family with biological children, which, since it was not offered by the State as a health service, meant that they had to resort to private medicine and, in general, incur expenditure for items such as medical consultations, laboratory tests, ultrasounds and x-rays, the purchase of medicines, transportation, trips abroad and meals, payment of the costs of artificial insemination procedures, *in vitro* fertilization, and ICSI [intracytoplasmic sperm injection]." For pecuniary damage, he requested: (i) for Maria del Socorro Calderón and Carlos Vargas, the sum of US$4,821.69 each; (ii) for Enrique Acuña Cartín, the sum of US$9,677.04; (iii) for Ileana Henchoz and Miguel Yamuni, the sum of $17,516.29 each; (iv) for Julieta González and Oriester Rojas, the sum of US$9,661.07 each; (v) for Karen Espinoza and Hector Jiménez, the sum of US$5,015.52 each; (vi) for Víctor Sanabria León, the sum of US$19,287.59, and (vii) for Joaquinita Arroyo and Giovanni Vega the sum of $7,188.08 each.

347. Representative May requested "payment of compensation for pecuniary and non-pecuniary damage." In particular, he asked for the following payments: (i) for Grettel Artavia Murillo, the sum of US$830,000; (ii) for Miguel Mejías Carballo, the sum of US$740,000; (iii) for Claudia Maria Carro Maklouf, the sum of US$700,000; (iv) for Andrea Bianchi Bruna, the sum of US$210,000; (v) for Germán Alberto Morera Valencia, the sum of US$120,000, and (vi) for Ana Cristina Castillo León, the sum of US$1,500,000. He argued that the Court "has defined the concept of pecuniary damage, including within it the costs and expenses incurred by the parties during all the proceedings and based on the causes for responsibility that can be attributed to the State." He indicated that "all of the expenditure and disbursements made by the victims that are found to be proved either with documents or determined reasonably based on the events and circumstances proved in this case" should be recognized." He also indicated that "all the expenditure incurred by the couples in relation to the medical attention they received during the procedures to verify and determine their infertility should be recognized, because a medical diagnosis would not have been possible without these investments." In addition, he stated that "the travel and other related expenses incurred by those victims who had to go abroad in order to undergo this technique should be compensated, because in the absence of the prohibition the technique would have been available to them free of charge under the social security system."

348. The State "analyzed the claims presented based on the specific situation of each claimant couple" and concluded that the requests for pecuniary damage should be rejected for the following reasons: (i) the expenses incurred by the couples "relating [to the] infertility treatment, [are] the same as those they would have incurred even if the decree regulating [IVF] had not been annulled"; therefore "they have no causal relationship to the violations allegedly attributed to the State"; (ii) the medical expenses prior to the

declaration of unconstitutionality cannot be attributed to the State or considered for the purposes of the requested compensation; (iii) "the violations attributed to the Costa Rican State have no effect on the presumed victims' employment"; (iv) the couples that had biological children do not qualify as infertile couples and therefore "it cannot be considered that the State limited the only possibility they ha[d] to become biological parents by declaring the decree that regulated [IVF] unconstitutional, since it is clear that they were able to have a biological child without undergoing [the said] procedure," and (v) representative May's arguments did not provide "a clear and accurate determination of the reasons why it [was] alleged that the State produced pecuniary or non-pecuniary damage."

Considerations of the Court

349. In its case law, the Court has developed the concept of pecuniary damage, and has established that it supposes "the loss or detriment to the victims' incomes, the expenses incurred owing to the facts and the pecuniary consequences having a causal nexus to the facts of the case."[503]

350. Based on the arguments presented by the parties, the Court considers it necessary to determine the criteria that it will take into account in order to establish the amounts for pecuniary damage. First, the Court emphasizes that the violations declared above are related to the impediment to exercise a series of rights autonomously (*supra* para. 317), and not for being able or unable to have biological children; consequently, the State's argument that the couples that could have children should not be compensated is not receivable. Second, the Court takes into account that the IVF technique was not a procedure covered by the Costa Rican Social Security Institute (*supra* para. 70); thus the couples would have had to incur the above-mentioned medical expenses irrespective of the Constitutional Chamber's judgment. Consequently, the Court finds that there is no causal nexus between all the expenses mentioned above (*supra* paras. 346 and 347) and the violations declared in this Judgment. Bearing in mind the foregoing, the Court concludes that the expenses that have a causal nexus to the violations in this case are only those resulting from the Constitutional Chamber's decisions; mainly those expenses incurred by the couples that had to travel abroad to undergo the treatment.

351. In the instant case, the Court observes that representative Molina provided documentary evidence[504] for the couples consisting of Ileana Henchoz and Miguel Yamuni, Julieta González and Oriester Rojas, and Víctor Sanabria León and Claudia Carro Maklouf,[505] who traveled abroad to undergo this technique. For his part, representative May did not present specific evidence with regard to Andrea Bianchi Bruna and Germán Alberto Moreno, who traveled abroad twice to undergo the treatment.

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[503] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91 para. 43, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 281.

[504] There is an invoice from Hotel "Renasa" (file of annexes to the pleadings and motions briefs, volume V, annex XXVII, folio 5772) where they were in Valencia dated April 24, 2000, with the hotel expenses from April 18, 2000, to April 24, 2000, for a total of 640.33 euros. There are the receipts for the four days that they were in the Hotel Roma in Panama paying US$33 for the 4 nights (file of annexes to the pleadings and motions briefs, volume II, annex I, folios 4283 to 4285). The other is an Iberia ticket (file of annexes to the pleadings and motions briefs, volume II, annex V, folio 4695) in the name of Victor Sanabria, between San Jose and Madrid for a total US$681.58. Also, the representative submitted several tables in which he had calculated in colones and dollars different expenses that he associated with the pecuniary damage (merits report, volume II, folios 587.24 to 587.39).

[505] It is worth noting that Ms. Carro was represented by representative May, but representative Molina presented evidence in her favor.

352. In this regard, the Court recalls that the criterion of equity has been used in this Court's case law to quantify non-pecuniary damage[506] and pecuniary damage,[507] and to establish loss of earnings.[508] However, the use of this criterion does not imply that the Court can act discretionally when establishing the compensatory amounts.[509] The parties must clearly specify the evidence of the harm they suffered, as well as the relationship of the specific pecuniary claim to the facts of the case and the alleged violations.[510]

353. In this particular case, representative May did not specify the amounts for pecuniary and non-pecuniary damage, thus the type of damage for which he requested compensation is unclear. Furthermore, he did not indicate the causal nexus between the violations declared in this case and the amounts requested for the victims; therefore it is not possible to determine the exact amount of the expenses incurred by Ms. Bianchi and Mr. Moreno.

354. For his part, representative Molina presented different types of documentary evidence on these expenses. However, the Court could not make an exact calculation of the amount owed, taking into account that the documentation presented, which corresponds to different dates, is in different currencies such as pesetas, Colombian pesos, and balboas. Even though, he submitted information on the equivalent of these amounts in colones and dollars, he failed to explain clearly the type of exchange rate used. In this regard, it is not the Court's task to calculate the value of the dollar at the date of each invoice or documentary proof. However, the Court can presume that during these trips disbursements were made for airfares and daily expenses.

355. Therefore, the Court establishes, based on the equity principle, the sum of US$5,000.00 (five thousand United States dollars) in favor of each of the following persons: Ileana Henchoz, Miguel Yamuni, Julieta González, Oriester Rojas, Víctor Sanabria León, Claudia Carro Maklouf, Andrea Bianchi Bruna and Germán Alberto Moreno, victims of this case who had to travel abroad to obtain access to IVF.

C.2) Non-pecuniary damage

Arguments of the Commission and claims of the parties

356. The Commission asked the Court to order the State "to make full reparation to the victims of the present case, to include both the pecuniary and the non-pecuniary aspects."

357. Representative Molina argued that the State "created a situation of lack of protection for these persons to the point of affecting them in their most intimate personal sphere, and re-victimizing them by not responding to their reproductive disability." He also argued that "in this case, it is essential to consider the damage to their life project as part of the non-pecuniary damage because, after all, these couples were seeking to found their family with biological children, and this road map they had prepared for their life was curtailed by the State's arbitrariness and inactivity." Therefore, he argued that "[i]n the case of the victims

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506 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 27, and *Case of the Barrios Family v. Venezuela*, para. 378.

507 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 50, and *Case of the Barrios Family v. Venezuela,* para. 373.

508 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 50, and *Case of the Barrios Family v. Venezuela,* para 373.

509 *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs*. Judgment of September 10, 1993. Series C No. 15, para. 87.

510 *Cf. Case of Furlan and family v. Argentina*, para. 313.

of the instant case, it is evident that the State's acts and omissions that prejudiced them impeded the achievement of their highest hopes."

358. In this regard, representative Molina argued that the non-pecuniary damage could be calculated by three methods, namely: (i) "Monthly temporary income"; (ii) "Psychological loss of earnings," and (iii) "Equity and justice." Regarding "monthly temporary income" he argued that it was possible to estimate the non-pecuniary damages in the sum of US$3,500 per month for the men, and US$4,500 for the women, calculated from the date on which IVF was prohibited and until the date of its eventual authorization, which, "following the Courts parameters to make the calculation based on simple interest and the LIBOR rate at the beginning of each year," would result in "a sum of US$654,435.84 for each woman, and US$466,651.98 for each man [… which] would mean that they could turn around their "Life project" and prepare to enjoy, with a monthly temporary income, their old age in better financial conditions." Regarding the "psychological loss of earnings," he argued that this was not "about the person who stopped working or who died and, consequently, this capital has to be replaced; but rather about a person who continues working or whose work is not remunerated; […] this would be the case for a housewife or student who, without working in exchange for a salary, can also be the victim of damage and who is not, because of this condition, left unprotected as a beneficiary of compensation. Thus, we classify this kind of damage as non-pecuniary, because its causal nexus arises from a psychological or affective harm, more than direct harm to their salary."[511] Regarding the criterion of "Equity and justice," he asked that "significant financial compensation be established in favor of the victims." He concluded that "a sum no less than US$800,000 […] should be established in favor of each victim in these proceedings, as a way of establishing a true balance between the arbitrariness of the State and the intense, prolonged, and now perpetual, suffering of the victims."

359. Representative May argued that "the Constitutional Chamber's decision […] produced a loss of opportunity that is included in the principle of full reparation," because "the victims' real and genuine possibility of becoming parents, founding a family, and being able to enjoy the right to equality in relation to the rest of the community disappeared with the prohibition, while before the prohibition (the harmful event), the victims had a real and genuine possibility of having biological children." The sums requested for non-pecuniary damage are those presented for pecuniary damage (*supra* para. 346).

360. With regard to the presumed non-pecuniary damage, the State argued the lack of a causal nexus between this and the judgment of the Constitutional Chamber, considering that: (i) "[i]n none of the cases […] had it contributed, by act or omission, to the infertility of the persons who appear as victims"; (ii) that "the suffering that the couples might feel because they were unable to procreate children […] is related to their natural condition of being unable to have children, and not to the prohibition indicated by the Constitutional Chamber," and (iii) that "there would have to be absolute certainty that the use of *in vitro* fertilization techniques […] would have resulted in the birth of a child or, at least, that there was a high level of probability of this," when "the evidence provided by the State allows it to be established that the probability that a child would be born following the practice of the *in*

[511] Representative Molina requested as "psychological loss of earnings": (i) for Maria del Socorro Calderón Porras the sum of US$180,847.05; (ii) for Carlos Eduardo Vargas Solórzano the sum of US$201,213.61; (iii) for Julieta González Ledezma the sum of US$187,787.01; (iv) for Oriester Rojas Carranza the sum of US$485,114.98; (v) for Joaquinita Arroyo Fonseca the sum of US$771,489.23; (vi) for Giovanni Antonio Vega the sum of US$1,814,061.98; (vii) for Ileana Henchoz Bolaños the sum of US$1,013,454.54; (viii) for Miguel Antonio Yamuni Zeledón the sum of US$1,259,961.59; (ix) for Karen Espinoza Vindas the sum of US$752,620.35; (x) for Héctor Jiménez Acuña the sum of US$590,306.84; (xi) for Víktor Hugo Sanabria León the sum of US$1,862,581.64, and (xii) for Enrique Acuña Cartín the sum of US$1,268,470.28 (merits report, volume II, folio 587.35).

vitro fertilization technique is very low, both nowadays and at the time the Constitutional Chamber's decision was issued." In addition, it considered that "Joaquinita Arroyo and […] Giovanni Vega and […] Karen Espinoza and Héctor Jiménez […] had children conceived naturally, so that it is clear that they were not infertile," and that "in the case of Grettel Artavia Murillo […], she also had a child who was born on July 27, 2011." Lastly, the State denied the existence of a "causal nexus between the violations of which the State is accused and the work-related difficulties that some of the individuals supposedly experienced.

Considerations of the Court

361. In its case law, the Court has developed the concept of non-pecuniary damage and has established that "it can comprise both the suffering and afflictions caused to the direct victims and to those close to them, the impairment of values that very significant to the individual, as well as alterations, of a non-pecuniary nature, to the living conditions of the victims or their family."[512] Since it is not possible to assign a precise monetary value to non-pecuniary damage, it can only be compensated for purposes of the victim's full reparation, by the payment of a sum of money or the delivery of goods or services with a measurable financial value that the Court determines in reasonable application of sound judicial discretion and based on equity.[513]

362. Furthermore, the Court reiterates the reparatory nature of the compensation, the nature and amount of which depend on the damage caused, and, therefore, should not signify either the enrichment or the impoverishment of the victims or their heirs.[514]

363. In the instant case, the Court recalls that the damage does not depend on whether or not the couples were able to have children (*supra* para. 350), but corresponds to the disproportionate impact on their lives of the inability to exercise their rights autonomously (*supra* para. 317). As revealed in Chapter VII, the feelings of anguish, anxiety, uncertainty and frustration, and the effects on the possibility of deciding their own, autonomous and independent life project, have been verified in these proceedings. Based on the suffering caused to the victims, as well as the changes in their living conditions and the other consequences of a non-pecuniary nature that they experienced, the Court finds it pertinent to establish, in equity, the sum of US$20,000.00 (twenty thousand United States dollars) for each victim as compensation for non-pecuniary damage.

D) Costs and expenses

Claims of the parties

364. Representative Molina asked the Court to order the State to reimburse the expenses incurred for the proceedings before the Court corresponding to US$60,000.00, because he "had to litigate it up until the judgment was delivered and taking into consideration also that the proceedings before the Inter-American Court are very complex, and even presume that experts on matters such as health, assisted reproduction, and psychologists must be

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512 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs. Judgment of May 26, 2001. Series C No. 77, para. 84, and Case of Nadege Dorzema et al. v. Dominican Republic*, para. 284.

513 *Cf. Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 244, and *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 223.

514 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, para. 79, and *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No. 187, para. 161.

consulted." Additionally, he requested US$10,926.43 for "the cost of expert evidence, the notary and expenses resulting from the preparation of briefs."

365. In his pleadings and motions brief, representative Trejos asked the Court to order the State to reimburse the costs and expenses he had incurred. In total, he asked the Court to establish, in equity, the sum of US$45,000.00 for "representing the victims" and for "the measures taken at the domestic and the international level since 2001 in order to obtain justice for all of the victims as *de facto* representative of all of the petitioners in this case before Costa Rica's judicial and administrative authorities and before the Inter-American Commission, as well as of the couples represented […] before the Inter-American Court." In his final arguments, representative May repeated the requests made by representative Trejos and asked that the Court include "invoices for supervening procedural expenses."

366. The State indicated that "the State cannot agree to the sum that is being requested, because the amounts are unreasonable, and even some of the amounts claimed are in excess of the non-pecuniary damage claimed for some of the presumed victims."

Considerations of the Court

367. As the Court has indicated on previous occasions, costs and expenses are included in the concept of reparation established in Article 63(1) of the American Convention.[515]

368. The Court has stated that the claims of the victims or their representatives for costs and expenses, and the evidence that supports them, must be presented to the Court at the first procedural moment granted them, in other words in the pleadings and motions brief, notwithstanding the possibility of updating the said claims subsequently, in keeping with the new costs and expenses incurred during the proceedings before this Court.[516]

369. Regarding the reimbursement of costs and expenses, it corresponds to the Court to evaluate their scope prudently; they includes the expenses generated before the authorities of the domestic jurisdiction, as well as those arising during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provided that the *quantum* is reasonable.[517] Moreover, the Court reiterates that it is not enough to submit evidentiary documents, but rather the parties must also provide arguments relating the evidence to the fact it is considered to represent and, since this relates to alleged financial disbursements, the items and their justification must be established clearly.[518]

370. In the instant case, the Court observes that representative Trejos, who represented the victims during the proceedings before the Commission (*supra* paras. 1 and 8), died

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[515] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 290.

[516] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador,* para. 275, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 292.

[517] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82; *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012 Series C No. 250, para. 314.

[518] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of Vélez Restrepo and family v. Colombia*, para. 307.

before this contentious proceedings were completed. Nevertheless, in his pleadings and motions brief, he was able to describe his claims for costs and expenses.

371. Furthermore, the Court observes that representative Trejos presented expense vouchers for US$1,376.96.[519] With his final arguments, representative May provided invoices corresponding to five affidavits for a total of US$2,500.00 dollars, without indicating why the cost of each notarial service had been calculated at US$500.00. In addition, in his final arguments, representative May requested the same amount that representative Trejos had asked for in his pleadings and motions brief, without clarifying whether these were two autonomous requests, or else, which part of the latter request corresponded to fees for Mr. Trejos and which part to fees for Mr. May. For his part, representative Molina provided expense vouchers for the sum of US$9,243.00, which corresponds mostly to the partial calculation of some professional services.[520]

372. The Court observes that the case file does not contain any supporting evidence to justify the sums that the representatives are requesting for professional fees and services. Indeed, the amounts requested for fees were not accompanied by specific proof of their reasonableness and scope.[521]

373. Therefore, the Court establishes, in equity, the sum of US$10,000.00 (ten thousand United States dollars) for costs and expenses in favor of representative Gerardo Trejos, which must be paid directly to his heirs, in keeping with the applicable domestic law. Furthermore, the Court establishes, in equity, the sum of US$2,000.00 (two thousand United States dollars) for costs and expenses in favor of representative May, and the sum of US$3,000 (three thousand United States dollars) for costs and expenses in favor of representative Molina.

E) Method of complying with the payments ordered

374. The State must make the payments of the compensation for pecuniary and non-pecuniary damage and reimbursement of costs and expenses established in this Judgment directly to the persons indicated herein, within one year of notification of this Judgment, in the terms of the following paragraphs. If the beneficiaries are deceased or die before they receive the respective compensation, this shall be delivered directly to their heirs, in accordance with the applicable domestic law.

375. The State must comply with the pecuniary obligations by payment in United States dollars or the equivalent in local currency, using the exchange rate in effect on the New York Stock Exchange, United States of America, on the day before the payment.

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519 In his pleadings and motions brief, representative Trejos presented as expenses during the proceedings: (i) the invoice for the purchase of a plane ticket in the name of Andrea Bianchi (US$439.72); (ii) the invoice for the purchase of a plane ticket in the name of Gerardo Trejos Salas (US$468.62), and (iii) the invoice for the purchase of a plane ticket in the name of Gloria Mazariegos (US$468.62),totaling US$1,376.96 (file of annexes to the pleadings and motions brief, volume I, folios 4071 and 4072).

520 In his pleadings and motions brief, representative Boris Molina Acevedo presented as expenses during the proceedings: (i) invoice for professional services issued to María Lorna Ballestero Muñóz por US$6,000.00; (ii) receipt of payment for professional services to Gabriela Darsié and Enrique Madrigal for US$1,375, (iii) receipt for payment of professional services for advice and assistance provided by William Vega for US$ 1,600, and (iv) and for photocopies and administrative expenses 131,850 colones (file of annexes to the pleadings and motions brief, volume VI, folios 6537 a 6364).

521 *Cf. Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212, para. 287

376. If, for causes that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the indicated time frames, the State must deposit the said amounts in their favor in an account or certificate of deposit in a solvent Costa Rican financial institution, in United States dollars, and in the most favorable financial conditions allowed by law and banking practices. If, after 10 years, the sum allocated has not been claimed, the amounts must be returned to the State, with the interest accrued.

377. The amounts allocated in this Judgment as compensation for pecuniary and non-pecuniary damage, and as reimbursement of costs and expenses, must be delivered to the persons and organizations indicated in full, in keeping with the provisions of this Judgment, without any reductions arising from eventual taxes or charges, within one year of notification of this Judgment.

378. If the State falls into arrears, it must pay interest on the amount owed, corresponding to the bank interest on arrears in Costa Rica.

379. In accordance with its consistent practice, the Court reserves the authority inherent in its attributes and also derived from Article 65 of the American Convention to monitor full compliance with this Judgment. The case will be closed when the State has complied fully with the provisions of this judgment.

380. The State must provide the Court with a report on the measures adopted to comply with this Judgment within six months and one year of its notification.

IX
OPERATIVE PARAGRAPHS

381. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the preliminary objections filed by the State, in the terms of paragraphs 17 to 40 of this Judgment.

DECLARES,

By five votes to one, that:

1. The State is responsible for the violation of Articles 5(1), 7, 11(2) and 17(2) in relation to Article 1(1) of the American Convention, to the detriment of Gretel Artavia Murillo, Miguel Mejías Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchoz Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, Maria del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza, in the terms of paragraphs 136 to 317 of this Judgment.

AND ESTABLISHES

By five votes to one, that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State must adopt, as soon as possible, appropriate measures to annul the prohibition to practice IVF, so that those persons who wish to use this assisted reproduction technique can do so without any impediment to the exercise of the rights that were declared violated in this Judgment. The State must provide information on the measures adopted in this regard, in accordance with paragraph 336 of this Judgment.

3. The State must regulate, as soon as possible, the aspects that it considers necessary for the implementation of IVF, taking into account the principles established in this Judgment, and must establish systems of inspection and quality control of the institutions and professional qualified that perform this type of assisted reproduction technique. The State must provide information every year on the gradual implementation of these systems, in accordance with paragraph337 of this Judgment.

4. The State must include the availability of IVF within the infertility treatments and programs offered by its health care services, in keeping with the obligation of guarantee in relation to the principle of non-discrimination. The State must provide information every six months on the measures adopted to make these services available gradually to those who require them and on the plans made to this end, in accordance with paragraph 338 of this Judgment.

5. The State must provide the victims with psychological treatment, free of charge and immediately, for up to four years, through the State's specialized health care institutions, as established in paragraph 326 of this Judgment.

6. The State must make the publications indicated in paragraph 329 of this Judgment, within six months of its notification.

7. The State must implement permanent education and training programs and courses on human rights, reproductive rights and non-discrimination for judicial officials in all areas and at all echelons of the Judiciary, as established in paragraph 341 of this Judgment.

8. The State must pay the amounts established in paragraphs 355 and 363 of this Judgment, as compensation for pecuniary and non-pecuniary damage, and for reimbursement of costs and expenses, in the terms of paragraph 373 of this Judgment.

9. The State must submit to the Court a general report on the measures adopted to comply with this Judgment within one year of its notification.

10. The Court will monitor full compliance with this Judgment, in exercise of its authority and in compliance with its obligations under the American Convention on Human Rights, and will consider this case concluded when the State has complied fully with the measures ordered herein.

Judge Diego García-Sayán informed the Court of his Concurrent Opinion, and Judge Eduardo Vio Gross informed the Court of his Dissenting Opinion, and they accompany this Judgment.

Done, at San Jose, Costa Rica, on November 28, 2012, in the Spanish and English languages, the Spanish text being authentic.

Diego García-Sayán
President

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE DIEGO GARCIA-SAYÁN
JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF *ARTAVIA MURILLO ET AL. ("IN VITRO FERTILIZATION")*
***v. COSTA RICA* OF NOVEMBER 28, 2012**

1. This Judgment is a very clear and important decision of the Court that enhances the right to personal integrity, to private and family life, and to the principle of non-discrimination. All of them were seriously harmed by the facts that gave rise to this litigation. By establishing which rights had been violated and the corresponding reparations, the Court addressed the Judgment, essentially, at an affirmation of life.

2. Justifying the absolute prohibition of *in vitro* fertilization (IVF) by the alleged "right to life" is a twofold contradiction. First, because indicating that IVF would result in "embryonic loss" fails to take into account that, as it has been proved in the instant case, embryonic loss also occurs in natural pregnancies and in other reproduction techniques. Second, because the prohibition, allegedly based on the right to life, resulted, paradoxically, in an impediment to life by obstructing the right of men and women to have children. Thus, an unwarranted obstacle to life was established, which will continue until the measures of reparation ordered by the Court in this Judgment have been fully implemented.

3. Since reproductive self-determination is closely related to the rights to privacy and to personal integrity (paras. 146 and 147), the absolute prohibition of IVF decreed by the Costa Rican Constitutional Chamber on March 15, 2000, harmed these rights, resulting in a serious impact on the victims.

4. This was increased by the discriminatory impact of the ban. As the Court recalled, States must not introduce regulations that have a discriminatory impact on different groups of the population when exercising their rights (para. 286). The Court established that the ban had a discriminatory impact on the victims in relation to crucial aspects such as their situation of disability or their financial situation (para. 284).

5. It is clear, as proved during these proceedings, that the disability consisting in infertility requires special treatment and that State policies should be inclusive rather than exclusive; also, that the ban had a disproportionate effect to the detriment of infertile couples with less income because, in order to undergo IVF treatment, they had to travel abroad.

6. Men and women who are infertile suffer from a disease, as the Court recalled in this Judgment (para. 288), bearing in mind that the World Health Organization (WHO) has established that infertility is "a disease of the reproductive system" defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."[1]

7. Taking this into consideration, the fact that the State refused them the right to use this scientific method, owing to the ban established in March 2000, seriously harmed the rights of those affected by this disease.

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[1] *Cf.* Written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits file, volume VI, folio 2828). As expert witness Zegers-Hochschild explained, according to the World Health Organization (WHO) infertility is a disease of the reproductive system (merits file, volume VI, folio 2818).

8. Furthermore, to the extent that the State has based many of its arguments on a certain interpretation of Article 4(1) of the American Convention on Human Rights, in this Judgment, the Court has proceeded to interpret this article for the effects of this case. And it has done so, as required by international law, in accordance with the ordinary meaning given to the terms, as well as with a systematic and historical interpretation and one that corresponds to the object and purpose of the treaty, using as supplementary means of interpretation the preparatory work of this article of the Convention.

9. The Court's interpretation and the available scientific evidence led, among other consequences, to the conclusion that it cannot be determined that Article 4(1) seeks to confer the status of "person" on the embryo, emphasizing that "… the tendencies of regulations under international law do not lead to the conclusion that the embryo should be treated in the same way as a person …" (para. 253).

10. The reparations have been established not only directly with regard to the persons declared victims. They also establish measures addressed at society as a whole, such as those concerning non-repetition, and specific guidelines to create the appropriate conditions to ensure compliance with the State's duty to comply with the obligations set out in the Judgment with regard to personal integrity, private and family life, and the principle of non-discrimination.

11. The essence of the measures of reparation is, therefore, that the State must not only cease creating discriminatory regulations and practices, but that it must also annul the prohibition and gradually facilitate the use of this reproduction technique to those who need and want it. In this regard, the Court basically establishes, *inter alia*, three precise lines of action designed to constitute guarantees of non-repetition and to ensure that the conduct of the State is in keeping with its international obligations:

    a) The first is that the State must "take the appropriate measures to annul as rapidly as possible the prohibition to practice IVF and so that the persons who wish to use this assisted reproduction technique can do so without any impediment" (para. 336). Thus, the State must adopt promptly the necessary measures, within its own institutional framework, to ensure that the prohibition is annulled;

    b) The second is that the State must "regulate any aspects of the implementation of IVF that it considers necessary" (para. 337), which refers to regulations to be drafted and implemented by the State to ensure that this technique is used correctly by qualified institutions and professionals;

    c) The establishment, in the third measure, that social security must gradually include "the availability of IVF within its health care infertility programs and treatments, in accordance with the obligation of guarantee in relation to the principle of non-discrimination" (para. 338) is designed to ensure that the said technique is included gradually in the programs to treat infertility that are already offered. This does not mean that a disproportionate percentage of social security's institutional and budgetary resources should be devoted to this purpose, to the detriment of other programs and priorities, but is intended to ensure that this service is made available progressively.

    It should be emphasized that this order of the Court is clearly and directly related to the principle of non-discrimination. Thus, it cannot be understood as an order that leads to situations of inequality. Consequently, regarding the said gradualness, it should be

stressed that the Committee on Economic, Social and Cultural Rights[2] has indicated that the "precise nature" of the available health services and programs "will vary depending on numerous factors, including the State party's developmental level." This Committee has also indicated that one of the components of accessibility without discrimination to health services is related to "economic accessibility (affordability)," so that health facilities, goods and services must be affordable for all. The Committee has added that the payment for health-care services "has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households."[3] These considerations allow me to stress the causal nexus of the order issued by the Court in relation to the particular situation of persons whose only possibility of procreation is access to IVF and who do not have the financial resources to access this type of assisted reproduction technique.

In addition, as revealed by the answer to the submission of the case and the final arguments of the State of Costa Rica, the State has medical programs and services that offer different treatments for infertility problems, including assisted reproduction techniques. The State advised that the only method excluded from the public programs to treat reproductive health problems has been IVF, owing to the ruling of the Constitutional Chamber. Thus, it is possible to relate the exclusion of IVF to the arguments developed in the judicial decision analyzed in this Judgment, and it is not evident that it was economic or budgetary considerations that justified the said exclusion. In addition, it was not proved that a situation existed, such as that of other States, in which the inexistence or insufficiency of resources to subsidize part of the access to assisted reproduction techniques has been alleged. Thus the State must continue making gradual progress to guarantee, without discrimination, access to the adequate and necessary treatments to deal with different forms of infertility.

In this regard, I would stress that the Court's mandate is not addressed at modifying any type of prioritization at the domestic level, in the understanding that access to assisted reproduction techniques had already been incorporated into the comprehensive care provided by the State. The Court, as is its consistent practice, leaves in the hands of the local authorities the series of decision on the nature and scope of the measures required to guarantee, progressively, whatever is pertinent in relation to the series of techniques associated with the different methods of IVF and, to this end, the authorities must implement the specific and necessary regulations.

12. Bearing in mind that the main fact that gave rise to this litigation was the prohibition of an assisted reproduction technique – IVF – in Costa Rica, this Judgment not only establishes which articles of the Convention have been violated and the corresponding reparations. In essence and based on its content, it makes a fundamental contribution to life as expressed by the more than five million people who today enjoy life because their parents used this type of method to counter infertility, and who would not exist if it had not been for this method.

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[2] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, para. 12.a)

[3] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, para. 12.b.iii)

Diego García-Sayan
Judge

Pablo Saavedra Alessandri
Secretary

Judge Rhadys Abreu Blondet adhered to this Opinion of Judge Diego García-Sayán.

Rhadys Abreu Blondet
Judge

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI.
INTER-AMERICAN COURT OF HUMAN RIGHTS,
CASE OF ARTAVIA MURILLO ET AL.
("*IN VITRO* FERTILIZATION") *v.* COSTA RICA
JUDGMENT OF NOVEMBER 28, 2012
(Preliminary Objections, Merits, Reparations and Costs)

INTRODUCTION.

This dissenting opinion[1] is issued with the utmost respect and consideration towards the Inter-American Court of Human Rights (hereinafter "the Court") and, certainly, to all of its members. The arguments that will be presented are, of course, limited solely and exclusively to what was addressed in the above judgment (hereinafter "the Judgment").[2] This opinion refers, particularly, to Article 4(1) of the American Convention on Human Rights (hereinafter "the Convention"), because the author of this opinion considers that the analysis of this Article was a determining factor in the outcome of all other issues of this case.

The commentaries made in dissenting opinion are, certainly, based on the law and not on the author's wishes. This opinion also bears in mind that the Court must interpret and apply the Convention,[3] instead of assuming the role of the Inter-American Commission of Human Rights[4] or the lawmaking function. The latter belongs to the States, which have the exclusive power to modify the Convention.[5] Finally—and especially—, this dissenting opinion notes that the Court must determine the States' will, expressed in the Convention

[1] Art. 66(2) of the Convention: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment"; and Art. 24(3) of the Statute of the Court: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate." In this particular, see also *Declaration of Complaints*, presented to the Court on August 17, 2011, *regarding* part of the conjoint Concurring Opinion issued in relation to the Court's orders "Provisional Measures Regarding Colombia. Case of Gutiérrez Soler," June 30, 2011, "Provisional Measure Regarding the United Mexican States, Case of Rosendo Catú *et Al.*," July 1, 2011, and "Provisional Measures Regarding the Republic of Honduras, Case of Kawas Fernández v. Honduras," July 5, 2011.

[2] Art. 65(2) of the Rules of the Court: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

[3] Art. 62(3) of the Convention: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

[4] First sentence of Art. 4(1) of the Convention: "The main function of the Commission shall be to promote respect for and defense of human rights."

[5] Art. 76(1) of the Convention: "Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General"; and Art. 39 of the Vienna Convention: "*General rule regarding the amendment of treaties*. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."

and in subsequent agreements and practices, so as to require from them what they really agreed to.[6]

The reasoning of this dissenting opinion has two main prongs. The first is an analysis of Article 4(1), due to the fact that the violation of this provision is the ultimate issue of this case. The second refers to the way this Judgment made a shift in the Court's case law referring to this Article.

I.- ARTICLE 4(1) OF THE CONVENTION.

In turn, the analysis of Article 4(1) of the Convention raises three issues. The first refers to the Judgment's perspective when addressing this case. The second regards the interpretation of this Article. The third concerns the Court's case law on this issue.

A.- Perspective used for deciding this case.

There is no doubt that the Judgment's perspective when addressing this case will influence its outcome. This is why it is necessary, first and foremost, to refer to this perspective.

In this regard, the Judgment states that it will, as the first issue on the merits of this case,

> "determine the scope of the rights to personal integrity and to private and family life, as relevant to decide the dispute."[7]

Then, it states that

> "the purpose of this case focuses on establishing whether the Constitutional Chamber's judgment resulted in a disproportionate restriction of the rights of the presumed victims"[8]

The Judgment is obviously referring to the Decision of March 15, 2000, of the Constitutional Chamber of the Supreme Court of Justice of the Republic of Costa Rica (hereinafter "the Decision"). The Decision declared unconstitutional the Executive Decree No. 24029-S of February 3, 1995, regulating *in vitro* fertilization, because it infringed Article 4(1) of the Convention ("Right to Life").

In this regard, the Judgment states that "[h]aving verified that interference existed, owing both to the prohibitive effect resulting from the Constitutional Chamber's judgment caused in general, and to the impact it had on the presumed victims in this case, the Court considers it necessary to proceed to examine whether this interference or restriction was justified." Hence, it "considers it pertinent to examine in detail the main argument developed by the Constitutional Chamber: that the American Convention makes the absolute protection of the 'right to life' of the embryo compulsory and, consequently, makes it obligatory to prohibit IVF because it entails the loss of embryos", stating also that it will

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[6] Art. 2(1)(a) of the Vienna Convention on the Law of Treaties (hereinafter Vienna Convention): "*Use of terms*. 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

[7] Para. 141 of the Judgment. Hereinafter, the expressions "para." or "paras." shall be understood as making reference to the Judgment.

[8] Para. 171.

"analyze whether the interpretation of the Convention that substantiated the interferences that occurred […] is admissible in light of this treaty, bearing in mind the pertinent sources of international law."[9]

Now, it is true that the Inter-American Commission on Human Rights (hereinafter "the Commission") and the victims' representatives (hereinafter "the Representatives"), alleged that the aforementioned Decision violated the following Articles of the Convention: 11(2) ("Right to Privacy"), 17(2) ("Rights of the Family") and 24 ("Right to Equal Protection"), in conjunction with Articles 1(1) ("Obligation to Respect Rights") and 2 ("Domestic Legal Effects"). Nevertheless, it is also true that one of the Representatives also alleged the violation of Articles 4(1) ("Right to Life"), 5(1) ("Right to Humane Treatment"), and 7 ("Right to Personal Liberty").[10] In addition, the aforementioned Decision is explicitly based on Article 4(1).

Hence, the issue at stake should not have been addressed in the way the Court did, but from the opposite perspective.

In fact, considering the applicable customary law,[11] this case should determine whether, in light of the Convention,[12] the aforementioned Decision[13] is internationally licit or not.[14] This requires, first and foremost, contrasting this act of the State with Article 4(1), with the international obligation that the very State adduced as its justification. Only once this issue is elucidated will it be possible to address the conformity of the Decision with Articles 5(1), 11(2), 17(2) and 24.

Thus, it was more logical for the Judgment to understand and address this case, primarily, as a possible violation of Article 4(1), rather than dealing with it the way it did.

By acting as it did, the Judgment not only follows the procedural and argumentative rationales that were legitimately suggested by the Commission and the Representatives in

[9] Para. 162 [note of the translator: and 171].

[10] Para. 7.

[11] Contained in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, prepared by the International Law Commission of the U.N., adopted by Resolution approved by the General Assembly [*based on the Report of the Sixth Committee (A/56/589 and Corr. 1)*] 56/83. Responsibility of States for internationally wrongful acts, 85th plenary meeting, 12 December 2001, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr. 1 and 2). 2 *Ibid*. (hereinafter "Draft on the State's International Responsibility").

[12] Art. 62(3) of the Convention, already referred to.

[13] Art. 4 of the Draft on the State's International Responsibility: "*Conduct of organs of a State*. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

[14] Articles of the Draft on the State's International Responsibility: "*Article 1. Responsibility of a State for its internationally wrongful acts*. Every internationally wrongful act of a State entails the international responsibility of that State"; "*Article 2. Elements of an internationally wrongful act of a State*. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State"; and "*Article 3. Characterization of an act of a State as internationally wrongful*. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

light of their own interests and procedural roles. It also ends up, in practice, minimizing and subordinating the "right to life" to the other previously referred rights. The perspective chosen by the Judgment has, in conclusion, the paramount practical effect of privileging these rights over the "right to life."

B.- Interpretation of Article 4(1).

As it was asserted, and in contrast to the path followed by the Judgment, the main issue raised in this case was the determination of whether the State, when issuing the relevant Decision, incurred in international responsibility[15] for violating Article 4(1) of the Convention, which provides:

> "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."

The interpretation of a provision of the Convention consists in elucidating the will of the Member States to the Convention, as it was expressed in this treaty. This must be done in accordance with the rules of the Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"), which contains both the treaty-based and customary rules on this matter. Due to their importance for this case, it is necessary to quote them.

Article 31 of the Vienna Convention provides:

> "*General rule of interpretation*
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32 of the same Convention provides:

> "*Supplementary means of interpretation*

[15] Art. 12 of the Draft on the State's International Responsibility: "*Existence of a breach of an international obligation*. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."

Now, in order to be able to interpret the aforementioned Article 4(1), it seems necessary to refer to the basic issues that are raised by this case, this is: the rights holder, the protection of this right, and the arbitrary deprivation of it.

1.- Holder of this right.

After considering Article 31(1) of the Vienna Convention, it is evident that the aforementioned Article 4(1) enshrines a right consisting in that the holder's "life [is] respected." That is the "object and purpose" of the said provision, the actual purpose for its establishment, not to be voided of meaning.

Accordingly, this provision presupposes that the holder of this right—whose life must be respected—exists.

In addition, this provision is clear when stating that the rights holder is "every person," which means that this Article makes no distinction whatsoever among the holders of said right. In fact, this is in full accord with the Convention´s previous assertion that States undertake to respect and ensure rights

> "to all persons subject to their jurisdiction […] without any discrimination […]."[16]

And, by virtue of the "special meaning" rule of treaty interpretation, established in Article 31(4) of the Vienna Convention, the interpreter must follow what is provided in Article 1(2) of the Convention when interpreting the word "person." The latter Article provides:

> "For the purposes of this Convention, 'person' means every human being."

As a conclusion, even though it may seem to be a truism, it can be asserted that Article 4(1) of the Convention recognizes or enshrines the right of "every person" or "human being," without any discrimination, to the respect of "his"—already existing—life. This means that the previously quoted provision, every sentence of it—as also all of the Convention—, refer exclusively to the "person" or "human being". They refer to his or her rights, not to other interests or to other beings.

2.- Legal protection of the right.

Article 4(1) provides in its second sentence and following a period, that "this right [that is, that of "every person… to have his life respected"] shall be protected by law and, in general,

[16] Art. 1(1) of the Convention: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

from the moment of conception." This sentence demands the interpretation of three expressions: first, what is understood as "law;" secondly, the meaning of "and, in general;" and thirdly, the term "conception."

a.-"Law".

When prescribing that the aforementioned right "shall be protected by law", the Convention imposed on the State the obligation to enact juridical norms to that effect. This obligation is also established, in more general and broad terms, in the previously quoted Article 2 of the Convention.[17]

It must be understood that the Convention uses the word "law" in its broad sense. That is, as a juridical norm, be it constitutional, legal or regulatory, enacted by the competent State body for regulating, in a general and mandatory fashion, the conduct or activity of all of a country's population. [18]

It must be also borne in mind that Article 4(1)'s stipulation that the right of "every person […] to have his life respected" must be "protected by law", does not mean that the Court cannot assess this law's compliance with International Law, whether this law is internationally licit, especially in light of the Convention.

As a commentary related solely to the case at hand, it must be highlighted that Article 21 of the 1949 Political Constitution of the State already provided that "human life is inviolable". It must also be considered that the Decision that gave rise to this case concluded explicitly that "the contested regulation *(Executive Decree No. 24029-S of February 3, 1995, issued by the Health Ministry)* is unconstitutional due to its violation of Article 21 of the Political Constitution and of Article 4 of the Inter-American Convention on Human Rights".[19] Hence, it could be understood that, by doing this, the State was fulfilling Article 4(1)'s instruction of protecting by law the right of "every person […] to have his life respected."

b.- "And, in general".

As to the meaning and scope of Article 4(1)'s expression "and, in general," it should be borne in mind that the Convention gives no "special meaning" to these terms, so they must be interpreted according to their "ordinary meaning."[20]

Among the definitions of the ordinary meaning of the term "general"—which are the same as those existing when agreeing on the Convention—are: "common, frequent, usual" and "common to all the individuals that constitute a whole, or to many objects, even if they are

[17] Art. 2 of the Convention: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[18] The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86, May 9, 1986. Series A No. 6.

[19] Para. 76.

[20] Art. 31(1) of the Vienna Convention.

of a different nature." Among the meanings of the expression "in general" are those of "commonly, generally," and "without specifying or identifying anything in particular."

In order to better understand these terms, it may be useful to consider their antonyms in the way they were understood by the time of the Convention[21]—which is the same as their current understanding. These antonyms are the terms "particular," which means "belonging exclusively to something, or belonging to it especially", "special, extraordinary, or rarely seen," "singular or individual, as opposed to universal or general;" "singular," whose definitions are "sole (unique in its kind)," "extraordinary, rare or excellent;" and "unusual," meaning "not usual, infrequent."

The rule regarding the "context" of the terms[22] must be also taken into account. Hence, it should be added that when the Article links the expressions "and, in general" with the obligation to "pro[tect] by law" the right of "every person […] to have his life respected," this provision is stating that this protection must be provided "from the moment of conception" of the relevant "person."

In turn, the rule of the "object and purpose" of a treaty must be used for interpreting the expression "and, in general." The object and purpose of the Convention is to require States to respect human rights and to ensure their free and full exercise.[23] In turn, the object and purpose of Article 4(1) is the respect of life. Hence, the expression "and, in general" must have an *effet utile* to this end, so that it contributes effectively to this object and purpose, not providing an exception to it or, *a fortiori*, a negation of the right to life.

In this regard, it must be noted that three countries proposed at the Specialized Inter-American Conference on Human Rights—where the Convention was approved—the elimination of the sentence "and, in general, from the moment of conception," so that abortion would not be forbidden. However, the majority of States participating in said Conference rejected this proposal, incorporating the aforementioned sentence in the Convention.[24] In other words, there was an evident intention of leaving no doubt as to the broad protection that the law must give to the right of every person to have his or her life respected, a protection that must be provided even when the person has been conceived or has not yet been born.

Consequently, the aforementioned sentence was established in order to allow States to grant the unborn the legal protection that must be given to the right of "every person […] to have his life respected" "from the moment of conception." In other words, such protection must be "common" to those who are born and to the unborn. Consequently, no distinction can be made in this respect among them, "even if they are of a different nature," because they "constitute a whole." There is human life in both the born and the unborn. Both are a human being, a person.

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[21] *Ibid.*

[22] Art. 32(1) of the Vienna Convention.

[23] Art. 1(1) of the Convention, previously quoted.

[24] Paras. 203 to 205.

The legally protected good in Article 4(1) is, then and ultimately, the right to life of "every person." This is why the Convention decided to leave no doubt as to the fact that Article 4(1) protects life, irrespective of its stage of development.

In this regard, the expression "in general" constitutes a reference to the way the law may protect the unborn. Needless to say, this protection could be different to that which is granted to the person who is already born.

Consequently, the expression "and, in general" makes no reference to an exception, to an exclusion. Quite the opposite, this expression is inclusive. It makes applicable the obligation, to protect the right to life of every person by law, from the moment of conception.

c.- "Conception".

Because of the aforementioned, in order to understand the relevant provision of Article 4(1), it is essential to elucidate the sense and scope of the term "conception," included in this Article. It is from that moment that the State must protect by law the right "to have […] life respected." In other words, the sense of this provision is clear, it states that this right exists "from the moment of conception."

The file and other background material show that, when signing the Convention, there was no determination as to what should be understood by "conception." This has not been specified afterwards either. On the other hand, the Convention gave no "special meaning" to this term.[25] It neither made a reference to the understanding of this concept according to medical science. Hence, the applicable rule in this case is, without any doubt, that of the "ordinary meaning" of the term.[26] In particular, the meaning must be the one existing by the time of adopting the Convention in 1969.

According to the 1956 version of the Spanish Dictionary of the *Real Academia Española*[27]—applicable back then—, the term "conception" was understood as the "action and effect of conceiving;" "to conceive" was read as "for the female to become pregnant;" that of "pregnant" meant "the woman or the female of any species that has conceived, and has the fetus or creature in its womb;" that of "to make pregnant" as "to impregnate;" that of "impregnate" as "to make the female conceive;" and that of "fertilization" as "the union of the masculine and feminine reproductive elements, originating a new being."

And almost at the same time of adopting the Convention, that is, in the 1970 version of the aforementioned dictionary,[28] the term "to make pregnant" was understood as "to impregnate, to fertilize, to make a woman conceive." The current dictionary also gives this definition.[29]

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[25] Art. 31(4) of the Vienna Convention.

[26] *Ibid*.

[27] 18th edition.

[28] 19th edition.

[29] 22nd edition.

The foregoing means that it was understood—and it still is—that the being, in this case the human, originates with "the union of the masculine and feminine reproductive elements." When this happens, it is recognized that this "creature" is inside the woman's "womb." Hence, it was understood that the terms *fertilization* and *to make the woman conceive* were synonyms.

Therefore, the term "conception," used by Article 4(1) of the Convention, should be legally understood—notwithstanding any other consideration—as the fertilization of the egg by the spermatozoid. This, nothing else, was agreed when adopting the Convention in 1969. This is still the legal understanding of this term. Furthermore, an important part of medical science—if not the majority—[30]shares this understanding.[31] This does not mean that medical science must be disregarded, but that its teachings must be considered only insofar as they are incorporated in the law.

In this regard, due attention must be paid also to the fact that, according to the rules of treaty interpretation, there are no other agreements or treaties among the States parties to the Convention enshrining a different concept.[32] Member States have neither made subsequent agreements nor adopted practices in the application of the Convention that may indicate an alteration of this concept.[33] On the other hand, there is no applicable customary rule that may go against the aforementioned interpretation. Finally, it cannot be asserted that domestic legislations of these States have created a general principle of law enshrining a meaning diverse to the aforementioned.[34]

Furthermore, it is evident and clear that Article 4(1) refers to the "conception" of "every person" whose right to life must be protected by law. This is in perfect agreement with the *context of terms*,[35] because this Article, as the Convention,[36] refers only to the object "every person." It does not refer to a different entity, object or reality.

Hence, if the aforementioned provision would have sought to grant or extend this protection—that must be given by law to the right of every person to have his or her life respected—to an entity, object or reality other than the person, it would have stated it clearly. It could have utilized a sentence or paragraph in the aforementioned Article 4(1), or it could have enshrined a different Article. It could have even stated it in a different treaty. However, none of this happened. Thus, the relevant Article and the Convention refer solely and exclusively to the "person," to the "human being."

To sum up, the Convention considers that there is life in a person from the moment when he or she is conceived; in other words, that someone is a "person" or a "human being" from the "moment of conception," which happens when the egg is fertilized by the spermatozoid. The Convention provides that from this moment there is a "right to have ["every person"'s] life respected". As a result, there is an obligation to protect this right.

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[30] Notes 266 to 284 of the Judgment.

[31] Paras. 79 ff.

[32] Art. 31(2) of the Convention.
[33] Art. 31(3)(a) and (b) of the Vienna Convention.
[34] Art. 31(3)(c) of the Vienna Convention.

[35] Art. 31(3) of the Vienna Convention.

[36] Art. 1(1) of the Convention, previously quoted.

A different interpretation of Article 4(1) would deprive the phrase "from the moment of conception" of its ordinary and obvious meaning. A different interpretation would end up assigning no object to this phrase, even though it is strikingly clear that it refers to the "conception" of "every person".

d.- Arbitrary deprivation of this right.

Finally, when the previously referred provision establishes that no one shall be arbitrarily deprived of his or her life, it is implicitly stating that the right of "every person […] to have his life respected" is not absolute, that it allows a restriction, as long as it is not arbitrary. This means that, according to what was understood as arbitrariness when the Convention was drafted—and what is still understood as such—, the restriction cannot be an "act or behavior against justice, reason or the law; based solely on the will or the whim."[37]

The file of this case shows that this element has not been discussed during these proceedings.

C.- The Court's case law.

The Court's case law has, in a steady and consistent fashion, made a precise description of the nature of the right of "every person […] to have his life respected". The Court has done so in the following terms:

> "The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible",[38]

and that

> "States have the obligation to guarantee the creation of the necessary conditions to ensure that violations of this inalienable right do not occur".[39]

This has been the steady and consistent case law of the Court in this particular matter. It has been asserted in more than twelve cases.[40] It has even been reaffirmed twice this year.[41]

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[37] 18th and 22nd editions.

[38] Case of the "Street Children" (Villagrán-Morales et al. v. Guatemala), Judgment of November 19, 1999. Series C No. 63, para. 144.

[39] Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, Judgment of November 24, 2011. Series C No. 237, para. 48.

[40] Case of Myrna Mack-Chang v. Guatemala, Judgment of November 25, 2003, Series C No. 101, para. 152; Case of Juan Humberto-Sánchez, Judgment of June 7, 2003, Series C No. 99, para. 110; Case of 19 Tradesmen, Judgment of July 5, 2004, Series C No. 109, paras. 152 and 153; Case of the Pueblo Bello Massacre, Judgment of January 31, 2006, Series C No. 140; Case of Sawhoyamaxa Indigenous Community, Judgment of March 29, 2006, Series C No. 146, para. 150; Case Baldeón-García, Judgment of April 6, 2006, Series C No. 147, para. 82; Case of the Massacres of Ituango, Judgment of July 1, 2006, Series C No. 148, para. 128; Case Ximenes-Lopes, Judgment of July 4, 2006, Series C No. 149, para. 124; Case Montero-Aranguren et al. (Detention Center of Catia), Judgment

Now, as a consequence of the paramount importance that the Court's case law attaches to the right to life regulated in Article 4(1) of the Convention, two principles must be applied to this right with a stronger emphasis: on the one hand, the guiding principle of the Law of Treaties, the principle of "good faith,"[42] which implies the understanding that agreements are made for their actual application; on the other hand, the principle *pro homine* or *pro persona*, enshrined in the Convention,[43] according to which the rules of human rights must be interpreted in the most favorable terms for the right-holders.

In addition, the case law of the Court has used the expressions "children"[44] and "baby"[45] for referring to the unborn.

In this regard, and as a comment related specifically to the case at hand, it is noteworthy that the year before the State's Decision of March 15, 2000, this is, on 1999, the important judgment of the "Street Children" was issued—giving rise to the aforementioned case law.[46] Hence, when the State's Decision was rendered, basing itself explicitly on Article 4(1) of the Convention,[47] it must be understood that it was taking into account the interpretation made in "Street Children." In other words, it should be presumed that the Decision complied with what is now called "conventionality control,"[48] and applied it.

II.- SHIFT IN THE COURT'S CASE LAW.

This Judgment brings up an important change, breaking away from the recent case law in three different ways. First, by limiting the scope of what had already been defined by the Court's case law; secondly, regarding the application of Article 4(1) to this case; and third, in as much as it leaves many questions unanswered.

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of July 5, 2006, Series C No. 150, para. 63; and Case Albán-Cornejo et al., Judgment of November 22, 2007, Series C No. 171, para. 117.

[41] Cases of Castillo-González et al. v. Venezuela and Massacres of El Mozote and Neighboring Locations v. El Salvador, both judgments were issued in October, 2012.

[42] Art. 31(1) of the Vienna Convention.

[43] Art. 29 of the Convention: "*Restrictions Regarding Interpretation.* No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

[44] Case of the Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Judgment of November 25, 2006, para. 292.

[45] Case of the Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment of July 8, 2004, para. 67(x).

[46] Case of the "Street Children" (Villagrán-Morales et al. v. Guatemala), Judgment of November 19, 1999, Series C No. 63, para. 144.

[47] Para. 76.

[48] Case of Cabrera-García and Montiel-Flores v. Mexico, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 225.

A.- Limiting the scope of the Court's case law.

This judgment seems to restrict the Court's—up to now—consistent and uniform case law on the matter. This time around, the Court omits the phrase "[o]wing (to the) fundamental nature (of the right to life), restrictive approaches to it are inadmissible."
Although this has happened in previous decisions, the Judgment's omission of this phrase becomes particularly relevant, because two preliminary annotations precede the reiteration of all other ideas regarding the right to life. The first annotation points out that "[t]o date, the Court's case law has not ruled on the disputes that have arisen in this case", and the second asserts that, "[i]n cases of extrajudicial executions, enforced disappearances and deaths that can be attributed to the failure of the States to adopt measures, the Court has indicated that the right to life is a fundamental human right, the full enjoyment of which is a prerequisite for the enjoyment of all other human rights."[49]
With these two annotations the Judgment would suggest that the Court's case law in reference to the right to life is only applicable to "extrajudicial executions, enforced disappearances and deaths that can be attributed to the failure of the States to adopt measures". Therefore, the right to life would not be applicable to the case under review because it applies to a different set of facts. Hence, the Judgment would be severely limiting the scope of what has already been set by the Court's case law on this matter.

B.- Inapplicability of Article 4(1) to the case under study.

The Judgment's aforementioned statements are the basis for its following assertions:

> "that "conception" in the sense of Article 4(1) occurs at the moment when the embryo becomes implanted in the uterus, which explains why, before this event, Article 4 of the Convention would not be applicable;"[50]
>
> "it is not admissible to grant the status of person to the embryo;"[51] and
>
> "the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention."[52]

It is evident that the Judgment represents a very significant shift in the Court's case law.
In order to find a basis for this change, the Judgment resorts to the interpretation of the terms "conception" and "in general." This, because the Court considers that "for the purposes of the interpretation of Article 4(1), the definition of person stems from the mentions made in the treaty with regard to 'conception' and to 'human being'."[53] When doing so, the Court resorts to Articles 31 and 32 of the Vienna Convention, which provide for the interpretation according to the ordinary meaning of terms, the systematic and historical interpretation, and the evolutive interpretation.
1.- Method in accordance with the ordinary meaning of terms.

[49] Para. 172.

[50] Para. 264.

[51] Para. 223.

[52] Art. 264.

[53] Para. 176.

This is one of the issues where this vote differs from the Judgment, because the majority uses as a starting point that the "scope" of the Convention terms "conception" and "human being," "should be assessed based on the scientific literature."[54]

The Convention gave these terms no "special meaning" whereby the "intention of the parties" to the Convention is expressed.[55] Neither did it submit itself to the definition of medical science. The Judgment fails to note that because of this, the interpreter must abide by the "ordinary meaning" attributed to the aforementioned terms. The most natural and obvious meaning of them is that of the dictionary, which, as pointed out, understands conception as the union of the egg and the spermatozoid.

It is not appropriate, then, to have recourse to medical science for valuing or understanding the meaning and scope of the terms in reference. It is not what medical science understands for "conception" what matters, but what the Parties to the Convention intended by the term, which is the ordinary meaning of the term "conception" (found in the dictionary). Besides, a significant part —if not the majority—[56] of the medical science[57] agrees with the ordinary meaning of the term "conception." The scientific definition of a term is relevant in as much as it has been integrated into law, or when the law submits itself to science, neither of which occur in the case at hand.

In this regard, it is imperative to underline that the Judgment states that "some opinions view a fertilized egg as a complete human life", "may be associated with concepts that confer certain metaphysical attributes on embryos. Such concepts cannot justify preference being given to a certain type of scientific literature when interpreting the scope of the right to life established in the American Convention, because this would imply imposing specific types of beliefs on others who do not share them."[58]

The latter assertion is correct, but the position adopted by the Judgment on this matter is not in agreement with it. The Judgment reproaches that the State's Decision opted for "one of the scientific positions on this issue to define as of when it was considered that life began" and that "understood that conception would be the moment when the egg is fertilized and assumed that, as of that moment, a person existed who held the right to life."[59] However, while asserting this, the Judgment adopts the opposite view, that which makes a difference between "two complementary and essential moments of embryonic development: fertilization and implantation," and holds that "only after completion of the second moment that the cycle is concluded, and that conception can be understood to have occurred."[60]

In order to reach this conclusion the Judgment resorts to two reasons. One is of a scientific nature, "an embryo has no chance of survival if implantation does not occur."[61] The other is that "when Article 4 of the American Convention was drafted the dictionary of the Real Academia differentiated between the moment of fertilization and the moment of conception,

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[54] *Ibid.*

[55] Art. 31(4) of the Vienna Convention.

[56] Notes 265 to 284 of the Judgment.

[57] Paras. 182 to 184.

[58] Para. 185.

[59] Para. 177.

[60] Para. 186.

[61] Para. 187.

understanding conception as implantation," and, thus, "[w]hen drafting the relevant provisions in the American Convention, the moment of fertilization was not mentioned."[62]

As to the first argument, the Judgment acknowledges that there are several scientific positions on the matter of "when life begins"[63] and of the understanding of "conception."[64] In spite of this, the Judgment sides with only one of them: that conception is produced at the moment of the embryo's implantation in the woman's uterus. The Judgment does not analyze the other positions, particularly the one that considers that "human life begins with the fusion of spermatozoid and egg, an observable 'moment of conception'."[65] This Judgment simply dismisses this position.

The Judgment's position seems to reveal some inconsistencies with other of its assertions. On the one hand, with the statement that "[t]he first birth of a baby resulting from in vitro fertilization occurred in England in 1978," and that "[i]n Latin America, the first baby born through in vitro fertilization and embryo transfer was reported in Argentina in 1984."[66] On the other hand, with the statement that "the definition of 'conception' accepted by the authors of the American Convention has changed" because "[p]rior to IVF, the possibility of fertilization occurring outside a woman's body was not contemplated scientifically."

Indeed, these statements show that, when the Convention was signed—in 1969—, it was not possible to know that "conception" and "fertilization" were two absolutely differentiated and distinct phenomena. Hence, it is impossible to share the understanding that "the definition of 'conception' accepted by the authors of the American Convention has changed." It may well be the case that some medical scientists have changed their views, but the definition of the term enshrined by the Convention framers remains unchanged.

Now, it is appropriate to refer to the second argument in which the Judgment bases its position, this is, that the Dictionary of the time, 1969, "differentiated between the moment of fertilization and the moment of conception, understanding conception as implantation." This dissenting opinion has already pointed out (*infra*) that this assertion is not, strictly speaking, accurate. It is not apparent that the 1959 Dictionary considered the terms "to conceive" and "to fertilize" as antagonistic or different. Furthermore, the 1970 edition of the Dictionary, issued a year after the subscription of this Convention, define "to conceive" as "for the female to become pregnant," and the term "to make pregnant" as "to impregnate, to fertilize, to make a woman conceive." These definitions remain in the present edition of the Dictionary.

Finally, and still in relation to the interpretation method of the ordinary meaning of terms, the Judgment asserts that "The literal interpretation indicates that the expression [in general] relates to anticipating possible exceptions to a particular rule."[67] It then concludes that "the term 'in general' infers exceptions to a rule."[68]

However, this dissenting vote has pointed out (*infra*) that the Dictionary's understanding of the expression "in general" has nothing to do with the establishment of exceptions. If the Convention would have wanted to establish an exception, instead of providing "in general,

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[62] Para. 187.

[63] Para. 177.

[64] Paras. 180 to 185.

[65] Para 182.

[66] Párr. 66.

[67] Para. 188.

[68] Para. 189.

from the moment of conception," it would have stated, for instance: "and, exceptionally, from the moment of conception." The Convention did not do this, precisely, for providing that the law's protection of the right of "every person [to have] his life respected" *will be* granted always and in every case or circumstance—although perhaps in a somewhat different fashion—from the moment of conception.

2.- Systematic and historical interpretation.

The Judgment also refers to the historical and systematic methods of interpretation. When doing so, it mentions Article 31 of the Vienna Convention, particularly its third paragraph. It does so in order to take "'take into account not only the agreements and instruments formally related to it (Article 31(2) of the Vienna Convention), but also its context (Article 31(3))'; in other words, international human rights law."[69] Likewise, and under the same heading, the Judgment states that it will utilize the supplementary means of interpretation of Article 32 of the Vienna Convention "for determining the interpretation of Article 4(1) of the American Convention" it is relevant to consider "that Article 31(4) of the Vienna Convention, which provides that a special meaning shall be given to a term if it is established that the parties so intended."[70]

a.- Rule of the special meaning given to terms.

From a methodological standpoint, it is impossible to agree on the foregoing, because the reference to Article 31(4) of the Vienna Convention is out of context. This norm is the final or last among the rules that constitute what is known as the *general rule of interpretation*. Within them, Article 31(4) is the rule of the *special meaning of terms*, which is an exception to the norm of the *ordinary meaning of terms*. Hence, this rule is not part of the norms that constitute the *supplementary means of interpretation*, provided for in Article 32, the subsequent Article of the Vienna Convention.

In other words, according to Article 31(4), the "special meaning [of a term] that the parties so intended" must be stated in one of the following ways: either in the agreements, instruments and practices referred to in Article 31, paragraphs 2 and 3 (which are distinguishable because they are intimately connected with the relevant treaty or because they refer to an agreement about its interpretation); or in a rule of international law that is applicable to the relations between the Member States.

b.- Rule of the context and of the progressive or evolutive development.

Now, following the State's allegations, the Judgment refers to the Universal Declaration of Human Rights,[71] the International Covenant on Civil and Political Rights,[72] the Convention on the Elimination of all Forms of Discrimination against Women,[73] and the Convention on the Rights of the Child.[74] It also refers to the provisions of the Universal,[75] European[76] and

[69] Para.191.

[70] Para.193.

[71] Para.224.

[72] Para.225.

[73] Paras.227 and 228.

[74] Paras. 229 to 233.

[75] Para. 226.

African human rights systems,[77] and also to the case law of the European Court of Human Rights[78] and of seven domestic constitutional courts.[79] The Judgment refers to all of them within the framework of the systematic and historical interpretation, even though it should have done so, in some cases, in application of the *rule of the context* (established in Article 31(2) of the Vienna Convention), and in other cases, in application of the rule of *progressive development of law* (provided for in Article 31(3) of the same convention).

These agreements and instruments, however, lack the relevant features for being considered as instruments or agreements made as a consequence of or in connection with the Convention. Hence, they cannot be used as a means for interpreting the Convention. They neither refer, strictly speaking, to subsequent practice, to the way how States parties to the Convention apply this treaty, whereby showing their agreement regarding the Convention's interpretation. As to the rules of international law applicable in the relations between the State parties, it is evident that they do not fulfill Article 31(4) of the Vienna Convention's requirement of being "relevant" to the case.

Even more so, the provisions of the previously referred treaties, the statements of the aforementioned judgments of international and European courts, and the provisions of domestic law of Member States to the Convention—all of which were quoted for interpreting the latter—can be neither considered a kind of customary law nor a general principle of law. They are not international custom because they are not precedents, that is, acts that are repeated constantly and uniformly with the understanding of being required by law. They are not general principles of law, either because they cannot be inferred or deduced logically from the international legal structure, or because they are not enough as for being considered common to the great majority of the States parties to the Convention.

Nevertheless, what is even more important is that these agreements or instruments are not applicable to this case, not only because some of them do not bind the Member States to the Convention, but also because they clearly do not consider the situation of the unborn or the conceived, so as to allow or not to prohibit abortion.[80]

c.- Rule regarding the prevalence of specialized law over general law.

It is due to this reality that none of these instruments contain a provision like Article 4(1) of the Convention, a particularity of the Inter-American system on human rights. The Judgment does not take this into account when interpreting this Article. It, hence, omits a rule of general legal interpretation, found in international law and in the Law of Treaties, which provides that "specialized law prevails over general law."

Article 4(1) is part of the body of international laws which—although it cannot be qualified as Latin American, regional or particular international law—are particular to the Member States to the Convention. Hence, this provision cannot be interpreted through the use of other general norms of international law or other Human Rights systems that do not include this provision. This would make the latter prevail over the American Convention, eventually modifying it in practice.

d.- Incapacity

Taking the above into account, this opinion does not share the Judgment's conclusion when making a systematic interpretation of the Convention and the American Declaration of Rights and Duties of Man, when it indicates that "it is not feasible to maintain that an

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[76] Para. 234.

[77] Para. 243.

[78] Paras. 236 to 242.

[79] Paras. 252, 261, and 262.

[80] Paras. 226, 227, 235, 236, 237, and 249.

embryo is the holder of and exercises the rights established in each" of the Articles of these texts. This is so, because the Judgment leaves out any consideration of the existing concepts of absolute and relative legal incapacity of persons. These concepts exist in different jurisdictions, and they may limit or preempt the exercise of these people's rights, without taking away their legal recognition as persons.

Even greater dissent needs to be expressed in the Judgment's statement that:

> "taking into account, as indicated previously, that conception can only take place within a woman's body [infra…], it can be concluded with regard to Article 4(1) of the Convention, that the direct subject of protection is fundamentally the pregnant woman, because the protection of the unborn child is implemented essentially through the protection of the woman".[81]

And this vote cannot agree with the affirmation in this paragraph because of its understanding of conception as a phenomenon that "can only take place within a woman's body," which is correct, but is based on a statement in another paragraph that "conception or gestation is an event of the woman, not of the embryo." This would lead to the conclusion that conception is an issue affecting the pregnant woman only.

Second, this statement cannot be agreed with because, if the intent had been to protect the unborn's "right to have his life respected" through protection of the pregnant woman, the Convention would have specifically stated so, which was not the case.

Third, this opinion dissents with the Judgment's assertion, given that article 4(1) as written, is sufficient to protect the pregnant woman and, consequently, the unborn. This protection is also found in Article 4(5) of the Convention, which prohibits the application of the death penalty on a pregnant woman. Reference to this protection can also be found in the San Salvador Protocol and the American Declaration of Rights and Duties of Man, cited by the Judgment.[82] In all these instruments the pregnant woman is seen as subject of human rights rather than an object or instrument thereof.

Finally, the author of this dissenting opinion disagrees with the findings of the cited paragraph because it leads to the conclusion that not only the embryos before implantation, but also unborn or conceived children, have no inherent "right to have [their] life respected." Their right would be dependent, not only on the respect for the pregnant woman's life, but also on her will to respect the rights of her child. Such an approach is contradictory to the letter and spirit of Article 4(1) of the Convention, which evidently relate to matters such as the juridical regime of abortion.

3.- Method of evolutive interpretation.

When interpreting Article 4(1) of the Convention, the Judgment also resorts to the method of evolutive interpretation of treaties. It states that "treaties are living instruments, whose interpretation must keep abreast of the passage of time and current living conditions," and that this interpretation "is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties."[83]

And, effectively, it is so. Article 29 of the Convention[84] states that no provision of this Convention shall be interpreted as suppressing, excluding or limiting (the latter beyond the boundaries of the Convention), either the enjoyment of rights established in it or in laws of

[81] Para. 222.

[82] *Ibid.*

[83] Para. 245.

[84] Previously quoted.

the Member States, or that are inherent to the human being or which derive from the democratic representative system of government, or the effects of the American Declaration of Rights and Duties of Man, and other international instruments of this nature. In addition, Article 31(3) of the Vienna Convention provides for evolutive interpretation of treaties, basing it on any agreement or subsequent practice between Member States regarding the interpretation of a treaty, or where there is a clear agreement of States in this particular regard, and on any relevant rules of international law applicable in the relations between the parties.

Nevertheless, the background material provided by the Judgment does not fulfill the requirements established in article 29 of the Convention. In essence, they only seek to limits what is prescribed in Article 4(1) of the Convention to such an extent that it becomes inapplicable to this case and is stripped of its content and *effet utile* as to the phrase "in general, from the moment of conception."

Regarding Article 31(3), some of the background material referred to in order to determine the status of the embryo are judgments of other judicial bodies, and consequently are unrelated to agreements and practices of States parties to the Convention and to rules of international applicable. Other background material referring to the laws of States parties to the Convention is insufficient, as it shall be illustrated below. It only demonstrates that assisted reproduction (of which in vitro fertilization is only one among several techniques) is used in eleven out of twenty-four Member States. It also shows that, among these countries, three prohibit this technique "for purposes other than human procreation;" one of them "prohibits the freezing of embryos for deferred transfer;" another "prohibits the use of procedures 'aimed at embryonic reduction';" that that the same State establishes that "the ideal number of eggs and pre-embryos to be transferred may be no more than four, to avoid increasing the risk of multiple births;" and where "the commercialization of biological material is a crime;" and that the said State and another allows "the cryopreservation of embryos, spermatozoids and eggs."[85]

Therefore, the Judgment's conclusion that "[t]his means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed"[86] is inconsistent. This is so, not only because there is no such majority, but also because no evidence has been presented that demonstrates that the eleven States that allow assisted reproduction have done so based on their application or consideration of Article 4(1) of the Convention.

4.- <u>The principle of the most favorable interpretation and the object and purpose of the treaty</u>.

The Judgment resorts to the *rule of the object and purpose of the treaty* for proving that the right to life from conception is not absolute. In this regard, it asserts that "the object and purpose of Article 4(1) of the Convention is that the right to life should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights."[87]

[85] Para. 255.

[86] Para. 256.

[87] Para. 258.

It is impossible to be more in disagreement with this assertion. Interpreted in good faith and in accordance with the terms of the treaty in their context, the object and purpose of Article 4(1) cannot be other than to effectively protect by law the right of "every person […] to have his life respected […] and, in general, from the moment of conception." This means, to effectively protect the right of every person, including the conceived or the unborn.

In addition, the Judgment further contradicts itself in this regard. While the Judgment first stated that Article 4(1) of the Convention was not applicable to this particular case, it now refers to it in order to assert that there must be an "adequate balance" between the clashing rights and interests.[88] It is puzzling how could this balance be reached if the Judgment has been previously stated that "the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention."[89] This means that it would have no right to "have his life protected," which is why there would be no rights to balance, harmonize or to make compatible.

Finally, in order to justify its assertions, the Judgment resorts again to decisions, either absolutely foreign to the Convention Member States, or pertaining to only three of them. These grounds are not enough for reaching the attained conclusion.

C.- Unanswered questions.

The Judgment states that, due to the fact that an "'absolute right to life of the embryo' as grounds for the restriction of [other] rights […], is not supported by the American Convention," "it is not necessary to make a detailed analysis of each of these requirements" required for restricting a right, this means, that "inferences are not abusive or arbitrary," which are "substantively and formally established by law," that pursue "a legitimate aim" and that meet "requirements of suitability, necessity and proportionality."[90]

In spite of this, the Judgment keeps on with this analysis in order "to indicate the way in which the sacrifice of the rights involved in this case was excessive in comparison to the benefits referred to with the protection of the embryo."[91] By doing this, the Judgment contradicts itself, because it does not confront this sacrifice with a right (which, according to the Judgment does not apply to this case), but with the prohibition of the technique of in vitro fertilization. If the Judgment would have confronted this sacrifice with a right, it would have harmonized the rights at stake.

Obviously, the result of the confrontation made by the Judgment cannot be different than the one that was reached.[92] This is so because—we repeat—there was no confrontation between rights, but between some rights and a technique.

However, even in this case, the background material can only be used for reaching very partial conclusions regarding the technique of in vitro fertilization. As it has been said,

[88] Para. 260.

[89] Art. 264.

[90] Para. 273.

[91] Para. 273.

[92] Paras. 277 ff.

assisted reproduction—of which in vitro fertilization is only one method—is not practiced in the majority of Member States to the Convention. It is practiced only in eleven of the twenty-four Member States, many of which forbid some proceedings related to this technique.

The natural conclusion to these facts is not that "the Convention allows IVF to be performed,"[93] but that the majority of Member States have abstained from referring to it, probably because they have understood that this technique is not, *per se*, regulated by international law. This, together with the fact that the Judgment makes Article 4(1) inapplicable to the embryo—at least until the moment of implantation in the woman's uterus—may make the majority of Member States understand that the regulation of this technique is within their internal, domestic or exclusive jurisdiction.[94]

This is the only reasoning that can explain why other State Parties of the Convention have prohibited certain techniques of assisted fertilization which are very similar to those which the Constitutional Chamber of the Supreme Court of the State had in mind when issuing the Decision that originated this case. This is so, even though these prohibitions could, at some point, be perceived as infringing some of the rights that the Court considers that were violated by the State.

The ultimate reason why the aforementioned Chamber of the Supreme Court declared the Decree unconstitutional and contrary to Article 4(1) of the Convention, is because the embryo "cannot be treated as an object for investigation purposes, be submitted to selection processes, kept frozen and, the most essential point for the Chamber, it is not constitutionally legitimate to expose it to a disproportionate risk of death."[95] These reasons were also suggested by three Member States when forbidding assisted fertilization "for purposes other than human procreation;" by one of them when establishing that "the commercialization of biological material is a crime;" and by another of them when prohibiting "the freezing of embryos for deferred transfer." Nevertheless, one of the previously referred States and another one allow the "the cryopreservation of embryos, spermatozoids and eggs."[96]

Finally, it must be pointed out that the Judgment makes no reference in its operative paragraphs to Article 4(1). This may happen because the Judgment dismisses the allegation regarding this Article. Nevertheless, the Court makes no reference—as it has previously done—to whether it is unnecessary to refer to this Article, or to whether the State is responsible for the alleged violation or is, on the contrary, blameless.

FINAL CONSIDERATIONS

[93] Para. 256.

[94] This concept was developed by the Permanent Court of International Justice in its advisory opinion *Nationality Decrees Issued in Tunis and Morocco* (February 7, 1923). In this opinion the Permanent Court concluded that the term domestic jurisdiction referred to issues that are not, in principle, regulated by international law, that is, matters where the State can take sovereign decisions. This may be the case, even though they may be closely related to the interests of more than one State.

[95] Para. 76.

[96] Para. 255.

When this dissenting opinion stated the reason why it disagreed with the Judgment, it tried to underline the importance of this case, where what is at stake is nothing less than the understanding of the "right to life" and of when does life begin.

Strictly speaking, when a juridical provision on this issue is drafted, many legitimate material sources of international law come into play; not only juridical notions, but also philosophical, moral, ethical, religious, ideological, scientific and others. Once the juridical provision is in force, however, it can only be interpreted in accordance with the formal sources of international law.

The Court has limits when exercising its interpretive function. This cannot be denied. Other jurisdictional bodies have already highlighted the difficulty—and even the inappropriateness—of deciding an issue which is within the realm (although not exclusively) of medical science, an issue regarding which there is still no consensus, even in this particular field.[97]

Nevertheless, in spite of these difficulties, the Court has had to fulfill its duty and decide the issue that was brought forth. This, however, does not exempt the States from fulfilling their own duty, which in this case is to exercise their normative function in the way they deem best. If they fail to do so, there is the risk that—as it somewhat happens in this case—the Court may not only decide on these issues, which require a more political pronouncement, but may also be obliged to assume this normative function. This would distort the Court's jurisdictional function, affecting thus the performance of the whole Inter-American system of human rights.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

[97] Para. 185 and note 283.