

Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica

ABSTRACT¹

This case is about a ban on In-Vitro Fertilization treatment in Costa Rica. The ban, motivated by an understanding that human embryos are life and therefore must be protected under the American Convention and Costa Rica’s laws, was challenged by several couples who suffered from infertility problems. The Court, focusing on the rights of infertile couples, found violation of their rights to physical, mental, and moral integrity, and personal liberty, freedom from interference with private life and family, and the right to raise a family. The Court also determined that the right to life begins at conception, and conception occurs when the embryo is implanted in the uterus, not when the egg has been fertilized in vitro.

I. FACTS

A. Chronology of Events

February 3, 1995: The Ministry of Health issues Executive Decree No. 24029-S, which authorizes and regulates in vitro fertilization (“IVF”) in Costa Rica for married couples.² IVF entails a complex series of procedures used to treat fertility or genetic problems and assist with the conception of a child.³ During IVF, mature eggs are collected from the ovaries and fertilized by sperm in a lab, in a vial (in vitro).⁴ Then, the fertilized eggs are implanted in the uterus.⁵

April 7, 1995: Mr. Hermes Navarro del Valle challenges the constitu-

1. Christopher Peterson, Author; Nathaniel Reinhardt, Editor; Kathryn Benson, Chief IACHR Editor; Cesare Romano, Faculty Advisor.

2. Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 68 (Nov. 28, 2012).

3. *Id.* ¶ 63.

4. *Id.* ¶ 64.

5. *Id.*

tionality of the law authorizing IVF, claiming the procedure causes a higher than normal rate of malformations, and is a violation of the right to life, as not all embryos resulting from IVF are eventually implanted in the uterus.⁶

October 14, 1995 – March 15, 2000: Fifteen babies are born in the State as a result of IVF procedures provided by the *Instituto Costarricense de Infertilidad*, a private entity.⁷

March 15, 2000: The Constitutional Chamber declares IVF unconstitutional in Judgment No. 2000-02306, holding that since a human embryo becomes a person when sperm and egg meet, the IVF procedure interferes with the “life and dignity of a human being.”⁸ More specifically, the Constitutional Chamber holds that American Convention Article 4(1) (Right to Life) protections begin at conception, and that conception occurs when the egg is fertilized.⁹

2010: The State Legislative Assembly proposes a bill to regulate the practice of IVF.¹⁰ This law would require “all eggs fertilized during a treatment cycle [to be] transferred to the woman who produced them,” that the embryos not be subjected to “reduction or destruction,” and that any violation shall be punished by six years imprisonment.¹¹ The Legislative Assembly does not pass the bill.¹²

1. Events pertaining to Ms. Grettel Artavia Murillo and Mr. Miguel Gerardo Mejías Carballo

1985: A work-related accident renders Mr. Miguel Mejías Carballo paraplegic.¹³

December 13, 1993: Ms. Grettel Artavia Murillo marries Mr. Mejías Carballo.¹⁴

6. *Id.* ¶ 71.

7. *Id.* ¶ 70, n.78.

8. *Id.* ¶¶ 70, 72.

9. *Id.* ¶ 73.

10. *Id.* ¶ 84.

11. *Id.*

12. *Id.*

13. *Id.* ¶ 85.

14. *Id.*

February 2000: After eight unsuccessful attempts at artificial inseminations, funded by mortgaging their home and selling off some of their belongings, a family doctor informs Ms. Artavia Murillo and Mr. Mejías Carballo that the IVF procedure is their only chance to have children.¹⁵

March 10, 2001: Unable to have the recently banned IVF procedure in Costa Rica and unable to afford to travel to have the procedure provided in another country, the couple divorce, citing inability to have children as a reason for their separation after eight years of marriage.¹⁶

2. Events pertaining to Ms. Ileana Henchoz Bolaños and Mr. Miguel Antonio Yamuni Zeledón

1994 – 1999: Ms. Ileana Henchoz Bolaños undergoes nineteen attempts at artificial insemination.¹⁷

1999: Ms. Henchoz Bolaños has a fibroid removed from her uterus.¹⁸

January 7, 2000: Ms. Henchoz Bolaños' doctor prescribes ovarian stimulation medication.¹⁹

February 15, 2000: Ms. Henchoz Bolaños undergoes two hormone tests and an ultrasound.²⁰

April 18 – 28, 2000: Unable to have the IVF procedure in Costa Rica, Ms. Henchoz Bolaños and Mr. Yamuni Zeledón travel to Spain for an IVF procedure, which costs the couple approximately \$2,607.38.²¹

April 23: A specialist conducts a procedure to implant two embryos into Ms. Henchoz Bolaños at the *Instituto Valenciano de Infertilidad* in Valencia, Spain.²²

15. *Id.* ¶¶ 86–87.

16. *Id.* ¶¶ 87–88.

17. *Id.* ¶ 90.

18. *Id.* ¶ 91.

19. *Id.*

20. *Id.*

21. *Id.* ¶ 93. This amounts to approximately 463,000 pesetas. *Id.*

22. *Id.* ¶¶ 93–94.

May 2 – 16, 2000: Ms. Henchoz Bolaños undergoes seven hormonal tests to monitor her pregnancy.²³ After the last test, her doctor concludes that the biochemical pregnancy has disappeared.²⁴

November 25 – December 3, 2000: Ms. Henchoz Bolaños and Mr. Michael Antonio Yamuni Zeledón travel to Colombia to have an IVF procedure.²⁵

December 5 – 27, 2000: Ms. Henchoz Bolaños undergoes another five hormone tests and two ultrasounds to monitor her pregnancy.²⁶

April 27, 2001: A cytogenetic report reveals that the IVF procedure provided in Colombia was unsuccessful.²⁷

3. Events pertaining to Ms. Julieta González Ledezma and Mr. Oriéster Rojas Carranza

July 20, 1996: Ms. Julieta González Ledezma marries Mr. Oriéster Rojas Carranza.²⁸

1997 – 1999: Mr. Rojas Carranza undergoes a surgery and is the subject of various medical tests in an attempt by the State's Social Security to identify the cause of the couple's infertility.²⁹

February 6 – March 12, 2001: Ms. González Ledezma begins preparations for an IVF procedure, including beginning the ovulation induction cycle, and plans to travel to Panama to have the IVF procedure provided.³⁰

March 13 – 20, 2001: Ms. González Ledezma and Mr. Rojas Carranza travel to Panama, where Ms. González Ledezma undergoes an IVF procedure.³¹

23. *Id.* ¶ 94.

24. *Id.*

25. *Id.* ¶ 95.

26. *Id.*

27. *Id.*

28. *Id.* ¶ 96.

29. *Id.*

30. *Id.* ¶ 97.

31. *Id.* ¶ 98.

January 23, 2002: After hormone tests reveal the attempt was unsuccessful, Mr. Rojas Carranza and Ms. González Ledezma begin adoption proceedings.³²

4. Events pertaining to Mr. Viktor Hugo Sanabria León and Ms. Claudia Carro Maklouf

September 21, 1998: Doctors diagnose Mr. Viktor Hugo Sanabria León with conditions of male infertility – hypomobility sperm and elevated seminal viscosity – that make natural pregnancy unlikely.³³

October 1998: Ms. Claudia Carro Maklouf undergoes surgery to repair tubal damage.³⁴

December 1999: Ms. Carro Maklouf has an unsuccessful IVF procedure performed in Costa Rica.³⁵

October 2001: Ms. Carro Maklouf and Mr. Sanabria León travel to Spain to have IVF procedure provided at the *Instituto Valenciano de Infertilidad* in Madrid.³⁶

October 22, 2001: The *Instituto Valenciano de Infertilidad* in Madrid issues the couple an invoice for the procedure amounting to approximately \$2,210.08.³⁷

December 10, 2002: After the IVF procedure proves unsuccessful, the couple attempts to adopt a child, subsequently resulting in the temporary guardianship of a girl.³⁸

January 27, 2005: The couple divorce.³⁹ After the divorce, Mr. Sanabria León and Ms. Carro Maklouf individually adopt a boy and a girl,

32. *Id.* ¶¶ 99–100.

33. *Id.* ¶ 101.

34. *Id.* ¶ 102.

35. *Id.*

36. *Id.* ¶¶ 103–104.

37. *Id.* ¶ 104. This amounts to approximately 413,000 pesetas. *Id.*

38. *Id.* ¶ 105.

39. *Id.*

respectively.⁴⁰

5. Events pertaining to Mr. Giovanni Antonio Vega Cordero and Ms. Joaquinita Arroyo Fonseca

December 8, 1989: Ms. Joaquinita Arroyo Fonseca marries Mr. Giovanni Vega Cordero.⁴¹

October 1990: Ms. Arroyo Fonseca and Mr. Vega Cordero undergo several tests to pinpoint the cause of their infertility.⁴² Ms. Arroyo Fonseca undergoes twelve artificial inseminations.⁴³

October 25, 2000: After finding a new doctor who performs several additional artificial inseminations, Ms. Arroyo Fonseca undergoes a laparoscopy.⁴⁴

October 13, 2001: Ms. Arroyo Fonseca's doctor concludes that the cause of infertility cannot be identified and recommends that Ms. Arroyo Fonseca go to the Barraquer Clinic in Columbia to have the IVF procedure.⁴⁵

October 2001 to March 2002: The couple twice makes plans to travel to Colombia to have the IVF procedure, but they never follow through.⁴⁶

2003: The couple adopts a child.⁴⁷

2006 – 2007: Ms. Arroyo Fonseca conceives and gives birth to a daughter.⁴⁸

6. Events pertaining to Ms. Karen Espinoza Vindas and Mr. Héctor

40. *Id.*

41. *Id.* ¶ 106.

42. *Id.* ¶ 107.

43. *Id.*

44. *Id.* ¶ 109.

45. *Id.*

46. *Id.* ¶ 110.

47. *Id.* ¶ 111.

48. *Id.*

Jiménez Acuña

February 10, 2001: Ms. Karen Espinoza Vindas marries Mr. Héctor Jiménez Acuña.⁴⁹

July 23, 2002: Ms. Espinoza Vindas has a laparoscopy to investigate her endometriosis, seven-year-long infertility, and tubal impermeability.⁵⁰

August 2002 – 2004: Ms. Espinoza Vindas' doctor examines her several times and runs several tests.⁵¹

2004: Ms. Espinoza Vindas undergoes three artificial inseminations.⁵² The results from a second laparoscopy lead her doctor to recommend IVF.⁵³

2006: The preparation phase of IVF, which is legal, is provided in Costa Rica with the expectation that the couple will travel to Colombia to undergo the rest of the procedure.⁵⁴ A lack of ovarian response to the first phase, however, renders the trip pointless.⁵⁵

October 26, 2007: The couple has a daughter by natural pregnancy.⁵⁶

7. Events pertaining to Mr. Carlos Eduardo de Jesús Vargas Solórzano and Ms. María del Socorro Calderón Porras

1989: Ms. María del Socorro Calderón Porras begins living with Mr. Carlos Eduardo de Jesús Vargas Solórzano.⁵⁷

1994: Ms. Calderón Porras' doctor informs her that a doctor had previously cut her Fallopian tubes.⁵⁸ The doctor additionally finds ovarian

49. *Id.* ¶ 112.

50. *Id.*

51. *Id.* ¶ 113.

52. *Id.*

53. *Id.*

54. *Id.* ¶ 114.

55. *Id.* ¶ 115.

56. *Id.*

57. *Id.* ¶ 116.

58. *Id.* ¶ 117.

cysts, which are surgically removed.⁵⁹

In addition, Mr. Vargas Solórzano's doctor diagnoses him with varicocele and concludes that the only way for the couple to have children would be by way of IVF.⁶⁰

1995: Ms. Calderón Porras marries Mr. Vargas Solórzano.⁶¹

Sometime after March 15, 2000: Unable to afford to travel to another country to have the IVF procedure completed, the couple give up on pregnancy and initiate adoption procedures.⁶² They are not awarded custody of a child.⁶³

8. Events pertaining to Mr. Enrique Acuña Cartín and Ms. Ana Cristina Castillo León

September 27, 1988: Ms. Ana Cristina Castillo León marries Mr. Enrique Acuña Cartín.⁶⁴

1997 – 2000: Mr. Acuña Cartín's doctor diagnoses him with varicocele and a low spermatozoid count.⁶⁵ Ms. Castillo León's doctor diagnoses her with endometriosis, retroverted uterus, endometriosis in the Fallopian tubes, and third-degree prolapse of the uterus.⁶⁶

March 2000: After eleven unsuccessful attempts at artificial insemination, a doctor suggests the couple consider IVF.⁶⁷

March 21, 2007: Ms. Castillo León and Mr. Acuña Cartín divorce.⁶⁸

9. Events pertaining to Ms. Andrea Bianchi Bruna and Mr. Germán

59. *Id.*

60. *Id.*

61. *Id.* ¶ 116.

62. *Id.* ¶ 118.

63. *Id.*

64. *Id.* ¶ 119.

65. *Id.*

66. *Id.* ¶ 120.

67. *Id.* ¶ 121.

68. *Id.* ¶ 122.

Alberto Moreno Valencia

June 15, 1996: Ms. Andrea Bianchi Bruna marries Mr. Germán Moreno Valencia.⁶⁹

1999: Ms. Bianchi Bruna has a laparoscopy, which reveals that her Fallopian tubes are blocked.⁷⁰

2000: Ms. Bianchi Bruna undergoes three unsuccessful attempts at artificial insemination.⁷¹

June 2001: The couple travels to Colombia for an IVF treatment, which does not result in a pregnancy.⁷²

December 2001: The couple travels to Colombia once again for an IVF treatment, which successfully leads to pregnancy.⁷³

July 11, 2002: Ms. Bianchi Bruna gives birth to twins.⁷⁴

10. Events pertaining to the challenge to the ban posed by Ms. Ileana Henchoz Bolaños and Ms. Karen Espinoza Vindas

May 30, 2008: Ms. Henchoz Bolaños files an action challenging the constitutionality of the Constitutional Chamber's ban on IVF, which is rejected.⁷⁵

October 14, 2008: The Superior Court of Accounts for Contentious Administrative and Civil Proceedings ("CACP") holds that IVF is not prohibited in the State because the problems with the procedure raised by the Constitutional Chamber no longer exist thanks to evolving medical technology.⁷⁶ The CACP orders the State's Social Security Institute to investigate whether Ms. Henchoz Bolaños can undergo IVF in a way that avoids the Constitutional Chamber's concerns for the embryos,

69. *Id.* ¶ 123.

70. *Id.* ¶ 124.

71. *Id.* ¶ 125.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* ¶ 78.

76. *Id.* ¶ 79.

such as a manner in which only one ovule is fertilized per reproductive cycle.⁷⁷

May 7, 2009: The First Chamber of the Supreme Court of Justice annuls the CACP ruling, holding that Ms. Henchoz Bolaños, at forty-eight years old, had lost her reproductive capacity.⁷⁸

January 6, 2005: In response to a complaint filed by Ms. Espinoza Vindas, the Ombudsman office issues note No. 00117-2005-DHR, recommending that a special program be created for those in need of IVF.⁷⁹

B. Other Relevant Facts

1978: The first baby conceived by way of IVF is born in England.⁸⁰

1984: The first baby conceived by way of IVF is born in Latin America in Argentina.⁸¹

2008 – 2009: 1.6 million worldwide IVF procedures result in the birth of 400,000 babies.⁸²

The Inter-American Court of Human Rights defines infertility as “the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.”⁸³ The Court defines IVF as “a procedure in which a woman’s eggs are removed from her ovaries, and are then fertilized with spermatozooids in a laboratory procedure; once this is completed, the fertilized egg (embryo) is re-implanted in the woman’s uterus.”⁸⁴

II. PROCEDURAL HISTORY

77. *Id.* ¶ 80.

78. *Id.* ¶ 81.

79. *Id.* ¶ 82.

80. *Id.* ¶ 66.

81. *Id.*

82. *Id.*

83. *Id.* ¶ 62.

84. *Id.* ¶ 64.

A. Before the Commission

January 19, 2001: Mr. Gerardo Trejos Salas files a petition with the Inter-American Commission on Human Rights (“the Commission”) against the State.⁸⁵ The petition alleges that the State has harmed the victims by denying them access to IVF.⁸⁶

March 11, 2004: The Commission approves Admissibility Report No. 25/04.⁸⁷

July 14, 2010: The Commission approves Report on the Merits No. 85/10, finding violations of Article 11(2) (Prohibition of Arbitrary Interference with Private Life, Family, Home, Correspondence, and of Unlawful Attacks on Honor and Dignity), Article 17(2) (Right to Marry and to Raise a Family), and Article 24 (Right to Equal Protection).⁸⁸ Specifically, the prohibition by the State’s Supreme Court constitutes an interference with a person’s private right to life and right to form a family.⁸⁹ Further, the Commission alleges the ban has a disproportionate impact on women.⁹⁰ The Commission recommends the following: the State lift the ban on *in vitro* fertilization, ensure that the State’s regulation of *in vitro* fertilization is in compliance with the previously alleged articles after lifting the ban, and make full reparations to the victims in the instant case.⁹¹

B. Before the Court

July 29, 2011: The Commission submits the case to the Court after the State failed to adopt its recommendations.⁹²

85. Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Report on Merits, Report No. 85/10, Inter-Am. Comm’n H.R., Case No. 12.361, ¶ 1 (July 14, 2010).

86. *Id.*; Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, ¶¶ 2–3.

87. Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Admissibility Report, Report No. 25/04, Inter-Am. Comm’n H.R., Case No. 12.361, ¶ 75 (July 29, 2011).

88. Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, ¶ 1.

89. *Id.* ¶ 2.

90. *Id.*

91. *Id.*

92. Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, ¶ 1.

1. Violations Alleged by Commission⁹³

Article 11(2) (Prohibition of Arbitrary Interference with Private Life, Family, Home, Correspondence, and of Unlawful Attacks on Honor and Dignity)

Article 17(2) (Right to Marry and to Raise a Family)

Article 24 (Right to Equal Protection)

all in relation to:

Article 1(1) (Obligation to Respect Rights)

Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.

2. Violations Alleged by Representatives of the Victims⁹⁴

Same Violations Alleged by Commission, plus:

Article 4(1) (Prohibition of Arbitrary Deprivation of Life)

Article 5(1) (Right to Physical, Mental, and Moral Integrity)

Article 7 (Right to Personal Liberty)

September 5 – 6, 2012: The Court holds a public hearing, during which two victims and four experts give testimony, final arguments are made, and documents are requested.⁹⁵ The Court receives forty-six amicus curiae briefs.⁹⁶

93. *Id.* ¶ 3.

94. *Id.* ¶¶ 4–7. Boris Molina Acevedo served as representative of Ms. Henchoz Bolaños, Ms. Arroyo Fonseca, Ms. González Ledezma, Ms. Espinoza Vindas, Mr. Acuña Cartín, Mr. Vargas Solórzano, Mr. Yamuni Zeledón, Mr. Vega Cordero, Mr. Rojas Carranza, Mr. Jiménez Acuña, Mr. Sanabria León, and Ms. Calderón Porras. *Id.* at n.5. Mr. Gerardo Trejos Salas represented Mr. Moreno Valencia, Mr. Mejías Carballo, Ms. Artavia Murillo, Ms. Castillo León, Ms. Carro Maklouf, and Ms. Bianchi Bruna. *Id.* n.6.

95. *Id.* ¶ 12.

96. The Court received the following amicus curiae briefs: (1) Mónica Arango Olaya, Regional Director for Latin America and the Caribbean of the Center for Reproductive Rights, and María Alejandra Cárdenas Cerón, the Center's Legal Adviser; (2) Marcela Leandro Ulloa of the Group in Favor of IVF; (3) Filomena Gallo, Nicolò Paoletti and Claudia Sartori, representatives of the Association *Luca Coscioni per la libertà di ricerca scientifica y del Partito Radicale Non-violento Transnazionale e Transpartito*; (4) Natalia Lopez Moratalla, President of the Spanish Association of Bioethics and Medical Ethics; (5) Lilian Sepúlveda, Mónica Arango, Rebecca J. Cook and Bernard M. Dickens; (6) Equal Rights Trust and the Human Rights Clinic of the University of Texas Law School; (7) International Human Rights Clinic of Santa Clara University

May 8, 2012: Since Mr. Gerardo Trejos Salas passed away, Mr. Huberth May Cantillano takes over the representation of the victims.⁹⁷

Law School; (8) Viviana Bohórquez Monsalve, Beatriz Galli, Alma Beltrán y Puga, Álvaro Herero, Gastón Chillier, Lourdes Bascary and Agustina Ramón Michel; (9) Ricardo Tapia, Rodolfo Vásquez and Pedro Morales; (10) Alejandro Leal Esquivel, Coordinator of the Department of Genetics and Biotechnology of the School of Biology of the Universidad de Costa Rica; (11) Rita Gabriela Chaves Casanova, Member of the Legislative Assembly of Costa Rica; (12) Alexandra Loría Beeche; (13) Claudio Grossman, Dean of the American University Washington College of Law, and Macarena Sáez Torres, Director of the Impact Litigation Project of the American University Washington College of Law; (14) John O'Brien, President of Catholics for Choice and Sara Morello, Executive Vice President; (15) Carlos Polo Samaniego, Director of the Latin American Office of the Population Research Institute; (16) Reynaldo Bustamante Alarcón, President of the Instituto Solidaridad y Derechos Humanos; (17) Hernán Collado Martínez; (18) Carmen Muñoz Quesada, Rita Maxera Herrera, Cristian Gómez, Seidy Salas and Ivania Solano; (19) Enrique Pedro Haba, Professor at the Universidad de Costa Rica; (20) Organización de Litigio Estratégico de Derechos Humanos (Litiga OLE); (21) Susie Talbot, Lawyer of the Center for the Legal Protection of Human Rights (INTERIGHTS) and Helen Duffy, Head Counsel of INTERIGHTS; (22) Andrea Acosta Gamboa; (23) Andrea Parra, Natalia Acevedo Guerrero, Matías González Gil and Sebastián Rodríguez Alarcón; (24) Leah Hoctor, Legal Adviser of the International Commission of Jurists; (25) Margarita Salas Guzmán, President, and Larissa Arroyo Navarrete, Lawyer, of the *Colectiva por el Derecho a Decidir*; (26) Fabio Varela, Marcelo Ernesto Ferreyra, Rosa Posa, Bruna Andrade Irineu and Mario Pecheny; (27) María del Pilar Vásquez Calva, Coordinator of *Enlace Gubernamental Vida y Familia A.C., Mexico*; (28) Latin American Network for Assisted Reproduction and Ian Cooke, Emeritus Professor of the University of Sheffield; (29) Priscilla Smith, Senior Fellow of the Program for the Study of Reproductive Justice of the Information Society Project (ISP) of the University of Yale and Genevieve E. Scott, Visiting Professor of the ISP; (30) Latin American Network for Assisted Reproduction and Santiago Munné, President of Reprogenetics; (31) *Centro de Estudios of Derecho, Justicia y Sociedad (DEJUSTICIA)*; (32) José Tomás Guevara Calderón; (33) Carlos Santamaria Quesada, Head of the Molecular Diagnosis Division of the Clinical Laboratory of the Hospital Nacional de Niños; (34) Cesare P.R. Romano, Law Professor and Joseph W. Ford Fellow at Loyola Law School, Los Angeles; (35) the Ombudsman's Office; (36) Hernán Gullco and Martín Hevia, professors of the Law School of the Universidad Torcuato Di Tella; (37) Alejandra Huerta Zepeda, professor of the Biomedical Research Institute (IIB) of the Universidad Nacional Autónoma de México, and José María Soberanes Diez, professor of the Universidad Panamericana, Mexico; (38) *Asociación de Médicos por los Derechos Humanos (AMEDEH)*; (39) Latin American Federation of Obstetrics and Gynecology; (40) Carlo Casini, Antonio G. Spagnolo, Marina Casini, Joseph Meaney, Nikolas T. Nikas and Rafael Santa Maria D'Angelo; (41) Rafael Nieto Navia, Jane Adolphe, Richard Stitch and Ligia M. de Jesus; (42) Hugo Martín Calienes Bedoya, Patricia Campos Olázabal, Rosa de Jesús Sánchez Barragán, Sergio Castro Guerrero and Antero Enrique Yacarini Martínez; (43) Julian Domingo Zarzosa; (44) Kharla Zúñiga Vallejos of the Berit Family Institute of Lima; (45) Guadalupe Valdez Santos, President of the *Asociación Civil Promujer y Derechos Humanos*; and (46) Piero A. Tozzi, Stefano Gennarini, William L. Saunders and Álvaro Paúl. *Id.* ¶ 13. Additionally, the Court receives amicus briefs from Hany Fahmy of the Human Rights Center of the University for Peace and Olga Cristina Redondo Alvarado, a psychoanalyst between September 26 and 27, 2012. *Id.* ¶ 14. However, as the deadline for submissions was September 21, 2012, the Court declines to consider these briefs. *Id.*

97. *Id.* ¶ 9.

III. MERITS

A. *Composition of the Court*⁹⁸

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

Pablo Saavedra Alessandri, Secretary
Emilia Segares Rodríguez, Deputy Secretary

B. *Decision on the Merits*

November 28, 2012: The Court issues its Judgment on Preliminary Objections, Merits, Reparations, and Costs.⁹⁹

The Court unanimously rejects the State's preliminary objections,¹⁰⁰ because:

Regarding the first preliminary objection, the State argued that the presumed victims did not exhaust domestic remedies, including amparo.¹⁰¹ The Court responded with two lines of analysis, one procedural and the other fact-based.¹⁰² In terms of procedure, the State raised the failure to exhaust domestic remedies at an improper stage in the proceedings.¹⁰³ The State should have made these arguments in front of the Commission during the admissibility proceedings.¹⁰⁴ Instead, it waited until four years after the admissibility proceedings to file its brief on the availabil-

98. The Court's Vice President, Judge Manuel E. Ventura Robles, recused himself in accordance with Article 19(1) of the Court's Rules of Procedure because he is a Costa Rican national, and thus, he did not participate in the deliberation or signature of the Judgment. *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs*, n.1.

99. *Id.* ¶ 317.

100. *Id.* ¶ 28.

101. *Id.* ¶¶ 18–19.

102. *Id.*

103. *Id.* ¶ 23.

104. *Id.*

ity of domestic remedies.¹⁰⁵ Turning to the facts, the Court rejected the State's argument that the Constitutional Chamber's decision was merely a restriction on the manner of providing IVF by pointing out that evaluating the decision necessarily involved a thorough analysis of the merits, which would not occur in a preliminary objection hearing.¹⁰⁶ Finally, the Court found the State's domestic remedies to be insufficient because the State had a concentrated constitutional review with the same body that issued the IVF decision (the Constitutional Chamber) in charge of all applications for amparo.¹⁰⁷

Regarding the second preliminary objection, the State argued that Ms. Espinoza Vindas' petition exceeded the six-month filing period under Article 46(1)(b).¹⁰⁸ Since Ms. Espinoza Vindas found out about her infertility in July 2002 but did not file until October 2004, the State argued for the couple's exclusion from the petition.¹⁰⁹ Further, the State pointed out that it was only because the Commission took three years to finalize its admissibility report that the petitioners could even be considered as being added to the petition.¹¹⁰ The Court, holding that a strict rule is not appropriate in the context of fertility techniques that often take years for couples to decide to use, upheld the Commission's finding on admissibility because (1) the Constitutional Chamber's decision was still in force; (2) no rule bound the victims to be aware of their infertility at the time of filing; and (3) the petition was lodged within a year of the petitioners' learning that the Constitutional Chamber's decision would prohibit IVF.¹¹¹

Regarding the third preliminary objection, the State argued that the representatives' briefs and pleadings contained allegations that the State had improperly exposed the presumed victims to the media and that these allegations were not included in the facts submitted to the Commission.¹¹² The Court rejected this argument, holding that preliminary objections pertain only to matters that are reviewable without en-

105. *Id.* ¶ 24.

106. *Id.* ¶ 25.

107. *Id.* ¶ 27.

108. *Id.* ¶ 29.

109. *Id.*

110. *Id.*

111. *Id.* ¶¶ 35–36.

112. *Id.* ¶ 38.

tering into an analysis of the merits of the case.¹¹³

The Court found five votes to one that Costa Rica had violated:

Article 5(1) (Right to Physical, Mental, and Moral Integrity) and Article 7 (Right to Personal Liberty), Article 11(2) (Prohibition of Arbitrary Interference with Private Life, Family, Home, Correspondence, and of Unlawful Attacks on Honor and Dignity) and Article 17(2) (Right to Marry and to Raise Family) in relation to Article 1(1) of the Convention, to the detriment of Ms. Artavia Murillo, Mr. Mejías Carballo, Ms. Bianchi Bruna, Mr. Moreno Valencia, Ms. Castillo León, Mr. Acuña Cartín, Ms. Henchoz Bolaños, Mr. Yamuni Zeledón, Ms. Carro Maklouf, Mr. Sanabria León, Ms. Espinoza Vindas, Mr. Jiménez Acuña, Ms. Calderón Porrás, Ms. Arroyo Fonseca, Mr. Vega Cordero, Mr. Vargas Solórzano, Ms. González Ledezma, and Mr. Rojas Carranza,¹¹⁴ because:

The national ban on IVF forced the couples to reveal intimate details about their private lives.¹¹⁵ Unable to quietly have the procedure performed in Costa Rica, each couple had to organize a trip to another country, which often required procuring money for the trip.¹¹⁶ Stripped of their privacy, the couples experienced depression, stress, and acute frustration.¹¹⁷ From this the court concluded that the ban caused unacceptable harm to the “psychological integrity” of the individuals.¹¹⁸ For those victims who could only have children via IVF, the ban denied them access to reproductive freedom.¹¹⁹ In addition, this restriction on reproductive freedom disproportionately affected women, the disabled, and the poor.¹²⁰ The disabled were indirectly discriminated against because the court adopted the World Health Organization’s definition of infertility as a disease.¹²¹ Women were indirectly discriminated against because infertility, whatever the cause, is often seen as a woman’s prob-

113. *Id.* ¶ 40.

114. *Id.* ¶ 317.

115. *Id.* ¶ 279.

116. *Id.* ¶¶ 282–83.

117. *Id.*

118. *Id.* ¶ 282.

119. *Id.* ¶ 277.

120. *Id.* ¶¶ 288–304.

121. *Id.* ¶ 288.

lem, as the wife is considered the “creator of the family.”¹²² The poor were indirectly discriminated against because they could not afford to travel abroad for the treatment, which in itself made the victims feel useless and dejected.¹²³

The Court concluded that the ban on IVF violated the rights of individuals only capable of having children via IVF.¹²⁴ Specifically, the ban infringed upon the right to personal integrity, to personal liberty, to private life, to intimacy, to reproductive autonomy, to access to reproductive health services, and to found a family.¹²⁵ These infringements of rights worked in a way that disproportionately affected victims in terms of disability, gender, and financial situation.¹²⁶

The Court weighed these violated rights against IVF’s impact on prenatal life, which it found to be “very slight.”¹²⁷ The Court pointed out that the risk to embryonic life is present in both IVF and natural pregnancies.¹²⁸ Furthermore, a review of the scientific data led the Court to hold that for Article 4 (Right to Life) purposes, “conception” begins when the embryo becomes implanted in the uterus.¹²⁹ The Court held that the rule is subject to exceptions and should reflect the “gradual and incremental” nature of human development.¹³⁰

The Court concluded that the victims violated rights outweighed the impact on prenatal life in a way that was discriminatory.¹³¹ For these reasons, the State violated the victims’ rights under Articles 5(1) (Right to Physical, Mental, and Moral Integrity), 7 (Right to Personal Liberty), 11(2) (Prohibition of Arbitrary Interference with Private Life, Family, Home, Correspondence, and of Unlawful Attacks on Honor and Dignity), and 17(2) (Right to Marry and to Raise Family).¹³²

122. *Id.* ¶ 295.

123. *Id.* ¶ 304.

124. *Id.* ¶ 314.

125. *Id.*

126. *Id.*

127. *Id.* ¶ 315.

128. *Id.*

129. *Id.* ¶ 264.

130. *Id.*

131. *Id.* ¶ 316.

132. *Id.* “Operative Paragraphs” ¶ 1.

C. Dissenting and Concurring Opinions

1. Concurring Opinion of Judge Diego García-Sayán

In a separate opinion, Judge Garcia-Sayán expressed particular concern with the implementation of the third measure of reparation, under which the State's social security program must gradually include the IVF procedure.¹³³ Although introducing the procedure into the State's existing framework of provided services is completely a local matter, the procedure should be made affordable.¹³⁴ The poor should not be disproportionately burdened with health care costs.¹³⁵ Thus, the State should continue the gradual process of guaranteeing nondiscriminatory access to infertility treatments.¹³⁶

2. Dissenting Opinion of Judge Eduardo Vio Grossi

Judge Vio Grossi argued that the question before the Court was not whether the victims had been denied their rights but, instead, whether the Constitutional Convention's decision was internationally lawful.¹³⁷ This determination, in turn, hinges on the State's decision in relation to Article 4(1) (Prohibition of Arbitrary Deprivation of Life).¹³⁸ As that provision grants the right to respected life to every person "in general, from the moment of conception," the definition of "conception" determines when the State must protect life.¹³⁹ This creates a clear rule because "in general" indicates the right should be respected universally, rather than contemplating any exception to it.¹⁴⁰

The trigger to this rule should be the moment the spermatozoid fertilizes the egg.¹⁴¹ The warrant for this is found in the fact that the *Real Academia Española* Spanish dictionary current at the time of the draft-

133. Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Concurring Opinion of Judge Diego García-Sayán, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 11(c) (Nov. 28, 2012).

134. *Id.* ¶¶ 11(c)(1), (3).

135. *Id.* ¶ 11(c)(1).

136. *Id.*

137. Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Dissenting Opinion of Judge Eduardo Vio Grossi, Inter-Am. Ct. H.R. (ser. C) No. 257, at 3 (Nov. 28, 2012).

138. *Id.* at 4.

139. *Id.* at 8.

140. *Id.*

141. *Id.* at 9.

ing of Article 4(1) (Prohibition of Arbitrary Deprivation of Life) defined “conception” as “to make pregnant.”¹⁴² This interpretation is consistent with the ordinary meaning of the term.¹⁴³ The Judgment, on the other hand, impermissibly looks to scientific literature for its definition of the term because what matters is what the parties at the convention thought “conception” meant, not the understanding of scientists.¹⁴⁴ In addition, the holding limits the scope of cases that the Court can hear because it puts a limit on what constitutes a person in regard to Article 4(1) (Prohibition of Arbitrary Deprivation of Life).¹⁴⁵ Finally, the Court is inconsistent in saying that it is balancing the rights and interests of the two sides, when it denies personhood and its attendant rights and interests to the embryos.¹⁴⁶

IV. REPARATIONS

The Court ruled five to one that the State had the following obligations:

A. Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)

1. Provide Psychological Rehabilitation to the Victims

As this case focused on the ways in which the ban on IVF affected the victims, the State must provide psychological services to those victims.¹⁴⁷ The services must be free and provided by State psychologists with specialized training in reproductive trauma.¹⁴⁸ If family counseling or medication is appropriate, these must be provided, as well as transportation necessary to procure the treatment.¹⁴⁹

142. *Id.* at 8.

143. *Id.*

144. *Id.* at 8–9.

145. *Id.* at 12.

146. *Id.* at 19.

147. Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, ¶ 326.

148. *Id.*

149. *Id.*

2. Publish the Judgment

The State must publish the Judgment in the State's official newspaper and in one other national newspaper with widespread circulation, and the State must publish the Judgment for one year on an official judicial website.¹⁵⁰

3. Implement Measures to Prevent Further Violations

To ensure compliance with this judgment, the State must take three steps.¹⁵¹ First, it must annul the prohibition on IVF "as rapidly as possible," and provide a progress report within six months.¹⁵² Second, the State must regulate the practice of IVF and create a framework with which to assess the quality of IVF services.¹⁵³ The State must provide annual updates on its progress regarding regulating IVF.¹⁵⁴ Finally, the State must tailor its health care program to make IVF available to all its citizens in a way that does not discriminate.¹⁵⁵ The State must submit progress reports every six months on its efforts to make IVF available to all those who need it.¹⁵⁶

4. Provide Training on Reproductive Disability Rights

The State shall create a permanent education program and require all employees of the judiciary to complete it.¹⁵⁷ The program shall make particular mention of the Judgment and touch on how reproductive rights relate to human rights and the principle of non-discrimination.¹⁵⁸

B. Compensation

The Court awarded the following amounts:

150. *Id.* ¶ 329.

151. *Id.* ¶¶ 336–38.

152. *Id.* ¶ 336.

153. *Id.* ¶ 337.

154. *Id.*

155. *Id.* ¶ 338.

156. *Id.*

157. *Id.* ¶ 341.

158. *Id.*

1. Pecuniary Damages

The Court's award of pecuniary damages is guided by two principles.¹⁵⁹ First, damages are for violation of personal autonomy, not the opportunity to have a child.¹⁶⁰ Therefore, the Court rejects the State's argument that the couples capable of having children should not be compensated.¹⁶¹ Second, the Court held that, of the various medical expenses, only the traveling expenses of those who went to another country for the IVF procedure had a strong enough connection to the State's ban on IVF to be compensable.¹⁶²

As the record did not provide a clear account of these expenses, the Court relied on equity to award \$5,000 to each of the victims who traveled for the procedure.¹⁶³ Thus, the Court awarded \$5,000 each to Ms. Bianchi Bruna, Mr. Moreno Valencia, Ms. Henchoz Bolaños, Mr. Yamuni Zeledón, Ms. Carro Maklouf, Mr. Sanabria León, Ms. González Ledezma, and Mr. Rojas Carranza.¹⁶⁴

2. Non-Pecuniary Damages

Based on the suffering the ban on IVF caused to the victims, its effect on their living conditions, and other non-pecuniary consequences, the Court awarded \$20,000 each to the eighteen victims.¹⁶⁵

3. Costs and Expenses

The Court awarded \$10,000 to the estate of the deceased representative, Mr. Trejos Salas, \$2,000 to Mr. May Cantillano, and \$3,000 to Mr. Molina Acevedo for costs and expenses.¹⁶⁶

4. Total Compensation (including Costs and Expenses ordered):

\$ 415,000

159. *Id.* ¶ 350.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* ¶ 363.

166. *Id.* ¶ 373.

C. Deadlines

The State must pay all compensation with one year of notification of the Judgment.¹⁶⁷ The State must publish the Judgment in the official State newspaper, in another national newspaper with widespread circulation, and on the official judicial website within six months of notice of the Judgment.¹⁶⁸ The State must provide a general report on compliance with its obligations within one year of notice of the Judgment.¹⁶⁹

V. INTERPRETATION AND REVISION OF JUDGMENT

[None]

VI. COMPLIANCE AND FOLLOW-UP

September 3, 2015: In a hearing on compliance with the Judgment, the State's executive branch said it would address the long standstill in implementing the Judgment's holding by issuing a decree.¹⁷⁰

September 10, 2015: President Luis Guillermo Solís issued Decree No. 39210-MP-S, ordering compliance with the Judgment and delegating control over the procedure to the public health system.¹⁷¹

February 26, 2016: The Court found that the State complied with its obligations to publish the Judgment, implement appropriate reproductive programs and education aimed at judicial officials, and award damages to appropriate victims.¹⁷² The Court found that the State must continue to provide psychological treatment to the relevant victims.¹⁷³ The Court found that the State failed to comply with its obligation to annul the prohibition on IVF and ordered the State to adhere to Decree No.

167. *Id.* ¶ 374.

168. *Id.* ¶ 329, "Operative Paragraphs" ¶ 6.

169. *Id.* "Operative Paragraphs" ¶ 9.

170. Diego Arguedas Ortiz, *Costa Rica Finally Allows In Vitro Fertilization after 15-year Ban*, Inter Press Service (Sept. 15, 2015), <http://www.ipsnews.net/2015/09/costa-rica-finally-allows-in-vitro-fertilisation-after-15-year-ban/>.

171. *Id.*

172. Artavia Murillo et al. ("Fecundación in Vitro") v. Costa Rica, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R., ¶¶ 1–2 (Feb. 26, 2016) (Available only in Spanish).

173. *Id.* "Operative Paragraphs" ¶¶ 3–5.

39210-MP-S.¹⁷⁴ The dissenting opinion of Judge Eduardo Vio Grossi argued that the Court improperly used the compliance monitoring mechanism to settle a domestic dispute between the State's executive and judiciary branches, violating international law in exercising power into the internal affairs of the State.¹⁷⁵

VII. LIST OF DOCUMENTS

A. Inter-American Court

1. Preliminary Objections

[Artavia Murillo et al. \(“Fecundación in Vitro”\) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. \(ser. C\) No. 257 \(Nov. 28, 2012\).](#)

2. Decisions on Merits, Reparations and Costs

[Artavia Murillo et al. \(“Fecundación in Vitro”\) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. \(ser. C\) No. 257 \(Nov. 28, 2012\).](#)

[Artavia Murillo et al. \(“Fecundación in Vitro”\) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Concurring Opinion of Judge García-Sayán, Judgment, Inter-Am. Ct. H.R. \(ser. C\) No. 257 \(Nov. 28, 2012\).](#)

[Artavia Murillo et al. \(“Fecundación in Vitro”\) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Dissenting Opinion of Judge Vio Grossi, Inter-Am. Ct. H.R. \(ser. C\) No. 257 \(Nov. 28, 2012\).](#)

3. Provisional Measures

[Artavia Murillo et al. \(“Fecundación in Vitro”\) v. Costa Rica, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. \(ser. C\) No. 257 \(Mar. 31, 2014\).](#)

174. *Id.* “Operative Paragraphs” ¶ 6.

175. *Id.* “Dissenting Opinion of Judge Eduardo Vio Grossi” ¶¶ 53–54.

4. Compliance Monitoring

[Artavia Murillo et al. \("Fecundación in Vitro"\) v. Costa Rica, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. \(Feb. 26, 2016\) \(Available only in Spanish\).](#)

5. Review and Interpretation of Judgment

[None]

B. Inter-American Commission

1. Petition to the Commission

[Not Available]

2. Report on Admissibility

[Artavia Murillo et al. \("Fecundación in Vitro"\) v. Costa Rica, Admissibility Report, Report No. 25/04, Inter-Am. Comm'n H.R., Case No. 12.361 \(July 29, 2011\).](#)

3. Provisional Measures

[None]

4. Report on Merits

[Artavia Murillo et al. \("Fecundación in Vitro"\) v. Costa Rica, Report on Merits, Report No. 85/10, Inter-Am. Comm'n H.R., Case No. 12.361 \(July 14, 2010\).](#)

5. Application to the Court

[Not Available]

VIII. BIBLIOGRAPHY

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after 15-year Ban, INTER PRESS SERVICE (Sept. 15, 2015), <http://www.ipsnews.net/2015/09/costa-rica-finally-allows-in-vitro-fertilisation-after-15-year-ban/>.

Martin Hevia & Carlos Herrera Vacaflora, *From Recognition to Regulation: Access to in Vitro Fertilization and the American Convention on Human Rights*, 25 FLA. J. INT'L L. 453 (2013).