



**ORGANIZACIÓN DE LOS ESTADOS AMERICANOS**  
WASHINGTON, D.C. 2 0 0 0 6 EEUU

July 29, 2011

**Ref.: Case No. 12.361**  
***Gretel Artavia Murillo et al. ("In Vitro Fertilization")***  
**Costa Rica**

Mr. Secretary:

I am pleased to address you on behalf of the Inter-American Commission on Human Rights in order to submit to the jurisdiction of the Honorable Inter-American Court of Human Rights, Case No. 12.361, Gretel Artavia Murillo *et al.* v. Costa Rica (hereinafter "the State", "the Costa Rican State" or "Costa Rica"), which concerns the violation of the rights to have one's private and family life respected, the right to found a family and the right to equality and non-discrimination, recognized in articles 11, 17 and 24 of the American Convention on Human Rights, read in conjunction with articles 1(1) and 2 thereof, to the detriment of Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

The violations were the result of an across-the-board ban on the practice of the assisted reproductive technique of *in vitro* fertilization, a ban that has been in effect in Costa Rica since 2000, following a ruling issued by the Constitutional Chamber of the Costa Rican Supreme Court. As indicated in merits report 85/10, the Commission found that this absolute ban constituted arbitrary interference in the right to private and family life and the right to found a family. The Commission also found that the ban violated the victims' right to equality inasmuch as the State had denied them access to a treatment that would have enabled them to overcome the disadvantage they have with respect to the possibility of having biological children. The ban also had a disproportionate impact on women.

The State ratified the American Convention on Human Rights on April 8, 1970 and accepted the Court's contentious jurisdiction on July 2, 1980.

The Commission has designated Commissioner Rodrigo Escobar Gil and IACHR Executive Secretary Santiago Canton as its delegates. Likewise, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Isabel Madariaga, Fiorella Melzi and Rosa Celorio, attorneys with the Commission's Executive Secretariat have been designated to serve as legal advisors.

In accordance with Article 35 of the Rules of Procedure of the Inter-American Court, the Commission is enclosing with this communication a copy of report No. 85/10 prepared in compliance with Article 50 of the American Convention, as well as a copy of the entire file before the Inter-American Commission (Appendix I) and the annexes used in the preparation of Report 85/10 (Annexes). The merits report was notified to the Costa Rican State by a communication dated August 23, 2010, which was given two months to report on the implementation of the recommendations made therein. On three different occasions, the State requested an extension from the Commission in order to implement those recommendations. The Commission granted the requested extensions, but thus far no significant progress has been made toward compliance.

The Commission is therefore submitting this case to the jurisdiction of the Inter-American Court in order to get justice for the victims.

As for the recommendation to “[l]ift the ban on *in vitro* fertilization in the country through the necessary legal procedures”, following notification of merits report 85/10 the Commission received information from the Costa Rican State concerning two bills on *in vitro* fertilization and embryo transfer that had been introduced in the Legislative Assembly and whose purpose was to lift the ban on that practice in Costa Rica. According to the information available, Bill 17,900 was tabled, and Bill 18,057 is still in the legislative process. Hence, at the present time, the ban on the practice of *in vitro* fertilization is still in force in Costa Rica.

As for the recommendation to “[e]nsure that any regulation of the practice of *in vitro* fertilization once the ban is lifted be compatible with the state’s obligations with respect to the rights recognized in articles 11(2), 17(2) and 24 (...) [and] take particular care to make certain that persons and/or couples that need and want the treatment have access to the technique of *in vitro* fertilization so that the treatment can serve its purpose”, the Commission believes it would be inappropriate for it to issue any definitive observations on the bills introduced, since one has already been tabled and the other is still being discussed. It therefore reserves the right to make observations on any law eventually approved in these or other legislative processes, to the extent that they are germane to any reparations that the Court might order.

Regarding the recommendation to “[m]ake full reparations to the victims in the present case, to include pecuniary and non-pecuniary damages and measures of satisfaction for the harm done”, the Commission notes that the only information the State has provided concerns the internal mechanisms that the victims could pursue to obtain reparations for “damages and injuries”. From the information available, it turns out that the State has not taken any steps to order the reparations that the victims are owed for the violations of the American Convention declared in the merits report.

The Inter-American Commission is submitting to the jurisdiction of the Court the full facts and human rights violations as set out in merits report 85/10 and is asking the Court to adjudge and declare the international responsibility of the Costa Rican State for the following:

- a) The violation of the rights established in Articles 11.2 and 17.2 of the American Convention, in connection with the obligations established in

Articles 1.1 and 2 of the said instrument, to the detriment of Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

- b) The violation of the right established in Article 24 of the American Convention in connection with the obligations established in Articles 1.1 and 2 of the said instrument to the detriment of Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

The Commission is therefore requesting that the Inter-American Court order the following reparations:

- a) Lift the ban on in vitro fertilization in the country through the necessary legal procedures.
- b) Ensure that the regulations governing the practice of in vitro fertilization issued once the prohibition is lifted are compatible with the State's obligations pertaining to the rights recognized in Articles 11.2, 17.2, and 24, as established throughout the report; and especially that the persons and/or couples that so request and desire it may have access to in vitro fertilization techniques, in such a way that said treatment contributes effectively to fulfilling its purpose.
- c) Make full reparations to the victims in the present case, to include pecuniary and non-pecuniary damages and measures of satisfaction for the harm done.

In addition to the need to get justice for the victims in the instant case, the IACHR observes that this case raises issues of inter-American *ordre public*.

The victims in the instant case are not the only ones affected by the general ban on the practice of *in vitro* fertilization in Costa Rica. The ban has raised the question of the scope and content of the rights recognized in articles 11 and 17 of the American Convention. Specifically, the instant case is an opportunity for the Court to examine the protection of the right to found a family, in the sense of deciding to become a biological parent and then having access to the means necessary for that right to be exercised. The Court will also be able to declare that the decision to found a family is one of the most private decisions that an individual and/or couple makes and is the exclusive purview of each individual and/or couple.

As this case directly concerns the scope and content of Convention articles 11 and 17, it necessitates a juridical analysis of the international standards that must be taken into account when examining permissible restrictions on the exercise of the right to a private and family life and the right to found a family, in a

reproductive health issue on which the Inter-American Court has not yet established any case law.

The instant case also includes a legal analysis of the international standards on the right to equality and non-discrimination from two different perspectives: on the one hand, the responsibility the State has incurred by having denied a group of persons access to a treatment that would have enabled them to overcome a disadvantage they had in terms of the possibility of having their own biological children; on the other, the disproportionate impact that a measure of this kind has on women. These two perspectives will enable the Court to build up its case law on the subject of equality and non-discrimination.

Because these issues affect inter-American *ordre public*, in keeping with Article 35(1)(f) of the Inter-American Court's Rules of Procedure the Commission is offering the following expert witnesses:

1. Fernando Zegers-Hochschild, who will give testimony concerning the assisted reproductive technique of *in vitro* fertilization, describing and comparing the technique and procedures used.

2. An expert whose name will be reported in due course, who will testify about and compare the various regulations governing the assisted reproductive technique of *in vitro* fertilization.

3. Paola Bergallo, who will testify about the international standards on reproductive rights, particularly on arbitrary interferences in private and family life and the principles of equality and non-discrimination. The expert will also discuss what the implications of a State's ban on the practice of *in vitro* fertilization are in light of those standards.

4. Paul Hunt, who will give testimony about the concept of "disproportionate impact" as a violation of the principle of equality and non-discrimination, and how the concept of "disproportionate impact" applies to women when their exercise of their reproductive rights is unduly restricted.

The *curricula vitae* of the experts proposed will be included in the annexes to merits report 85/10.

The Commission is advising the Inter-American Court that through a number of communications received in September 2010, subsequent to notification of report 85/10, the petitioner supplied information related to the individual victims named in that report, and persons who were not parties to Case 12,361. Responding to that information, by a communication dated October 20, 2010 the IACHR informed the petitioner that the only information that would be included in the file for future purposes would be that pertaining to the individuals identified by name in report 85/10. Some of the information supplied by the petitioner concerns cases that are still in process with the IACHR.

Finally, the person who served as petitioner in the case with the Inter-American Commission is Mr. Gerardo Trejos Salas. The contact information that the Commission has for this person is as follows:

Gerardo Trejos Salas  
[REDACTED]

Please accept renewed assurances of my highest regards.

*Signed in the original*

Elizabeth Abi-Mershed  
Deputy Executive Secretary

**REPORT No. 85/10**  
CASE 12.361  
MERITS  
GRETEL ARTAVIA MURILLO *ET AL.*  
(*IN VITRO* FERTILIZATION)  
COSTA RICA  
July 14, 2010

**I. SUMMARY**

1. On January 19, 2001, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," "the Commission" or "the IACHR") received a petition that Mr. Gerardo Trejos Salas (hereinafter "the petitioner") lodged against the Republic of Costa Rica (hereinafter "the State," "Costa Rica" or "the Costa Rican State") alleging its international responsibility for having denied the alleged victims access to the practice of *in vitro* fertilization within Costa Rica. By its judgment number 2000-02306, of March 15, 2000, the Constitutional Chamber of the Costa Rican Supreme Court held that Presidential Decree No. 24029-S of February 3, 1995, which regulated the practice of *in vitro* fertilization within Costa Rica, was unconstitutional.

2. On March 11, 2004, the Commission approved admissibility report No. 25/04<sup>1</sup> in which it concluded that it did have jurisdiction to consider the complaint and decided, based on the arguments of fact and of law and without prejudging the merits of the petition, to declare it admissible with respect to the alleged violation of articles 1, 2, 11, 17 and 24 of the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention") to the detriment of the alleged victims.

3. The petitioner contends that the ruling that the Constitutional Chamber of the Costa Rican Supreme Court delivered on March 15, 2000, in which it prohibited the practice of *in vitro* fertilization in the country, violates the following persons' rights under the American Convention: Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

4. The State, for its part, argues that it has not committed any breach of the American Convention because the case does not state facts that tend to establish a violation of human rights guaranteed therein. The State contends that the Constitutional Chamber regulated the right to reproduce by stating that the right to reproduce must be subordinate to the absolute right to life, as it would be a contradiction to allow the possibility of a life at the cost of other human lives which is, in its view, what happens when the technique of *in vitro* fertilization is practiced. The State reasons that Costa Rica is thus simply enforcing Article 4 of the American Convention.

5. After weighing the parties' positions and examining the facts of the case, and in accordance with Article 50 of the American Convention, in this report the Commission concludes that the State of Costa Rica is responsible for violation of the rights protected under articles 11(2),

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<sup>1</sup> See, IACHR, Report No. 25/04 (Admissibility), Petition 12,361, Ana Victoria Sánchez Villalobos *et al.*, Costa Rica, March 11, 2004. By a communication dated November 18, 2008, Ana Victoria Sánchez Villalobos and her husband Fernando Salazar Postilla informed the Commission that they were withdrawing from the case *sub examine*. The Commission therefore changed the name of the case.

17(2) and 24 of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof, to the detriment of: Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza

## II. PROCESSING SUBSEQUENT TO ISSUANCE OF THE ADMISSIBILITY REPORT

6. In Report No. 25/04 of March 11, 2004, the Commission concluded that the petition was admissible with respect to articles 1, 2, 11, 17 and 24 of the American Convention. By note dated March 11, 2004, the Commission forwarded the report to the petitioner and to the State and gave the petitioner two months in which to submit additional observations on the merits. Pursuant to Article 48(1)(f) of the American Convention, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter.

7. On May 12, 2004, the IACHR forwarded to the State the petitioner's observations on the merits. The State was given two months in which to present its observations, which were received on September 1, 2004.

8. The IACHR also received information from the petitioner on the following dates: April 15 and 16, May 12 and October 1, 2004; June 19, 21, 28 and 30, July 5 and 6, and October 20, 2006; January 19, February 12, 26 and 27, 2007; March 31, April 1, August 8 and October 28, 2008; January 30, July 27, August 5 and 19, November 3 and December 18, 2009; and January 3 and February 16 and 17, 2010. Those communications were duly forwarded to the State.

9. The Commission received observations from the State on the following dates: July 19, 2004; February 11, 2005; October 17 and November 20, 2006; February 27 and May 17, 2007; October 17, 28 and 29 and November 24, 2008; January 30, April 22, May 26, June 3 and August 6, 2009; and January 8, 12 and 22, 2010. Those communications were promptly forwarded to the petitioner.

10. On October 28, 2008, during its 133<sup>rd</sup> regular session, the Commission held a public hearing attended by Andrea Bianchi Bruno (an alleged victim), who was present as a witness. Also in attendance were her representative and the State of Costa Rica.

11. During the proceedings on the case, three *amicus curiae* briefs were received in support of the arguments made by the petitioners. The Center for Reproductive Rights submitted an *amicus* brief on December 9, 2004. The Commission received a second *amicus* brief on September 26, 2005, this one filed by Yale Law School's Allard K. Lowenstein International Human Rights Law Clinic. On October 6, 2009, the IACHR received an *amicus curiae* brief filed by the International Reproductive and Sexual Health Law Programme of the University of Toronto's Faculty of Law. Two *amicus curiae* briefs were received in support of the State's arguments. On February 28, 2005, the Commission received an *amicus* brief from Human Life international. On October 26, 2008, the Commission received an *amicus curiae* brief from the University of St. Thomas' School of Law. All the *amicus* briefs were forwarded to the parties on December 3, 2009.

### III. THE PARTIES' POSITIONS

#### A. The petitioner

12. The petitioner contends that on February 3, 1995, then Costa Rican President J.M. Figueres and his Minister of Health, Herman Weinstok, signed a Presidential Decree (No. 24029-S) in which they authorized the technique of *in vitro* fertilization for married couples and regulated its practice.

13. The petitioner asserts that a March 15, 2000 ruling of the Constitutional Chamber of the Costa Rican Supreme Court nullified the Presidential Decree in question, which it declared unconstitutional on the grounds that the practice of *in vitro* fertilization, as regulated in the decree, implied a heavy loss of embryos caused by a conscious and deliberate manipulation of reproductive cells. As a result of that decision, the practice of *in vitro* fertilization was prohibited in Costa Rica.

14. According to the petitioner, the court ruling that prohibited the practice of *in vitro* fertilization is binding upon everyone. The petitioner underscored the fact that in its ruling, the Constitutional Chamber held that "no law can legitimately authorize its practice" (in reference to *in vitro* fertilization). Therefore, by prohibiting the practice of *in vitro* fertilization, the presidential decree was eliminated from the domestic legal system,<sup>2</sup> thereby creating a continuing violation of a number of rights protected under the American Convention and binding upon all persons.

15. The petitioner states that the alleged victims in the instant case were patients diagnosed as severe cases of infertility, who were on the waiting list for the *in vitro* fertilization procedure. As a result of the Constitutional Chamber's ruling, the alleged victims were unable to undergo treatment in Costa Rica or had to go abroad for the treatment. In the hearing the Commission held on October 28, 2008, one of the alleged victims testified as follows:

After three consecutive years of examinations, tests and surgeries, I was diagnosed with infertility resulting from an illness known as endometriosis, which caused a complete blockage of my fallopian tubes. Following these examinations and the diagnosis, I learned that the only option I had was *in vitro* fertilization. But the very same year that I was diagnosed, that fertilization technique was banned in Costa Rican territory. That ban not only denied me the health treatment I was seeking, but also compounded the suffering that an infertile couple experiences [...]<sup>3</sup>

16. The petitioner underscored the fact that *in vitro* fertilization is used for cases of infertility caused by unknown factors, endometriosis, immunological infertility, male infertility, cervical factor infertility, and so on. He also contends that there has been a surge in the use of this technique in cases of unexplained or idiopathic sterility, especially in cases of male infertility. The petitioner maintains that Costa Rica is the only state in the region that has banned the practice of *in vitro* fertilization within its borders.

17. The petitioner further asserts that the regulation contained in the Presidential Decree was already quite restrictive: only married couples could use *in vitro* fertilization; only six ova could be fertilized per period of treatment, and all embryos had to be deposited in the uterus. Disposal of fertilized eggs or preserving them for later use, either in the same patient or other patients, was strictly prohibited.

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<sup>2</sup> The petitioner mentions Article 88 of the Law on Constitutional Jurisdiction, which provides that "rulings that declare the law or measure being challenged to be unconstitutional and orders them nullified shall have the effect of *res judicata* and the law or measure shall be expunged from the system."

<sup>3</sup> The IACHR hearing on the case, held on October 28, 2008.

18. The petitioner contends that the Constitutional Chamber held that the human embryo had the same standing in law as a human person, thereby according the embryo an absolute right to life that allows of no exceptions, conditions, or restrictions and thus pre-empts all other rights.

19. According to the petitioner, the Constitutional Chamber's interpretation of the ultimate fate of the human embryo reveals a subjectivity that attaches blame to those professionals who practice *in vitro* fertilization for an act that occurs in nature by the law of natural selection. The petitioner asserts that the notion that every human embryo will automatically end up becoming a newborn is wrong. The petitioner argues that in fact, there is extensive bibliography demonstrating that not every human embryo develops to birth. To the contrary, as many as 80% of all human embryos either fail to become implanted in the uterus or otherwise fail to develop to birth, either in the form of a biochemical abortion (when the pregnancy is not clinically apparent) or a clinical abortion (when pregnancy is already clinically apparent). He states that one can reasonably conclude that of every 100 eggs fertilized by natural means, approximately 20 will be born. The petitioner contends that the early gestational loss of the human species that is nature's doing is not challenged; however, if man intervenes to ensure the existence of embryos and gestational losses occur as a result, then it is subject to question and in fact impermissible.

20. The petitioner argues that the State cannot interfere in a couple's decision to have children, as it would be violating their right to privacy and interfering in the sexual and reproductive life of persons. He claims that this would be a violation of Article 11 of the American Convention. The petitioner observes that the right to family planning includes the possibility of using techniques of artificial insemination and *in vitro* fertilization whenever reproduction cannot be achieved naturally. He maintains that the prohibition of *in vitro* fertilization constitutes arbitrary and abusive interference in the private and family lives of persons who need and want to undergo the procedure in order to reproduce and found a family.

21. According to the petitioner, the relationship between the physician and his/her patient is absolutely private, and the State therefore has no authority to prohibit an individual from undergoing that treatment. Actions that are not contrary to public order, morals and good customs are beyond the reach of the law.

22. He argues that the State has recognized the right to family planning, and references Decree No. 27913-S, published on June 9, 1999. It created an Inter-institutional Commission on Reproductive Health and Rights and Sexual Rights. The decree states the following:<sup>4</sup>

5.- It is the undelegable duty of the Costa Rican State to ensure that the public's rights to sexual and reproductive health are protected and to respect and enforce the international commitments undertaken in that regard, which uphold the right of all persons to control every aspect of their health and, in particular, their reproductive capacity.

6.- The Costa Rican State has an obligation to respect the principle of the free will of adult men and women.

23. As for the alleged violation of the right to found a family, the petitioner contends that recognition of the right to reproduce, i.e., to have issue, is a condition *sine qua non* for exercise of the right to found a family. The petitioner argues that the right to found a family is so fundamental that if violated, denied or otherwise not recognized, exercise of this right would be both materially and legally impossible.

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<sup>4</sup> Executive Decree No. 27913-S published in *La Gaceta* on June 9, 1999, paragraphs 5 and 6.

24. The petitioner contends by prohibiting *in vitro* fertilization in Costa Rica, which like other treatments for infertility, is an internationally accepted medical technique, articles 1 and 24 of the American Convention are being violated by virtue fact that persons who can only reproduce by using this technique are being discriminated against and accorded unequal treatment. The petitioner alleges further that the State's decision to prohibit the practice of *in vitro* fertilization creates a discriminatory situation among persons with reproductive disabilities.

25. In their communication to the IACHR, the alleged victims stated the following: "While for biological reasons, nature denies about 10% of all couples worldwide the right to be parents, a misguided Costa Rican court ruling has denied those couples in our country who suffer this misfortune, any possibility of assisted reproductive fulfillment, thereby creating an unfair disadvantage and discrimination with respect to the intent and practice of this medical treatment, which is now accepted in most countries and on all continents."

26. As for the October 15, 2008 ruling delivered by the Superior Contentious Administrative Law Court<sup>5</sup> on the case brought by Ileana Henchoz (one of the alleged victims in the present case) seeking a declaratory judgment, the petitioner adds that the possibility of getting a favorable result by fertilizing a single egg, which is what the Superior Contentious Administrative Law Court prescribed, "is ridiculous" because the scientific literature has established that the success rate when just one egg is fertilized is not even 10%.<sup>6</sup> The petitioner therefore contends that the ruling in question merely confirmed the absolute ban on that practice.

27. According to the petitioner, in every society the inability to reproduce causes enormous suffering to those so afflicted. Reproductive dysfunction creates a terrible sense of inferiority in the couple. The health of those who are unable to have biological children can be affected. Incurable sterility takes its toll on the couple. In trying to come to terms with the inability to reproduce, each member of a couple wants to assign "blame" either to one's partner or to oneself, all of which can lead to depression, a rejection of one's partner, abandonment, etc. The petitioner asserts further that the longer one waits, the less chance there is of undergoing any medical treatment that will enable the couple to have a child of their own. In testimony before the IACHR, one of the alleged victims said the following:

[a]s a human being, I yearned for and wanted something to fulfill a part of my being, my partner's being and my life. In Costa Rica, that 'something' came to be regarded as illegal, something unhealthy, something negative in every respect. I couldn't understand it. This ruling forced me to look for help abroad. Thank God, I was able to get the treatment, but it came at a heavy emotional and financial cost abroad. How can I explain to you what it means for someone to try to have a baby, a baby to care for and love with all one's heart and in so doing discover the reason why one goes on living [...]

I can't understand why I and so many others were being denied this with such inconceivable cruelty. We were not just denied this opportunity at life; instead, what we wanted was depicted as something criminal. It's not simply that I don't understand this; I am offended, offended as a human being labeled as someone out to commit a crime, when in fact all I want

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<sup>5</sup> While the petitioner refers to this body as the Superior Contentious Administrative Law Court, the Commission's understanding is that he is referring to the Superior Court of Accounts for Contentious Administrative and Civil Proceedings.

<sup>6</sup> The petitioner cites as evidence the opinion of physician Gerardo Escalante, National Director of the Costa Rican Infertility Institute, National Director of Postgraduate University Studies in Maternal/Fetal Medicine of the University of Costa Rica, Professor in the School of Medicine of the University of Costa Rica, Chief of Obstetrics at the Hospital Calderón Guardia, the Costa Rican Social Security Institute, and the Annual Report that the Inter-American Juridical Committee submitted to the OAS General Assembly on January 23, 2001 (OEA/Ser.G CP/doc. 3406/01).

to commit is an act of love, an act of discovery. This option is called the avenue of hope; for many people, it's the only option there is; medically speaking, there was no other option [...]

Is my idea of being part of the community and of society so wrong? Isn't it the same feeling that every person has? The only difference was that I was unable to get that by the means that for everyone else is so natural. But there is another way, one that is accepted and available everywhere. Whatever the regulations, the answer can't be a simple "No". That's not right, because that means I'm not entitled to start a family, to have my health problem treated; because that means I don't have a right to privacy, to fulfill my life's plan with my partner, the plan that I make for myself or that he makes with me; the plan that so many others pursue [...]

## **B. The State's position**

28. The State contends that the facts alleged do not establish a violation of the human rights that the American Convention guarantees.

29. The State maintains that *in vitro* fertilization is not a cure for the causes of infertility; instead, it is a complex technical resource that attempts to overcome infertility by artificial means. The State argues that while it understands and empathizes with the suffering that the inability to conceive may cause, the petitioner is wrong when he says that the ban on the practice of *in vitro* fertilization condemned those he represents to being childless, as the ban on *in vitro* fertilization is not the cause of the inability to conceive any more than *in vitro* fertilization is a guarantee of having children.

30. The State contends that the problem lies in the fact that the regulation of the practice violates the embryos' right to life. According to the State, science and technology are not the only considerations when addressing this issue; the legal system and the constitution, as a "faithful reflection of a nation's values", also have to be considered, as does international law. Hence, any treatment that may be administered to a person must always conform to the provisions of the Constitution and the international law on the protection of human rights.

31. The State asserts that the Constitutional Chamber held that the right to reproduce must be subordinate to the absolute right to life, because it would be a contradiction to accept the possibility of a life that comes at the cost of other human lives, which is what happens in the practice of *in vitro* fertilization. Consequently, the right to reproduce is regulated by acknowledging that some techniques, like artificial insemination, are accepted practice while other techniques like *in vitro* fertilization are not because they affect other persons' absolute rights.

32. The State observes that Article 4(1) of the American Convention expressly provides that the right to life shall be protected, in general, from the moment of conception and that the Costa Rican State has opted to provide this degree of protection in its domestic laws. The State alleges that irrespective of how one interprets the expression "in general" in Article 4(1) of the Convention, what matters is that the article provides for the possibility of protecting life from the moment of conception, and that the State has opted for that degree of protection. According to the State, the right to life is the predicate for all other rights; hence, the Costa Rican State has acted in accordance with the international obligations it has undertaken. The State argues that science and technology have offered no clear answers in this area; hence it is up to the State to regulate the use of assisted reproductive techniques within Costa Rica.

33. The State observes that it has been careful to cultivate the conditions necessary to respect the right to protection of the family. It argues, however, that under Article 17(2) of the Convention, men and women have the right to marry and to raise a family if they meet the

conditions required by domestic law. The State reasons that while “parents must have the right to have children, to do so by depriving other human beings of their lives can hardly be lawful.”<sup>7</sup>

34. According to the State, the Constitutional Chamber held that “...science and biotechnology are advancing at such a dizzying pace that the technique may one day be improved to the point that the objections raised here may be moot.”<sup>8</sup> In other words, given the way in which the technique was being used at the time of the Constitutional Chamber’s ruling, the view was that any elimination or destruction of embryos, whether intentional or as a result of the ineptitude of the person applying the technique or its imprecision, was a violation of the right to life. Hence, the technique was deemed to be in violation of constitutional law and of Article 4 of the American Convention.

35. The State asserts further that Mrs. Ileana Henchoz Bolaños (one of the alleged victims in the case *sub examine*) sought a declaratory judgment against the *Caja Costarricense de Seguro Social* [Costa Rican Social Security Institute] (case file No.089-000178-1027-CA) in which the court would order that she be administered the *in vitro* fertilization procedure. According to the State, the October 15, 2008 ruling of the Superior Court of Accounts for Contentious Administrative and Civil Proceedings upheld the State’s position in this regard. The Superior Court held that the Constitutional Chamber had not declared *in vitro* fertilization as an assisted reproductive technique to be unconstitutional; instead, the Constitutional Chamber’s earlier interpretation of domestic and international law was that “the procedure as practiced in the year 2000 [...] undoubtedly exposed embryos to a disproportionately high risk of death.”<sup>9</sup>

36. The State alleges that the ruling of the Superior Court of Accounts for Contentious Administrative and Civil Proceedings recognized that the Constitutional Chamber’s judgment was final. The State cites a portion of the Superior Court’s decision, as follows:<sup>10</sup>

whenever *in vitro* fertilization is indicated, this procedure shall be performed in accordance with the guidelines established by the Constitutional Chamber [...] based on the technique as it can practiced at this time: in other words, only one ovum can be fertilized and transferred in each of the patient’s reproductive cycles; two or more eggs cannot be fertilized in the same reproductive cycle, and it is strictly prohibited to select one embryo from among several, or to destroy, dispose of or cryo-preserve embryos or experiment with them.

37. However, at the hearing the Commission held on case 12,361 during its 133<sup>rd</sup> session, the State told the Commission that the probability of success when only one egg is fertilized is very small, which means that the procedure would have to be repeated multiple times over to achieve pregnancy and that many embryos would be lost in the process. The State also indicated that the procedure that the Contentious Administrative Law Court established has little chance of success and the embryo loss rate is high. Finally, the State concluded that the Constitutional Chamber did not prohibit *in vitro* fertilization; instead, its finding was that the procedure could be conducted when the technique is perfected and the embryo loss rate is low.<sup>11</sup>

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<sup>7</sup> Communication from the State, dated November 16, 2006.

<sup>8</sup> Communication from the State, dated November 24, 2008, in which it cites part of Judgment No. 2000-2306, which the Constitutional Chamber delivered on March 15, 2000.

<sup>9</sup> Communication from the State, dated January 29, 2009.

<sup>10</sup> Communication from the State, dated November 24, 2008, in which it cites part of Judgment No. 2000-2306, which the Constitutional Chamber delivered on March 15, 2000.

<sup>11</sup> IACHR, Record of Hearing No. 46, Case 12,361, P1368-04, P16-05, P678-06, P1191-06 *In Vitro* Fertilization, October 28, 2008.

#### IV. ANALYSIS OF THE MERITS

##### A. Facts established

38. In application of Article 43(1) of its Rules of Procedure, the Commission will examine the arguments and evidence offered by the parties and the information obtained at the hearing held during the Commission's 133<sup>rd</sup> regular session and from the *amicus curiae* briefs presented. It will also consider information that is in the public domain.<sup>12</sup>

39. On April 7, 1995, Hermes Navarro del Valle, a Costa Rican citizen, filed a case challenging the constitutionality of Executive Decree No. 24029-S, issued on February 3, 1995, which regulated *in vitro* fertilization in Costa Rica. The petitioner alleged that the *in vitro* fertilization and embryo transfer technique regulated in that decree violated the right to life and the right to have one's dignity respected.

40. The Executive Decree in question authorized the technique of *in vitro* fertilization between married couples and established rules to govern its practice. In Article 1, the Executive Decree established the practice of assisted reproductive techniques between married couples and set forth rules for their practice.<sup>13</sup> Article 2 defined assisted reproductive techniques as "all those artificial techniques in which the egg and the sperm are united through a form of direct manipulation of the reproductive cells in the laboratory."

41. Those provisions of Decree Law No. 24029-S that specifically concern the technique of *in vitro* fertilization<sup>14</sup> at issue in the constitutionality challenge were as follows:<sup>15</sup>

Article 9.- In cases of *in vitro* fertilization, fertilization of more than six of the patient's ova per treatment cycle is strictly prohibited.

Article 10.- All ova fertilized in a treatment cycle shall be transferred to the patient's uterine cavity; disposing of or destroying fertilized ova or preserving them to be transferred into the same patient in later cycles or into other patients, is strictly prohibited.

Article 11.- Manipulation of the embryo's genetic code, or any other experimentation on the embryo, is strictly prohibited.

Article 12.- Marketing either homologous or heterologous reproductive cells –eggs and sperms- to be used in treating patients by means of assisted reproductive techniques, is strictly prohibited.

Article 13.- Failure to comply with the provisions herein established 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 necessary sanctions to be administered.

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<sup>12</sup> Article 43(1) of the Commission's Rules of Procedure: "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge."

<sup>13</sup> Judgment No. 2000-02306 of March 15, 2000, issued by the Constitutional Chamber of Costa Rica's Supreme Court, Case File No. 95-001734-007-CO.

<sup>14</sup> The Commission understands that the Spanish expression "*fertilización in vitro*" in this decree is the same as the expression "*fecundación in vitro*," as defined later in this report.

<sup>15</sup> Judgment No. 2000-02306 of March 15, 2000, issued by the Constitutional Chamber of the Costa Rican Supreme Court, Case File No. 95-001734-007-CO.

42. *In vitro* fertilization was practiced in Costa Rica from 1995 to 2000. During that period 15 Costa Rican *in vitro* babies were born until the Constitutional Chamber of the Costa Rican Supreme Court declared the practice unconstitutional in ruling 2000-02306, delivered on March 15, 2000.<sup>16</sup>

43. In its ruling, the Constitutional Chamber held that *in vitro* fertilization practices are a threat to the life and dignity of the human person. As the Constitutional Chamber wrote:<sup>17</sup>

The human embryo is a person from the moment of conception and therefore shall not be treated as a research specimen or be subjected to selection and cryo-preservation procedures. The most fundamental issue for the Court is that it is unlawful under the Constitution for the embryo to be exposed to a disproportionate risk of death. [...]

The Court's main objection is that the practice of the technique carries a high embryo loss rate, which cannot be justified by the fact that the ultimate purpose is to produce a human life and give a child to a couple that might otherwise be unable to have one. What matters most is that the embryos that the technique initially endeavors to give life to and then cuts short are human beings and the Constitution does not admit of any distinction between them.

The Court also dismisses the argument that under natural circumstances, some embryos fail to implant in the uterus or, even if they do implant, do not develop to birth; it rejects this argument for the simple reason that the *in vitro* fertilization technique involves a conscious and voluntary manipulation of male and female reproductive cells in order to bring about a new human life, when one knows beforehand that the situation being created is one in which a considerable percentage of the human lives thus brought into being have no chance of surviving.

From what the Court has been able to establish, the technique of *in vitro* fertilization and embryonic transfer, as currently practiced, threatens human life. This Court knows that science and biotechnology are advancing at such a dizzying pace that the technique may one day be improved to the point that the objections raised here are moot. Nevertheless, given the conditions under which the technique is currently practiced, any elimination or destruction of embryos –whether intentional or as a result of the practitioner's ineptitude or the inaccuracy of the technique itself- is a violation of the right to life. Thus, the regulation being challenged is unconstitutional as it violates Article 21 of the Constitution and Article 4 of the American Convention on Human Rights.

The technique itself violates the right to life. Therefore, no legal provision can legitimately authorize its practice so long as the science of the technique remains the same and poses a conscious threat to human life.

44. The original petition filed with the Commission states that the alleged victims were on the waiting list for the *in vitro* fertilization procedure, which in the end could not be performed because the technique was outlawed in Costa Rica. They were thus affected by the decision of the Costa Rican Constitutional Chamber as it closed off any possibility of their getting the treatment. The Costa Rican State did not contest that claim.

45. Later, Ileana Henchoz Bolaños, one of the alleged victims in the case *sub examine*, filed for a declaratory judgment against the Costa Rican Social Security Institute, asking the court to order that she be administered the *in vitro* fertilization procedure. The Costa Rican Social Security

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<sup>16</sup> *Diario La Nación*, Interview with Gerardo Escalante, April 27, 2009.

<sup>17</sup> Judgment No. 2000-02306 of March 15, 2000, issued by the Constitutional Chamber of the Costa Rican Supreme Court, Case File No. 95-001734-007-CO.

Institute, for its part, argued that the procedure could not be performed because the Constitutional Chamber had flatly banned the procedure in its ruling No. 2000-2306 of March 15, 2000.<sup>18</sup>

46. By a ruling dated October 14, 2008, the Superior Court of Accounts for Contentious Administrative and Civil Proceedings concluded that *in vitro* fertilization as an assisted reproductive technique is not banned in Costa Rica so long as none of the procedures that the Constitutional Chamber proscribes is practiced and “especially inasmuch as the current prescription for this medical procedure is to fertilize just one ovum in the female’s reproductive cycle, which shall then be transferred to the mother’s uterus.”<sup>19</sup>

47. The Superior Court of Accounts for Contentious Administrative and Civil Proceedings ordered the Costa Rican Social Security Institute to prepare a diagnostic study and perform the necessary medical tests to determine whether assisted reproductive techniques could be performed on Mrs. Henchoz Bolaños,<sup>20</sup> including the *in vitro* fertilization techniques. It also ordered that the procedure was to be conducted according to the guidelines dictated by the Constitutional Chamber and based on the technique as it is practiced at this time: in other words, only one ovum can be fertilized and transferred in each of the patient’s reproductive cycles; two or more eggs cannot be fertilized in the same reproductive cycle, “and it is strictly prohibited to select one embryo from among several, or to destroy, dispose of or cryo-preserve embryos or experiment with them.”<sup>21</sup>

48. The Costa Rican Social Security Institute appealed the Superior Court’s ruling. On August 19, 2009, the magistrates on the bench of the First Chamber of the Supreme Court reversed the ruling and dismissed the case.<sup>22</sup> The First Chamber of the Supreme Court wrote that “the plaintiff’s interests would not be served by pursuing the case.”<sup>23</sup> The Supreme Court reasoned that “it has been established [...] that *in vitro* fertilization would be contraindicated for the plaintiff by reason of her age, since at age 48, she has already lost her capacity to reproduce with her own eggs, which makes an assisted pregnancy extraordinarily unlikely and remote,” in addition to the fact that the plaintiff, “once the decision now being challenged was issued, told a number of mass media outlets that she would not undergo the *in vitro* fertilization procedure because of her age.”<sup>24</sup>

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<sup>18</sup> 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, which both parties provided to the Commission during the hearing on the merits held on October 28, 2008.

<sup>19</sup> 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, which both parties provided to the Commission during the hearing on the merits held on October 28, 2008.

<sup>20</sup> 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, which both parties provided to the Commission during the hearing on the merits held on October 28, 2008.

<sup>21</sup> 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, which both parties provided to the Commission during the hearing on the merits held on October 28, 2008.

<sup>22</sup> First Chamber of the Supreme Court of Justice, judgment of May 7, 2009, Case 08-000178-1027-CA, Res. 000465-F-S1-2009, which the State forwarded via a communication dated January 22, 2010.

<sup>23</sup> First Chamber of the Supreme Court of Justice, judgment of May 7, 2009, Case 08-000178-1027-CA, Res. 000465-F-S1-2009, which the State forwarded via a communication dated January 22, 2010.

<sup>24</sup> First Chamber of the Supreme Court of Justice, judgment of May 7, 2009, Case 08-000178-1027-CA, Res. 000465-F-S1-2009, which the State forwarded via a communication dated January 22, 2010.

49. Therefore, based on the information in the case file, the ban on *in vitro* fertilization in Costa Rica following the Constitutional Chamber's March 15, 2000 ruling is still in effect.

50. This ban has forced some of the alleged victims to seek that treatment abroad. A case in point is that of Andrea Bianchi Bruno, who told the Commission that she had spent US\$ 30,000 for an *in vitro* fertilization treatment in Colombia, which in Costa Rica would have cost US\$3,000 had it been permissible there.<sup>25</sup> She also said she had to resign from her job, as she worked in the medical field and her job did not allow her to take the leave she would need to undergo the procedure.<sup>26</sup> In other cases, like that of the alleged victim Ileana Henchoz Bolaños, the prohibition of *in vitro* fertilization has meant that because of her age, it is no longer biologically feasible for the *in vitro* fertilization procedure to be practiced on her.<sup>27</sup>

## **B. Prior definitions and preliminary questions**

51. The Commission will now proceed to clarify certain questions related to infertility, the assisted reproductive techniques and *in vitro* fertilization.

### **1. Infertility in the international context**

52. A number of organizations recognize that infertility is a source of physical and psychological suffering for the couples, particularly the women, and can even strain the couple's relationship.<sup>28</sup> The most current clinical definition issued by the International Committee for Monitoring Assisted Reproductive Technology and the World Health Organization is 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."<sup>29</sup>

53. The most common causes of infertility are low sperm or egg production, or damage to or abnormalities of the female reproductive system that prevent the sperm and egg from uniting.<sup>30</sup> A small percentage of couples, no more than 5%, are infertile for unknown and therefore untreatable reasons. A higher incidence of infertility is referred to as acquired infertility, which generally indicates that there are community factors that can cause new infertile couples. The main causes of acquired infertility are pelvic infections caused by sexually transmitted diseases (like

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<sup>25</sup> Hearing on the case before the IACHR, held on October 28, 2008.

<sup>26</sup> Hearing on the case before the IACHR, held on October 28, 2008.

<sup>27</sup> First Chamber of the Supreme Court of Justice, judgment of May 7, 2009, Case 08-000178-1027-CA, Res. 000465-F-S1-2009, which the State forwarded via a communication dated January 22, 2010.

<sup>28</sup> World Health Organization, *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction" held at WHO Headquarters in Geneva, Switzerland 17–21 September 2001, See: Foreword; *Current Challenges in Assisted Reproduction*, Mahmoud F. Fathalla; *Infertility and social suffering: the case of ART in developing countries*, Abdallah S. Daar, Zara Merali.

<sup>29</sup> The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO), *Revised Glossary on ART Terminology*, 2009, published in *Human Reproduction*, Vol.24, No.11 pp. 2683–2687, 2009; see also British Fertility Society, available online at: <http://www.britishtfertilitysociety.org.uk/public/factsheets/keyfacts.html>.

<sup>30</sup> *Amicus curiae* brief presented by Yale Law School's Allard K. Lowenstein International Human Rights Law Clinic, September 26, 2005, p. 3.

chlamydia and gonorrhea) and unsafe abortions.<sup>31</sup> Estimates are that between 8 and 12% of couples experience some form of infertility during their reproductive years.<sup>32</sup>

54. Infertility runs even higher in the developing countries. In some countries, as many as 25% of couples are unable to have children without medical assistance.<sup>33</sup> In the Latin American countries, estimates suggest that the incidence of infertility is 15% or higher.<sup>34</sup>

55. There is no real consensus that infertility *per se* constitutes an illness. However, many of its causes can be traced to concrete physical conditions that require medical treatment. Also, in many cases, the inability to get pregnant can cause psychological disorders or mental suffering.<sup>35</sup> According to the World Medical Association:<sup>36</sup>

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.

56. According to the Inter-American Court, health is a public interest the protection of which is a duty of the States.<sup>37</sup> The World Health Organization has written that health is not only the absence of infirmity and disease but also a state of physical, mental and social well-being. Following the model of the World Health Organization, the Protocol of San Salvador states that everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.<sup>38</sup> And so, infertile couples, who endure real physical and psychological suffering because of their inability to reproduce, are not fully enjoying their right to health.

57. The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health observed that States have an obligation to ensure access to such vital health services as [...] infertility treatment.<sup>39</sup> Paragraph 7.6 of the Cairo Programme of Action urges the countries to strive to provide “prevention and appropriate treatment of infertility” among the health care services they offer. *In vitro* fertilization is

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<sup>31</sup> Inter-American Institute of Human Rights, *Reproducción Asistida, género y derechos humanos en América Latina*, Florencia Luna, 2007, p. 57.

<sup>32</sup> World Health Organization, *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on “Medical, Ethical and Social Aspects of Assisted Reproduction” held at WHO Headquarters in Geneva, Switzerland 17–21 September 2001, *Infertility and social suffering: the case of ART in developing countries*, Abdallah S. Daar, Zara Merali, p. 15.

<sup>33</sup> *Amicus curiae* brief presented by Yale Law School’s Allard K. Lowenstein International Human Rights Law Clinic, September 26, 2005, pp. 2-3.

<sup>34</sup> *Amicus curiae* brief presented by Yale Law School’s Allard K. Lowenstein International Human Rights Law Clinic, September 26, 2005, pp. 2-3.

<sup>35</sup> Inter-American Institute of Human Rights, *Reproducción asistida, género y derechos humanos en América Latina*, Florencia Luna, 2007, p. 75.

<sup>36</sup> World Medical Association, Statement on Assisted Reproductive Technologies, South Africa, October 2006. Available online at: <http://www.wma.net/en/30publications/10policies/r3/index.html>

<sup>37</sup> I/A Court H.R. *Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs*. Judgment of July 4, 2006. Series C No. 149, par. 89.

<sup>38</sup> Article 10 of the Protocol of San Salvador.

<sup>39</sup> United Nations, Report of the Special Rapporteur, Paul Hunt, Economic, Social and Cultural Rights. *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. February 16, 2004, par. 29.

mentioned specifically, where the Programme of Action states that “*In vitro* fertilization techniques should be provided in accordance with appropriate ethical guidelines and medical standards.”<sup>40</sup>

58. The use of *in vitro* fertilization to combat infertility is also closely related to the enjoyment of the benefits of scientific progress, an internationally recognized right,<sup>41</sup> which in the inter-American realm is protected under Article 14(1)(b) of the Protocol of San Salvador. In its Declaration on the Use of Scientific Progress for the Benefit of Mankind, the United Nations General Assembly pointed up the relationship between this right and the satisfaction of material and spiritual needs of all sectors of the population.<sup>42</sup> In that declaration, the UN General Assembly proclaimed that all States shall take the necessary measures to ensure that “the utilization of scientific and technological achievements promotes the fullest realization of human rights and fundamental freedoms without any discrimination whatsoever on grounds of race, sex, language or religious beliefs.”

## 2. Assisted Reproductive Techniques

59. The Assisted Reproductive Techniques are a group of different medical treatments used to assist infertile persons and couples to achieve pregnancy. For some persons and couples, assisted reproductive techniques are the only means to conceive.

60. The term ‘assisted reproduction’ includes all treatments involving medical or scientific manipulation of gametes<sup>43</sup> and embryos<sup>44</sup> to produce a pregnancy.<sup>45</sup> Assisted reproductive techniques work by removing the eggs from the woman’s body and then uniting them with the sperm to facilitate the formation of embryos. The embryos are then transferred to the woman’s body. The techniques include *in vitro* fertilization, intracytoplasmic sperm injection, transcervical embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, egg donation and embryo donation, and surrogate motherhood.<sup>46</sup>

61. The assisted reproduction techniques do not include assisted fertilization. Assisted fertilization is any method of reproduction in which the sperm of the woman’s partner (homologue) or the donor sperm (heterologue) is deposited in the woman using specialized procedures and

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<sup>40</sup> United Nations, Cairo Programme of Action, International Conference on Population and Development, paras 7.6. and 7.17.

<sup>41</sup> Article 15(b) of the International Covenant on Economic, Social and Cultural Rights provides that “The States Parties to the present Covenant recognize the right of everyone [...] to enjoy the benefits of scientific progress and its applications.” Costa Rica has ratified by the International Covenant on Economic, Social and Cultural Rights and the Protocol of San Salvador.

<sup>42</sup> United Nations, Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, approved by the United Nations General Assembly in resolution 3384 (XXX), November 10, 1975.

<sup>43</sup> The term ‘gametes’ refers to the ovum (egg) and sperm.

<sup>44</sup> For purposes of this report, the term “embryo” is what is biologically referred to as zygotes and is the product of the fertilization of an oocyte by a spermatozoon. The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO), *Revised Glossary on ART Terminology*, 2009, definition of zygote, published in *Human Reproduction*, Vol.24, No.11 pp. 2683–2687, 2009.

<sup>45</sup> World Medical Association, Statement on Assisted Reproductive Technologies, South Africa, October 2006. Available online at: <http://www.wma.net/en/30publications/10policies/r3/index.html>

<sup>46</sup> World Health Organization, *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on “Medical, Ethical and Social Aspects of Assisted Reproduction” held at WHO Headquarters in Geneva, Switzerland 17–21 September 2001, Glossary.

instruments, whether in a preovulatory follicle (intrafollicular), in the uterus, in the cervix or in the fallopian tubes.<sup>47</sup> The assisted fertilization techniques such as artificial insemination are simple techniques used only when there are certain minor fertility problems.<sup>48</sup>

62. Currently, only homologous insemination is allowed in Costa Rica; in other words, insemination to treat cases of minor infertility. However, these techniques are not useful for the vast majority of infertility problems, such as cases that involve tubal blockage, damaged fallopian tubes and severe endometriosis, as well as cases of male infertility. In such cases, the patient will have to resort to *in vitro* fertilization.<sup>49</sup>

### 3. *In vitro* fertilization

63. *In vitro* fertilization is an assisted reproductive technique that involves *extracorporeal* fertilization.<sup>50</sup> *In vitro* fertilization basically consists of the harvesting of eggs from the woman's ovaries and the fertilization of those eggs outside the woman's body, and then re-implanting them in the uterus.<sup>51</sup>

64. This technique is indicated when infertility is because the woman's fallopian tubes are either missing or blocked; in other words, when an egg cannot get through the fallopian tubes to be fertilized and then implanted in the uterus, or in cases of male infertility.<sup>52</sup>

65. The first baby born as a result of *in vitro* fertilization was Louise Brown, in England in 1978.<sup>53</sup> In Latin America, the first baby born through *in vitro* fertilization and embryonic transfer was reported in Argentina in 1984.<sup>54</sup>

### C. The Law

#### 1. The right to private and family life (Article 11 of the American Convention) and the right to found a family (Article 17 of the American Convention)

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<sup>47</sup> World Health Organization, *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction" held at WHO Headquarters in Geneva, Switzerland 17–21 September 2001, Glossary, p XIX.

<sup>48</sup> Artificial insemination is indicated, for example, in cases of changes in the cervical mucus, for example when the mucus becomes hostile to sperm or when the man is producing antibodies against his own semen.

According to the World Medical Association, although some legislatures have considered artificial insemination, whether using donor semen or semen from the patient's partner, as different, many of the issues about regulation in relation to obtaining, storing, using and disposing of gametes and embryos are closely interlinked; Inter-American Institute of Human Rights, *Reproducción Asistida, género y derechos humanos en América Latina*, Florencia Luna, 2007, p. 41.

<sup>49</sup> Inter-American Institute of Human Rights, *Reproducción Asistida, género y derechos humanos en América Latina*, Florencia Luna, 2007, p. 41.

<sup>50</sup> The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO), *Revised Glossary on ART Terminology*, 2009, published in *Human Reproduction*, Vol.24, No.11 pp. 2683–2687, 2009; World Health Organization, *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction" held at WHO Headquarters in Geneva, Switzerland 17–21 September 2001, Glossary, p XX.

<sup>51</sup> Canadian Health Law and Policy, Jocelyn Downie *et al*, Second Edition, 2002, p. 376.

<sup>52</sup> Canadian Health Law and Policy, Jocelyn Downie *et al*, Second Edition, 2002, p. 376.

<sup>53</sup> WHO, *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction", held at WHO Headquarters in Geneva, Switzerland, 17–21 September 2001, *Current Challenges in Assisted Reproduction*, Mahmoud F. Fathalla, pp. 3-12.

<sup>54</sup> WHO, *Current Practices and Controversies in Assisted Reproduction*, Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction", held at WHO Headquarters in Geneva, Switzerland, 17–21 September 2001, *The Latin American Registry of Assisted Reproduction*, Fernando Zegers-Hochschild.

66. This case concerns the Costa Rican Constitutional Chamber's ban on the assisted reproductive technique of *in vitro* fertilization. Given the parties' arguments, the Commission must now determine whether that ban is compatible with the American Convention. Accordingly, the Commission will first assess whether the facts fall within the scope of the rights contemplated in articles 11 and 17 of the American Convention. If so, the Commission will then examine whether the prohibition of *in vitro* fertilization interferes with the exercise of those rights. If it concludes that it does interfere with the exercise of those rights, then the Commission must proceed to determine whether that interference meets the requirements that the Convention stipulates.

67. Therefore, the Commission will analyze the arguments of the parties and the information in the case file, in the following order: i) considerations regarding the scope of Article 11 of the American Convention; ii) considerations regarding the scope of Article 17 of the American Convention; iii) analysis of whether the ban on *in vitro* fertilization constitutes interference in the exercise of the rights recognized in articles 11 and 17 of the Convention; and iv) analysis to determine whether that inference is compatible with the American Convention.

**a. Considerations regarding the scope of Article 11 of the American Convention**

68. Article 11(1) of the American Convention provides that everyone has the right to have his honor respected and his dignity recognized. Under Article 11(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." Article 11(3) states that everyone has the right to the protection of the law against such interference or attacks.

69. The case law of the IACHR and the Inter-American Court holds that Article 11 of the Convention has a broad content that includes protection of the home, the private life, the family and correspondence.<sup>55</sup> Given the nature of the instant case, the Commission will focus here on the scope and content of the protection of private and family life under Article 11 of the American Convention.

70. One fundamental purpose of Article 11 is to protect individuals from arbitrary action by State authorities which intrudes into the private sphere.<sup>56</sup> The Inter-American Court has held that "the sphere of privacy is characterized by being exempt and immune from abuse and arbitrary invasion by third parties or public authorities."<sup>57</sup> This protection extends into the realm of the family.<sup>58</sup>

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<sup>55</sup> I/A Court H.R., *Case of Escué Zapata v. Colombia. Merits, Reparations and Costs*. Judgment of July 4, 2007. Series C No. 165, par. 91. It is important to note that the American Declaration of the Rights and Duties of Man also recognizes the right of every person to protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

<sup>56</sup> IACHR, *María Elena Morales de Sierra v Guatemala*, Report No. 4/01, Case 11,625, January 19, 2001, par. 47, citing Eur. Court H.R., *Kroon v. the Netherlands*, Ser. A No. 297-B, par. 31 (1994); European Court of Human Rights, *Tysiac v. Poland*, par. 109.

<sup>57</sup> I/A Court H.R. *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 6, 2009. Series C No. 200, par. 113; I/A Court H.R.. *Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1, 2006. Series C No. 148. par. 194; I/A Court H.R.. *Case of Escué Zapata v. Colombia. Merits, Reparations and Costs*. Judgment of July 4, 2007. Series C No. 165, par. 95, and I/A Court H.R.. *Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193, par. 55.

<sup>58</sup> I/A Court H.R.. *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 6, 2009. Series C No. 200, par. 113, I/A Court H.R.. *Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193, par. 55.

71. The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances.<sup>59</sup> The IACHR has observed that protection of the individual against any arbitrary interference by public officials requires that the state adopt all necessary legislation in order to ensure this provision's effectiveness.<sup>60</sup>

72. Taking account of the jurisprudence of the European Court of Human Rights, the IACHR has held that protection of private life encompasses a range of factors pertaining to the dignity of the individual, including, for example, the ability to pursue the development of one's personality and aspirations, determine one's identity, and define one's personal relationships.<sup>61</sup>

73. In its case law, the European Court of Human Rights has expanded the content of the right to have one's private life respected by providing that while the concept of "private life" covers the physical and psychological integrity of a person,<sup>62</sup> it also encompasses aspects of a person's physical and social identity, including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world.<sup>63</sup>

74. The European Court has also held that the concept of private life also includes the right to respect for decisions to become or not to become a parent<sup>64</sup> and even the choice to become a genetic parent.<sup>65</sup> Here, the European Court has described this choice as a particularly important facet of an individual's existence or identity<sup>66</sup>, and that where such issues are at stake the margin of appreciation accorded to a State will be restricted.<sup>67</sup>

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<sup>59</sup> IACHR, María Elena Morales de Sierra v Guatemala, Report No. 4/01, Case 11,625, January 19, 2001, par. 47, referencing Human Rights Committee, *Toonen v. Australia*, Comm. No. 488/1992, par. 8.3, citing General Comment 16[32] on Article 17 (of the ICCPR), Doc. CCPR/C/21/Rev. 1 (May 19, 1989).

<sup>60</sup> IACHR, X and Y v. Argentina, Report No. 38/96, Case 10,506, October 15, 1996, par. 91.

<sup>61</sup> IACHR, María Elena Morales de Sierra v Guatemala, Report No. 4/01, Case 11,625, January 19, 2001, par. 46, referencing, *inter alia*, European Court of Human Rights, *Gaskin v. the United Kingdom*, Ser. A No. 169 (concerning the petitioner's interest in accessing records related to his childhood and adolescence); and *Niemetz v. Germany*, Ser. A No. 251-B, par. 29 (which observes that respect for private life includes the right to establish and develop both personal and professional relationships).

<sup>62</sup> European Court of Human Rights, *Pretty v. The United Kingdom*, Application 2346/02, April 29, 2002, par. 61.

<sup>63</sup> European Court of Human Rights, *Tysiac v Poland*, par. 107; European Court of Human Rights, *Pretty v. The United Kingdom*, Application 2346/02, April 29, 2002, par. 61.

<sup>64</sup> European Court of Human Rights, *Pretty v. The United Kingdom*, Application 2346/02, April 29, 2002, par. 61; European Court of Human Rights, *Evans v. The United Kingdom*, Application 6339/05, April 10, 2007, par. 71.

<sup>65</sup> European Court of Human Rights, *Dickson v. the United Kingdom*, Application 44362/04, December 4, 2007, par. 78.

<sup>66</sup> European Court of Human Rights, *Dickson v The United Kingdom*, Application 44362/04, December 4, 2007, par. 78. In this case, the two applicants were a Mr. and Mrs. Dickson. Mr. Dickson was in prison at the time. They alleged that the refusal of access to artificial insemination facilities violated their right to have their private and family life respected, recognized in Article 8 of the European Convention on Human Rights, and the right to marry and start a family, recognized in article 12 of that international instrument. The Court wrote that the core issue is whether a fair balance was struck between the competing public and private interests involved. In this particular case, the Court noted that, given the circumstances, artificial insemination was the only way for the applicants to have children and that it was obvious that the matter was of vital importance to them. The Court also wrote that the policy applied in the case of the applicants did not weigh the competing public and private interests and did not assess the proportionality of the relevant restriction on prisoners. The policy also placed an inordinately high "exceptionality" burden on the applicants when requesting artificial insemination facilities. The Court therefore held that there had been a violation of Article 8 of the European Convention on Human Rights.

See, also: *Amicus curiae* brief presented by the University of Toronto Faculty of Law, p. 7.

<sup>67</sup> European Court of Human Rights, *Dickson v. the United Kingdom*, Application 44362/04, December 4, 2007, par. 78.

75. In both inter-American and international case law, these attributes of the human person have been labeled as the right to privacy. This right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one's own.<sup>68</sup>

76. Applying the above standards to the instant case, the Commission considers that the decision of the couples –the alleged victims- to have biological children is within the most intimate sphere of their private and family life. Furthermore, the way in which couples arrive at that decision is part of a person's autonomy and identity, both as an individual and as a partner. It is therefore protected under Article 11 of the American Convention.

**b. Considerations regarding the scope of Article 17 of the American Convention**

77. As for the right to raise a family, Article 17(2) of the American Convention provides that 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."<sup>69</sup>

78. The IACHR has written that Article 17 of the American Convention recognizes the central role of the family and family life in the individual's existence and society in general. It is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances.<sup>70</sup> Article 17(1) of the American Convention provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

79. The right to found a family is upheld in a number of international human rights instruments. The Universal Declaration of Human Rights also recognizes the right to protection of the family. Article 16(1) provides that men and women have the right to marry and found a family; Article 16(3) provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The International Covenant on Civil and Political Rights also recognizes the right of men and women of marriageable age to marry and to found a family.<sup>71</sup>

80. Citing the European Court of Human Rights, the IACHR has previously observed that the right to found a family is subject to certain conditions of natural law, although the limitations thereby introduced must not be so restrictive "that the very essence of the right is impaired."<sup>72</sup>

81. The United Nations Human Rights Committee has written that the right to found a family implies, in principle, the possibility to procreate and live together. It observed that when States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.<sup>73</sup>

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<sup>68</sup> IACHR, *X and Y v. Argentina*, Report No. 38/96, Case 10,506, October 15, 1996, par. 91.

<sup>69</sup> IACHR, Report No. 25/04, Petition 12,361, Admissibility, *Ana Victoria Sánchez Villalobos et al.*, Costa Rica, March 11, 2004.

<sup>70</sup> IACHR, *X and Y v. Argentina*, Report No. 38/96, Case 10,506, October 15, 1996, par. 96.

<sup>71</sup> Article 23(2) of the International Covenant on Civil and Political Rights.

<sup>72</sup> IACHR, *María Elena Morales de Sierra v Guatemala*, Report No. 4/01, Case 11,625, January 19, 2001, par. 40; European Court of Human Rights, *Rees v. The United Kingdom*, Ser. A No. 106, October 17, 1986, par. 50.

<sup>73</sup> United Nations, Human Rights Committee, General Comment No. 19, Article 23 (Thirty-ninth session, 1990), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994) par. 5.

**c. The prohibition of *in vitro* fertilization as interference in the exercise of the rights recognized in articles 11 and 17 of the Convention**

82. Based on the observations made in the preceding sections, a combined reading of articles 11 and 17 of the Convention indicates that: i) protecting the right to found a family also means protecting the right to decide to become a biological parent and the option and access to the means by which one's decision can be realized; ii) this decision is part of the most intimate realm of private life and is the sole prerogative of each person and/or couple; and iii) any attempt on the State's part to interfere in these decisions must be assessed on the basis of the criteria established in the American Convention.

83. The present case concerns a ban that the Costa Rican State imposed on the practice of the assisted reproductive technique of *in vitro* fertilization. This technique was available in that country and had been practiced successfully before the Costa Rican Constitutional Chamber declared the practice unconstitutional. As *in vitro* fertilization was the only means through which the alleged victims could become biological parents, the prohibition that denied the alleged victims access to that technique constitutes interference in decisions taken on a particularly important aspect of private and family life. In this case, it also constitutes a restriction on the right to found a family when a couple so decides.

84. As has been established in earlier paragraphs, both the right to private and family life and the right to found a family may be subject to certain limitations. The following are the criteria by which the Commission is called upon to assess whether the restrictions on the rights provided for in articles 11 and 17 of the American Convention are compatible with that instrument or are arbitrary limitations and hence violations of the Convention.

**d. The analysis to determine whether the interference is compatible with the American Convention**

85. Article 30 of the Convention provides that "[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

86. This article, like the specific provisions of the Convention that establish the criteria for evaluating the permissible restrictions on the rights in question, incorporates the notion of proportionality in a broad sense as a synonym for the non-arbitrariness of the State's intervention and its compatibility with the American Convention. Thus, when dealing with a legal concept that is not clearly defined, both the Inter-American Commission and the Inter-American Court have opted to use criteria to assess, in any given case, whether the restriction of a right or the state's interference in the exercise of that right is lawful.

87. Thus, the Inter-American Court has written that the restrictions on the rights recognized in the Convention "must meet certain requirements of form, which depend upon the manner in which they are expressed. They must also meet certain substantive conditions, which depend upon the legitimacy of the ends that such restrictions are designed to accomplish."<sup>74</sup>

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<sup>74</sup> IACHR. Report No. 38/96, X and Y (Admissibility and Merits), Argentina, Case 10,506, October 15, 1996, par. 59; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paragraph 37.

88. In cases involving the right upheld in Article 11 of the Convention, the Commission has written that the State has a special obligation to prevent “arbitrary or abusive interference with this right.”<sup>75</sup> The Commission has held that the notion of “arbitrary interference” refers to elements of injustice, unpredictability and unreasonableness.<sup>76</sup>

89. For its part, the Inter-American Court has held that the right to privacy is not an absolute right and can be restricted by the States, provided interference is not abusive or arbitrary. For this analysis, the Court has applied the following criteria: legality, legitimate aim, suitability, necessity and proportionality.<sup>77</sup>

90. As previously observed, the ban prohibiting access to *in vitro* fertilization treatment constitutes interference in the exercise of the right to private and family life and the right to found a family. This interference has to be evaluated by especially strict criteria, as it affects one of the most protected spheres of private and family life, as it is part of a realm of intimacy that can hardly be related to or affect state interests. This means that the reasons invoked to justify interference in that sphere must be particularly compelling. Accordingly, the Commission will assess whether the prohibition on *in vitro* fertilization is compatible with the American Convention, based on a section-by-section analysis of the following criteria: i) legality; ii) legitimate aim; iii) suitability; iv) existence of less restrictive alternatives; and v) strict proportionality. In each section, the Commission will briefly explain what the analysis consists of for each criterion.

#### **i. Legality**

91. According to the Inter-American Court, when determining whether the restriction of a right recognized in the American Convention is permissible under that instrument, the first step is to examine whether it meets the legality test. This means that the conditions and general circumstances under which a restriction of a given human right is authorized must be clearly established by law.<sup>78</sup> The norm that establishes the restriction must be a law in the formal and substantive sense.<sup>79</sup>

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<sup>75</sup> IACHR, *X and Y v. Argentina*, Report No. 38/96, Case 10,506, October 15, 1996, par. 92.

<sup>76</sup> IACHR, *X and Y v. Argentina*, Report No. 38/96, Case 10,506, October 15, 1996, par. 92.

<sup>77</sup> See: I/A Court H.R., *Escher et al. v. Brazil Case*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 199, párr. 129. “Since the telephone conversations of the alleged victims were private and they had not authorized that their conversations be conveyed to third parties, the interception of the conversations by State agents constituted interference in their private life. Therefore, the Court must examine whether this interference was arbitrary or abusive in the terms of Article 11(2) of the Convention or whether it was compatible with the said treaty. As indicated previously (*supra* para. 116), to conform to the American Convention any interference must comply with the following requirements: (a) it must be established by law; (b) it must have a legitimate purpose, and (c) it must be appropriate, necessary and proportionate. Consequently, the absence of any of these requirements implies that the interference is contrary to the Convention”. See also. I/A Court H.R., *Tristán-Donoso v. Panama Case*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para 76.

<sup>78</sup> Article 30 of the American Convention reads as follows:

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

<sup>79</sup> I/A Court H.R., *Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 6, 2009. Series C No. 200, par. 130; I/A Court H.R., *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, paragraphs 27 and 32; I/A Court H.R., *Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193, par. 77.

92. In the case *sub examine*, the ban on *in vitro* fertilization was the result of a ruling of the Constitutional Chamber which, under Costa Rica's domestic law, has jurisdiction over questions of constitutionality.

93. As Article 2(b) of the Constitutional Jurisdiction Act states, it is the function of the Constitutional Chamber to check the constitutionality of any norms and measures governed by Public Law, and to determine whether the domestic laws comport with international law or community law. It does so when an action is filed challenging the constitutionality of a norm or action and other constitutionality issues.<sup>80</sup> Therefore, the rule requiring that the restriction be provided by law has been satisfied.

**ii. Legitimate aim**

94. By this test, the IACHR evaluates whether the end pursued by the Costa Rican State in banning *in vitro* fertilization can be considered legitimate under the American Convention.

95. The State's main argument for banning *in vitro* fertilization in Costa Rica is predicated on protection of the life of the embryos not implanted in the uterus. For the Constitutional Chamber, "given the conditions under which the technique is currently practiced, any elimination or destruction of embryos –whether intentional or as a result of the practitioner's ineptitude or the inaccuracy of the technique itself- is a violation of the right to life. Thus, the regulation being challenged is unconstitutional [...] as it violates Article 21 of the Constitution and Article 4 of the American Convention on Human Rights."

96. Article 21 of Costa Rica's Constitution provides that "human life is inviolable." The Commission notes that the Constitutional Chamber's purpose was to protect human life based on the scope of that right under its legal system. The Commission therefore deems that the State was pursuing a legitimate end in general terms, which was to safeguard a protected right, namely the right to life. The measures adopted to achieve that end must be compatible with the obligations undertaken in the American Convention and shall not arbitrarily restrict or interfere in the rights recognized therein.<sup>81</sup> The analysis to determine whether the ban on *in vitro* fertilization in order to protect life from the moment of conception, unduly restricted the right to a private and family life and the right to found a family, will be analyzed in the next points of the test.

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<sup>80</sup> The Constitutional Jurisdiction Act, Law No. 7135 of October 11, 1989.

<sup>81</sup> Article 29 of the American Convention on Human Rights.

### iii. Suitability

97. The Commission must now establish the relationship of means to end, between the measure that interferes with or restricts the exercise of a right and the end that the interference or restriction is intended to serve. The determination regarding suitability is not in principle a value judgment; instead, it is an objective assessment that determines whether a logical cause-and-effect relationship exists.

98. In the instant case, given the State's legitimate interest in protecting the right to life, there is a causal relationship between that interest and the imposition of controls on the practice of *in vitro* fertilization. The Commission therefore concludes that the prohibition or ban does meet the suitability test.

### iv. Existence of less restrictive alternatives

99. For this aspect, the Commission must determine whether the State had other less restrictive but equally suitable means to achieve the legitimate end that it pursued. In the instant case the existence of less restrictive means is, in part at least, a function of scientific advances. A review of the practice of *in vitro* fertilization reveals that it is not an isolated practice, but rather one of several treatment procedures whose availability or suitability depends on a variety of factors.

100. In practice, a number of methods of *in vitro* fertilization are available in the countries of the Americas and one can say that there is no prescribed standard regarding the control and use of these methods. From the information available, it appears that the Constitutional Chamber's ruling made Costa Rica the only country in the hemisphere to ban *in vitro* fertilization.

101. Like Costa Rica, many countries of the region protect prenatal life in their laws or constitutions, but they consider that the practice of *in vitro* fertilization is wholly consistent with this basic value. Examples include countries like Argentina, Chile, Colombia, Ecuador, Guatemala, Panama, Peru and Uruguay. These countries have found a way to reconcile the rights that infertile persons and/or couples have to a private and family life and to form a family, with the State's interest in protecting life.

102. Some countries of this hemisphere have enacted laws to regulate the use of *in vitro* fertilization. In most countries it is a matter for the medical field.<sup>82</sup> Article 7 of Peru's General Health Law makes provision for the right to procreate through the use of assisted reproductive techniques, with certain limitations :

Every person shall have the right to infertility treatment and to procreate by means of assisted reproductive techniques, provided the genetic mother and the gestational mother are one and the same person. For treatment using assisted reproductive techniques, prior, written consent of the biological parents shall be required. Fertilization of human eggs for purposes other than procreation shall be prohibited, as shall human cloning.<sup>83</sup>

103. Article 165 of the Tabasco State Civil Code provides that "married couples may plan the number and spacing of their children and use a method of artificial reproduction to beget their

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<sup>82</sup> The Commission notes that the Latin American Network of Assisted Reproduction, formed in 1995, now has 141 centers that perform assisted reproductive techniques in Latin America. Available online at: <http://www.redlara.com/esp/home1.asp>

<sup>83</sup> Article 7 of the General Health Law, Law No. 26842 of July 15, 1997.

own children.”<sup>84</sup> This right may only be exercised by married couples or couples who “live publicly as if they were husband and wife and have no impediment to prevent them from marrying each other.”<sup>85</sup>

104. Canada, for example, has had an Assisted Human Reproduction Act since 2004, with changes and additions introduced in 2007. A number of countries of this hemisphere have considered or are considering a law or statute to regulate *in vitro* fertilization, with the idea of protecting the interests of infertile couples and of the children born by this method.<sup>86</sup>

105. Brazil has resolutions adopted by the Federal Medical Board<sup>87</sup> and legislative bills.<sup>88</sup> Argentina and Mexico proposed legislative measures to permit and regulate *in vitro* fertilization. In Mexico and Brazil, assisted reproductive techniques are offered to married couples or unmarried couples living in a stable relationship.<sup>89</sup>

106. Chile is one of the few countries that have enacted laws on *in vitro* fertilization and embryonic transfer. Its provisions include the following:<sup>90</sup>

*In vitro* fertilization (IVF) and embryonic transfer (ET) are a set of complex procedures, undergoing constant development, that pulls together sophisticated progress in gynecology and obstetrics and make it possible to fertilize an egg in an artificial medium; after the embryo develops for two or three days, it is implanted in the uterine cavity, so that the pregnancy has a chance to evolve into a healthy and living newborn.

These procedures are one more therapeutic modality whose ultimate purpose is to solve the problem faced by childless couples who, because of various afflictions and situations inimical to the natural development of life, are unable to conceive.

For the moment, the solution to these situations, which prevent spontaneous and natural conception, is the IVF and ET developed by science as a means to enable childless couples to beget their own child [...]

107. The law also specifies that all normal, fertilized eggs must be transferred to the mother and prohibits “the freezing of embryos for transfer at a later date, much less for research.”<sup>91</sup>

108. In addition to the situation in the region, in terms of comparative law the IACHR observes that the Constitutional Court of Germany recognizes the right to life from the moment of conception and has expressly held that protection of this right must be weighed against the

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<sup>84</sup> Tabasco State Civil Code, Article 165, paragraph 2, published on April 9, 1997.

<sup>85</sup> Tabasco State Civil Code, Article 165, paragraph 2, published on April 9, 1997.

<sup>86</sup> Amicus Curiae brief presented by the Yale University Law School’s Allard K. Lowenstein International Human Rights Clinic, September 26, 2005, p. 8.

<sup>87</sup> Resolution 1358/92 of the Federal Medical Board, Resolution 340 of the National Council on Health. Also, while Law 11,106, approved in 2005, is a bio-safety law, it also includes references to *in vitro* fertilization.

<sup>88</sup> Inter-American Institute of Human Rights, *Reproducción Asistida, género y derechos humanos en América Latina*, Florencia Luna, p. 49.

<sup>89</sup> Inter-American Institute of Human Rights, *Reproducción Asistida, género y derechos humanos en América Latina*, Florencia Luna, p. 49.

<sup>90</sup> Republic of Chile, Ministry of Health, Republic of Chile, Ministry of Health, Normas Aplicables a la Fertilización in Vitro y la Transferencia Embrionaria [Rules Applicable to *In Vitro* Fertilization and Embryo Transfer], Exempt Decree No. 1072, Santiago, June 28, 1985.

<sup>91</sup> Republic of Chile, Ministry of Health, *Normas Aplicables a la Fertilización in Vitro y la Transferencia Embrionaria* [Rules Applicable to *In Vitro* Fertilization and Embryo Transfer], Exempt Decree No. 1072, Santiago, June 28, 1985.

limitations that such protection places on the rights of others.<sup>92</sup> In effect, German law allows the technique of *in vitro* fertilization while prohibiting the destruction of embryos.<sup>93</sup>

109. The Constitution of Ireland provides constitutional protection to the unborn and *in vitro* fertilization is permitted in the country. While there is no specific regulation on this subject, medical practice in this area is governed by Irish Medical Council Guidelines.<sup>94</sup>

110. The Commission therefore concludes that there were less restrictive ways to accomplish the State's objective and to reconcile the interests at stake, for example, through some other form of regulation that could produce results that more closely resemble the natural process of conception, such as a regulation that diminishes the number of fertilized ovules. When the regulation of *in vitro* fertilization was challenged in Costa Rica's Constitutional Chamber, the latter deemed it insufficient. But the State should have examined other forms of regulation to reconcile all the competing interests. According to the information available to the Commission, the Constitutional Chamber did not consider other alternatives to protect life and at the same time respect the rights of infertile couples.

111. In conclusion, the Commission deems that the outright ban on the practice of *in vitro* fertilization fails to comply with this aspect of the test; hence, the ban constituted arbitrary interference and a restriction incompatible with the American Convention on the exercise of the right to a private and family life and the right to found a family, recognized in articles 11 and 17 of the American Convention, in relation to Article 1(1) thereof.

112. The foregoing conclusion notwithstanding and given the nature of the interests at stake, some observations are in order with regard to the requirement of proportionality *stricto sensu*. For the proportionality test, the sacrifice of the right that the State measure restricted or interfered with, has to be weighed against the benefits gained by accomplishing the end sought.

113. For the victims who suffer from infertility conditions that make any other assisted reproductive technique unviable, the ban on *in vitro* fertilization represented a complete suppression of their personal identity and individual free will to decide to have biological children and control their own reproductive capacity; in other words, the possibility of developing their life plan.

114. While the inability to have biological children comes as a shock and a disappointment when one decides to have a family, it continues to exact its toll throughout every stage of life. The statement that one of the alleged victims made to the Commission captures how the ban on *in vitro* fertilization –which was the only technique by which she could have had biological children- took its toll on various areas of her life –the harm to her health, the intrusion into her privacy, the frustration of her desire to have biological children. In the words of Andrea Bianchi Bruno:<sup>95</sup>

[t]he first thing I felt was that my right to health had been severely, completely and utterly violated. I was left with no other treatment option; I was being unequivocally denied the only treatment option available to me [...]

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<sup>92</sup> For example, Article 42 of the Constitution of Colombia states, *inter alia*: "children born in wedlock or out of wedlock, adopted, procreated naturally or with scientific assistance, have the same rights and duties." See, *in general*, *Amicus curiae* brief presented by the Yale University Law School's Allard K. Lowenstein International Human Rights Clinic, p. 19.

<sup>93</sup> German embryo protection law, issued in 1991.

<sup>94</sup> See, Report of the Commission on Human Reproduction, available online at: <http://www.dohc.ie/publications/pdf/cahr.pdf?direct=1>

<sup>95</sup> Hearing that the Commission held on the case on October 28, 2008.

[t]he second thing I felt was that my privacy had been invaded. When I had to go abroad for treatment, it became obvious [that I was infertile]; at immigration, I even had to give financial reasons for why I was leaving the country: I'm leaving the country because I'm unable to get what I need in Costa Rica. Once abroad, I found myself in a completely alien environment [...] I had the sense that what I was doing, what I was pursuing as a human being, was demonized. As a human being, I yearned for and wanted something to fulfill a part of my being, my partner's being and my life. In Costa Rica, that 'something' came to be regarded as illegal, something unhealthy, something negative in every respect. I couldn't understand it. This ruling forced me to look for help abroad. Thank God, I was able to get the treatment [...]

[t]here is a stage in life when one looks for one's partner; if one is lucky enough to find that someone and go through life together, then one wants to have a family. This is the normal thing that happens when one loves someone else. If one doesn't want a family, that's one's right; but if one does want a family, then it should be so. What about my desire to raise a family, to see the country move forward, to have the option to see the future in my children, to see those children become a source of pride for everyone, to see that family that I want, the love that I am ready to give, happen as it happens for so many people. I can't understand why I and so many others were being denied this with such inconceivable cruelty. We were not just denied this opportunity at life; instead, what we wanted was depicted as something criminal. It's not simply that I don't understand this; I am offended, offended as a human being labeled as someone out to commit a crime, when in fact all I want to commit is an act of love, an act of discovery. This option is called the avenue of hope; for many people, it's the only option there is; medically speaking, there was no other option [...] This makes me wonder about myself; I'm questioning things that I ought not to question. Am I wanted here? Will my children be wanted here? Is my idea of being part of the community and of society so wrong? Isn't it the same feeling that every person has? The only difference was that I was unable to get that by the means that for everyone else is so natural. But there is another way, one that is accepted and available everywhere. Whatever the regulations, the answer can't be a simple "No". That's not right, because that means I'm not entitled to start a family, to have my health problem treated; because that means I don't have a right to privacy, to fulfill my life's plan with my partner, the plan that I make for myself or that he makes with me; the plan that so many others pursue.

115. Summarizing, the Commission considers that the rights at stake were not subject to some moderate restriction. Instead, the restriction was severe, to the point that it obviated any possibility of taking decisions on a matter pertaining to one's private and family life and of exercising the right to found a family according to one's own desires and aspirations.

116. The Commission observes, however, that the decision to create or implant human embryos has a social dimension and cannot be considered solely a private matter. The State may adopt proportional measures to protect human embryos from treatment inconsistent with the American Convention, such as wanton destruction, sale or trafficking.

117. By virtue of all the foregoing considerations, the Commission concludes that the Costa Rican State violated the rights recognized in articles 11(2) and 17(2) of the American Convention, in relation to the general obligations undertaken in articles 1(1) and 2 thereof, to the detriment of Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

## 2. Right to equality before the law and to equal protection of the law (Article 24 of the American Convention)

118. Time and time again, the Inter-American Commission and the Inter-American Court have held that the right of equality and non-discrimination is a fundamental principle of the inter-American human rights system and “entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.”<sup>96</sup>

119. From its earliest case law on the subject, the Inter-American Court underscored the following with respect to the principle of equality:

[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenious character.<sup>97</sup>

120. On the concept of “discrimination,” while the American Convention and the International Covenant on Civil and Political Rights do not contain any definition of this term, the Commission, the Court and the United Nations Human Rights Committee have relied on the definitions contained in the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women to make the case that discrimination is:

[...] any distinction, 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.<sup>98</sup>

121. As for the nexus between the principle of equality and non-discrimination, the Court has written that “[t]he element of equality is difficult to separate from non-discrimination” and that there is

an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility.<sup>99</sup>

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<sup>96</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 173 (5).

<sup>97</sup> I/A Court H.R., Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica. Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, par. 55.

<sup>98</sup> United Nations, Human Rights Committee, General Comment 19, Non-discrimination, 10/11/89, CCPR/C/37, par. 7; I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 92; Fourth Progress Report of the Rapporteurship on Migrant Workers and Their Families, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, Annual Report of the IACHR 2002, March 7, 2003, par. 87; IACHR, *María Elena Morales de Sierra v Guatemala*, Report No. 4/01, Case 11.625, January 19, 2001.

<sup>99</sup> I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 85.

122. The Inter-American Court has repeatedly held that not every difference in treatment can be regarded as a violation of the American Convention.<sup>100</sup> The Court has also distinguished “distinctions” and “discriminations,” reasoning that distinctions are differences that are compatible with the American Convention because they are reasonable and objective, whereas “discriminations” are arbitrary differences that are detrimental to human rights.<sup>101</sup>

123. The IACHR has written that the laws and policies should be examined to ensure that they comport with the principles of effective equality and non-discrimination; in so doing, the analysis should look for potential discriminatory impacts, even when the formulation or wording appears neutral or they apply to everyone without discrimination.<sup>102</sup> Both the United Nations Human Rights Committee and the Committee against Racial Discrimination have recognized the effects of indirect discrimination.<sup>103</sup> The Committee on Economic, Social and Cultural Development, for its part, has defined indirect discrimination as “laws, policies or practices that appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.”<sup>104</sup>

124. The European Court of Human Rights has also developed the concept of indirect discrimination by establishing that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group.<sup>105</sup>

125. Various concepts of the right to equality and non-discrimination have developed. For example, one concept is related to the prohibition of arbitrary difference in treatment –with difference in treatment understood as any distinction, exclusion, restriction or preference<sup>106</sup>–; another concept is related to the obligation to create conditions of real equality for groups that have historically been the victims of discrimination. Another concept tied in with the previous two is the concept of indirect discrimination or the disproportionate impact of laws, measures, policies and so forth, which appear neutral but affect certain groups differently.

126. The multiple variations on the right to equality are reflected in the Inter-American Court’s cases and advisory opinions in the sense that in order to give effect to the right to equality

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<sup>100</sup> I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, par. 211, citing *Proposed amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, par. 56; *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/03 of August 28, 2002. Series A No. 17, par. 46; and *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 89.

<sup>101</sup> I/A Court H.R., *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, par. 211, citing *Juridical Condition and Rights of the Undocumented Migrants*, *supra*, note 68, par. 84.

<sup>102</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, par. 90. See Also I/A Court H.R., *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130, par. 141.

<sup>103</sup> Human Rights Committee, Communication No.993/2001, *Althammer v. Austria*, August 8, 2003, par. 10.2.; Committee for the Elimination of Racial Discrimination, Communication No. 31/2003, *L.R. et al. v. Slovakia*, par. 10.4.

<sup>104</sup> United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights), July 2, 2009.

<sup>105</sup> European Court of Human Rights, *Hoogendijk v. Netherlands*, Application No. 58641/00, 2005.

<sup>106</sup> See: United Nations, Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, par. 7; I/A Court H.R., Corte I.D.H., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 92; Fourth Progress Report of the Rapporteurship on Migrant Workers and Their Families, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, Annual Report IACHR 2002, March 7, 2003, par. 87.

and non-discrimination, States must “abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights,” that States must “combat discriminatory practices at all levels, particularly in public bodies,” and finally that States “must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.”<sup>107</sup>

127. Before analyzing the facts under article 24 of the American Convention, the Commission clarifies that it will not refer to the scope of the Executive Decree No. 24029-S of February 3, 1995. Said decree was not part of the allegations presented before the Commission, and was rendered without effect within the legal system of Costa Rica. The Commission will solely refer to the resulting prohibition of the Constitutional Chamber in Costa Rica of March 15, 2000.

128. In this sense, the Commission is examining a ban prohibiting access to a procedure that could have helped the victims in the case have biological children, which is what they wanted. The Commission deems that this ban had two effects that are within the scope of the right to equality: i) it prevented the victims from overcoming the disadvantage they were up against by availing themselves of the benefit of scientific progress, specifically a medical treatment, and ii) it had a very specific and disproportionate impact on women.

129. As to the first point, while the victims’ infertility cannot be blamed on the Costa Rican State, the assisted reproductive technique of *in vitro* fertilization was the only medical treatment that might have made it possible for them to have biological children. By denying access to this treatment, the State not only intruded into a fundamental side of the victims’ private and family life –as explained throughout this report- but also denied them the possibility of overcoming a disadvantage they had in having biological children, a disadvantage in the form of infertility. And while this disadvantage was not the State’s doing, it is to blame for the fact that the disadvantage persisted even though there were ways to overcome it or, at the least, lessen its effect. Furthermore, the ban on *in vitro* fertilization compounded the difficulties that infertile couples would normally have in trying to have children, since it forced them to look for alternatives abroad, with all the economic, personal, family and emotional consequences this implies.<sup>108</sup>

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<sup>107</sup> I/A Court H.R., *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130, par. 141, and *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, par. 88, cited in I/A Court H.R., *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, par. 170; see also, *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, par. 44; and *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, párr. 54, cited in I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, par. 185.

<sup>108</sup> In the words of one of the victims in the case, Andrea Bianchi Bruno:

For a couple like us, a husband and wife, taking out this amount of money is an economic strain; it has to be done as soon as possible, because once one has the diagnosis, time becomes a factor [...] one doesn’t know how long it will take to put together that amount of money, especially if one has to do it several times. The financial stress is difficult for a couple; how many couples separate because of everyday financial stresses. Then there’s the question of the loss of privacy: all of my employers had to know that I was undergoing this treatment, because I was constantly requesting leave; I had to say I was resigning just before I was scheduled to travel, because no one is going to give me leave with just 24 hours’ notice. They could continue to monitor me for up to 24 hours before I travelled; then I had to travel to Colombia with 24 hours’ advance notice. They monitored me for five days following the procedure; then I went back to Costa Rica, where a pregnancy test was done 10 days later. After that, the pregnancy was monitored. With all this, everyone realized what was happening [...]

One’s privacy is completely violated; everyone knows what’s happening. And even though it is the woman who is infertile, everyone assumes the couple is infertile, too, or has been unable to have children. This was very difficult for my husband as well. He had to be there giving me constant support in things he really doesn’t understand [...] I experienced social and family stress as well, since my family was suddenly divided.

130. The complete prohibition of a means that could allow victims to reach a situation of equality, exacerbates the differences between them and persons and/or fertile couples, and even couples and/or infertile persons, that had access to other means to procreate biologically. It serves to perpetuate a distinction that should only be deemed compatible with the American Convention if it is reasonable and objective. To evaluate distinctions of this kind, the Commission, the Court and other international organizations and courts have applied criteria similar to those used when analyzing restrictions on human rights. Thus, a distinction will be reasonable if it pursues a legitimate aim, is suitable for achieving that aim, there are no other less restrictive alternatives and is proportionate. The Commission has already analyzed these criteria in the section on the right to a private and family life and the right to found a family. Its conclusion was that the ban on *in vitro* fertilization was unnecessary and, therefore, incompatible with the provisions of Article 24 of the Convention.

131. As for the second point, the Commission observes that the technique of *in vitro* fertilization is a procedure that more directly concerns the woman's treatment and body and hence women bear the brunt of the impact of the Costa Rican Constitutional Chamber's decision. The purpose of *in vitro* fertilization is to enable the embryo to become implanted in the woman's uterus; in other words, the procedure is in large part centered on what a woman wants and decides to do with her own body. These are questions that, in principle, are up to the woman, in consultation with her physician, and to the couple as well. It is in this sense that the absolute ban on the procedure will take a heavier toll on women. In effect, while infertility is a condition that can affect both men and women, the use of assisted reproductive technologies places greater demands on the woman's body. Therefore, the prohibition of *in vitro* fertilization has a direct effect on women's free will with regard to their bodies.

132. Article 12(1) of the CEDAW reads as follows:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

133. The CEDAW Committee has written that "the obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals."<sup>109</sup> Hence, the ban on *in vitro* fertilization has very serious consequences for women and denies them access to the ever-evolving benefits of scientific progress in this area.

134. Given the above considerations, the Commission concludes that the Costa Rican State violated the right to equality and the principle of non-discrimination, recognized in articles 24 and 1(1) of the American Convention, in relation to the obligations undertaken in Article 2 of that instrument, to the detriment of Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

## V. CONCLUSIONS

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<sup>109</sup> United Nations. Committee on the Elimination of Discrimination against Women, General Recommendation 24, Women and Health.

135. Based on these considerations, the IACHR concludes that the Costa Rican State violated the rights recognized in articles 11(2), 17(2) and 24 of the American Convention, in relation to the obligations undertaken in articles 1(1) and 2 thereof, to the detriment of Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

## **VI. RECOMMENDATIONS**

136. Based on the analysis of the present case and the conclusions reached therein, the Inter-American Commission on Human Rights recommends to the Costa Rican State that it:

1. Lift the ban on *in vitro* fertilization in the country through the necessary legal procedures.
2. Ensure that any regulation of the practice of *in vitro* fertilization once the ban is lifted be compatible with the state's obligations with respect to the rights recognized in articles 11(2), 17(2) and 24 of the American Convention, as established throughout the present report. Take particular care to make certain that persons and/or couples that need and want the treatment have access to the technique of *in vitro* fertilization so that the treatment can serve its purpose.
3. Make full reparations to the victims in the present case, to include pecuniary and non-pecuniary damages and measures of satisfaction for the harm done.

**PETITION 12.361****EXPLANATION OF DISSENTING OPINION**

1. The Commission has unanimously decided that the State of Costa Rica violated Articles 11.2 (the right to private life) and 17.2 (the right to raise a family) of the American Convention on Human Rights insofar as judgment number 2000-02306 of March 15, 2000, issued by the Constitutional Chamber of Costa Rica declared unconstitutional Presidential Decree 24029-S of February 3, 1995, regulating *in vitro* fertilization (IVF) in Costa Rica. The Commission determined that the Constitutional Chamber's judgment arbitrarily interfered with the privacy rights of these infertile married couples because other means, less restrictive of the victims' rights, can serve to achieve the legitimate aim of safeguarding human embryos, which the State, like other States in the region, seeks to do pursuant to Convention Article 4.

2. A majority of the Commission also determined that the decision violates Article 24 of the Convention, guaranteeing equality and equal protection of the law. Three members of the Commission are unable to find discrimination in the Constitutional Chamber judgment, insofar as it banned access to *in vitro* procedures equally to all individuals and couples in the country.

3. The determination that the right to private life was violated is inconsistent in this case with also holding that the measure is discriminatory. The Commission first agreed that recourse to *in vitro* fertilization procedures falls within the scope of private life as guaranteed by Article 11.2. Like other rights in the Convention, this right inheres in all individuals equally. The victims in this case cannot claim to be a distinct group being treated differently from all others in the State whose private life is arbitrarily restricted as a result of the Constitutional Chamber judgment. If the right to private life extends to a person's decision to have recourse to *in vitro* techniques, as the Commission has decided, then as a right it should extend to those who are married and unmarried, whether fertile or infertile,<sup>110</sup> under appropriate regulations adopted by the State. Indeed, the zone of privacy that surrounds this decision should make it irrelevant and outside the query of the State why an individual or couple seeks such access, provided it is not for an illegal purpose such as trafficking in embryos. The marital or medical status of those persons who seek *in vitro* fertilization is not an issue from the perspective of the State's interest as expressed in this case. The objective of the State, found by the Commission to be a legitimate one, is to protect human embryos, not to regulate who is entitled to reproduce. Thus, from the perspective of the right to private life, the petitioners in this case are situated in exactly the same position as all other adults in Costa Rica who might, for their own reasons, seek access to the IVF procedure.

4. To find that the persons named in the petition were treated unequally, it is necessary to identify a characteristic that they share that sets them apart from the rest of society, causing such a disproportionate burden that the measure must be considered discriminatory. It does not appear that such a characteristic exists with respect to them. As summarized in the Admissibility decision of March 11, 2004, Report No. 25/04, the petitioner alleged that prohibiting the practice of *in vitro* fertilization constitutes unequal treatment because it makes a distinction between medical

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<sup>110</sup> Expert Judith Daar refers to functional and structural infertility, thus expanding the group considered infertile well beyond those described in this petition: "Structural infertility occurs when an individual or couple desires to reproduce but must do so through means other than sexual intercourse because of the social structure in which they self-identify. Single individuals and same-sex couples provide examples of structural infertility. If they wish to reproduce and rear children within their existing social milieu, they lack the necessary structures to achieve biological parenthood on their own. Thus, they must access assistance in order to conceive and carry a child to term." Judith F. Daar, "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms," 23 Berkeley J. Gender L. & Just. 18, 24 (2008).

conditions.<sup>111</sup> In response, it must be noted that States routinely regulate medical treatments and pharmaceuticals, allowing some procedures, restricting or even banning others. It does not make the regulations automatically discriminatory, although some such measures may be found to arbitrarily interfere with the patients' right to private life, as was the case herein.

5. The majority singles out the fact that the named victims are married, functionally-infertile couples who are only able to procreate, if at all, through *in vitro* fertilization. However, neither the fact of marriage nor the fact of infertility distinguishes these persons from other individuals and couples in society whose situations preclude sexual reproduction: medically infertile individuals or couples who are not married, homosexual couples who cannot legally marry or sexually reproduce, and married fertile couples who – for reasons entirely within their private lives – do not have sexual relations. All of these persons may be considered either functionally or structurally infertile and are equally barred from *in vitro* fertilization techniques by the Constitutional Chamber decision. Thus, those named in the petition constitute an under-inclusive group as far as the claimed lack of equal treatment is concerned.

6. The victims may also be an over-inclusive group. Some of them might be ineligible for *in vitro* fertilization under appropriate State regulations, despite having been previously on a waiting list for the procedure. Assisted reproductive technologies such as IVF inject third parties into the reproductive process and this necessarily impacts the scope of privacy and the regulatory powers of the state.

“Whether these third parties are physicians specializing in infertility care, or strangers willing to provide the missing ingredients for the conception and birth of a child, the addition of one or more actors to the traditional two-party procreative process exponentially increases its complexity. The necessity of third parties in assisted conception means that the conception process is no longer purely internal to the couple, but rather is externalized, forcing prospective parents to seek out and procure services essential to their procreation.”<sup>112</sup>

While the State in this instance regulated in order to protect human embryos, nothing in the decision suggests that the State is precluded from also regulating to protect maternal health and life. Indeed, States have been instructed to take measures to improve maternal health and reduce maternal mortality.<sup>113</sup> The risks of pregnancy increase with age and the State may very well set an upper age limit (as well as a lower one to protect girls from abuse). It may enact appropriate regulations on record-keeping and laboratory procedures to ensure that embryos are not mistakenly implanted in the wrong person, and to ensure the quality of medical treatment afforded. With all these possibilities, it is not clear that the victims in this case constitute a cohesive and similarly-situated group.

7. If the majority is correct that the named victims constitute a distinct category denied equal treatment, then it seems implicit that the State can rectify the problem by allowing only that category (medically infertile married couples) access to *in vitro* fertilization. Such a result seems inconsistent with the right to private life enjoyed by all persons in society. Indeed, it would serve to create discrimination rather than cure it.

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<sup>111</sup> The United States Center for Disease Control (CDC) considers a couple infertile if they have not used contraception and have not become pregnant for twelve months or more. See Nat'l Ctr. for Health Statistics, 1995 National Survey of Family Growth (1995). Note that the definition does not imply that there is an identifiable medical cause; infertility is the inability to conceive for whatever known or unknown reason.

<sup>112</sup> Judith F. Daar, “Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms,” 23 Berkeley J. Gender L. & Just. 18, 21 (2008).

<sup>113</sup> See, e.g. ICESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12) paras. 14, 21.

