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EMBRYOS, SUBJECTS OF RIGHTS?

By Former Judge of the Inter-American
Court

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I have been asked to speak on this issue as it was addressed by the Inter American Court of Human Rights (hereafter referred to as the IACHR) in our judgment in the case of **ARTAVIA MURILLO** et al v **COSTA RICA**, delivered on the 28th day of November 2012.

It is my honour and pleasure to speak with you today about this subject which the State of Costa Rica by it's Constitutional Court's decision in 2000, made into an issue of grave concern for a number persons there. It would be quite impossible for me to deal with the subject matter as comprehensively as it was dealt with in our judgment in the time allotted to me, consequently I shall deal with what I consider the highlights to illustrate the points I believe ought to be made from the judgment; and I will do so within the framework of 4 subject-areas of discourse.

The first is, which were the human rights alleged by the parties in the case to have been violated by the State of Costa Rica, which were of course

denied by the State, and, for clarity, those which the Court held had been violated by the State to the detriment of the victims.

The second is the legal impact when courts, by their decisions, prohibit access to reproductive technologies such as In Vitro Fertilization, (hereafter referred to as (IVF)) and emergency contraception amongst others.

The third within this framework is our analysis of the impact that the prohibition in Costa Rica had on IVF, or rather on the persons affected by it, based on the argument "to protect the right to life from conception," in conjunction with the fourth, which is the answer of the IACHR to this proposition in our decision in the case.

I do not think it is necessary for me to go into the facts of the case in any depth as I am sure you are all well aware of these facts, however, for completeness, I will relate the facts in a summary way.

In Costa Rica from February 1995 the Ministry of Health by an Executive Decree permitted and regulated the procedure for the use of IVF for "married couples" and made regulations for the practice of assisted reproduction techniques, again, between married couples. Rules were established for their use and the techniques were defined therein. Between 1995 and the year 2000, by the use of IVF in Costa Rica in one private institution, fifteen (15) babies were born. However in the year 2000, the Constitutional Chamber of the Supreme Court of Costa Rica, (hereinafter referred to as the Constitutional Chamber) declared the decree to be unconstitutional and annulled it. This was understood by the petitioners to Inter-American Commission (hereafter referred to as the Commission) and by the Commission to be an absolute prohibition of the use of IVF in Costa Rica, because of the impossibility of meeting the Court's condition that there should be no loss of embryos in any treatment for IVF because they

are human beings and therefore all eggs fertilized must be implanted in the donor woman. The Constitutional Chamber clearly thought that in stating that if technology advances to the certain position so that there would be no loss of 'life', consequently at such a time there would be no need to ban it's use. It also said that because of this condition of advancement with the technic, their prohibition was not an absolute one. An assertion which was not accepted.

I now quote from paragraph 73 of our judgment, relying on only a part of the quotation of the Constitutional Chamber's reasoning:-

"In considering the applicability of Article 4 of the American Convention,

The Constitutional Chamber stated, inter alia:-

When the spermatozoid fertilizes the egg that entity becomes a zygote and therefore an embryo. The most important feature of this cell is that everything that will allow it to evolve into an individual is already in place; all the necessary and sufficient information to determine the characteristics of a new human being appear to come together in the union of the twenty-three chromosomes of the spermatozoid and the twenty-three chromosomes of the ovocyte [...] In describing the segmentation of the cells that occurs immediately after fertilization, this view holds that at the three-cell stage a minuscule human being exists and from that stage every individual is unique, rigorously different from any other. In short, as soon as conception occurs, a person is a person and we are in the presence of a living being, with the right to be protected by the legal system.¹ "

The Chamber also concluded that the practice of IVF jeopardized the life and dignity of a human being. All of whom have the right not to be deprived of their lives or suffer unlawful attacks by the State or private individuals and they must be assisted to defend themselves from dangers to their lives.

¹ Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 88 and 89).

It held that once conceived, a person is a person and so, one is then dealing with a living being, who possesses the right to be protected by law, and so, since everyone is entitled to the right to life, that is to say of those who have been born and those of yet unborn children; their lives therefore must be protected.

The Constitutional Chamber cited in support of its proposition referred to these international human rights provisions:-

Article I of the American Declaration; Article 3 of the Universal Declaration of Human Rights; Article 6 of the International Covenant on Civil and Political Rights; and Article 4 of the American Convention.

Further the Chamber concluded that:-

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

article 21 of the Constitution and Article 4 of the American Convention on Human Rights. Since the technique violates the right to life, it shall be expressly placed on record that its application cannot be authorized even based on a norm with legal status, at least while its scientific development remains at the current state and entails conscious damage to human life.²

The year following the decision with the ban operating in Costa Rica, petitions were submitted to the Commission and ultimately consolidated, and, since the State did not comply with its various recommendations, despite extensions of time granted to it for compliance, the Commission submitted the case to the IACHR. I should just mention that Costa Rica had, in attempting compliance, drafted and submitted a bill to its Legislative Assembly in 2010. The Bill though it purported to permit IVF, really was a restatement of the State's position vis- a vis embryos; with conception being the start of life of a human person. Their suggested implantation of all fertilized eggs, would seriously, according to PAHO, endanger the lives and reproductive health of the women, who had such an IVF treatment as proposed in the Bill. The Commission in it's brief and submissions to us, stated that the case concerned violations of human rights caused by the absolute prohibition of the practice of IVF in Costa Rica pursuant to the Constitutional Chamber's decision.

It posited that this amounted, inter alia, to arbitrary interference with the right to a private life and the right to form a family. It also alleged that the ban violated the right to equality of the victims, as the State was denying them the right to a treatment which would enable them to overcome their obstacle in having biological children. It further alleged that the prohibition

² Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice, Case file No. 95-001734-007-CO (file of annexes to the merits report, volume I, folios 94 and 95).

had a disproportionate impact on women and it asked the Court to find the State internationally responsible for violations of Articles 11(2), 17(2) and 24 in relation to Articles 1(1) and 2 of the American Convention to the detriment of Gretel Artavia Murilo and seventeen (17) others. Representatives Molina and May on behalf of the then presumed victims concurred with the violations submitted by the Commission, though they sought to add other issues related to the personal and social impacts suffered by the victims following the Constitutional Chamber's prohibition.

We however held in our judgment that we did not have the competence to deal with these additional issues as they fell outside the ambit of the case submitted to us.

This then in summation was the reason for their decision.

I must remind you that two Judges jointly dissented from the majority position, holding that they did not consider IVF to be incompatible with the right to life or human dignity- Justices Ramirez and Miranda. They said, inter alia, that it was a scientific instrument and technique created to assist humanity, that infertility should be recognized as a 'genuine disease' and dealt with accordingly.

They pointed out that 'assisted reproduction techniques are:-"offered as a way to exercise the legitimate right to human reproduction which, even though it is not expressly recognized in [the] Constitution, is derived from the right to freedom and to self-determination, the right to privacy and family life, and the freedom to found a family."³

Their opinions ultimately accorded with the conclusion of the IACHR.

³ Dissenting opinion of March 15, 2000, of Justices Arguedas Ramírez and Calzada Miranda (file of annexes to the answering brief, volume IX, folios 10994).

For completeness I will just state at this stage, the Convention Rights which by a majority of 5:1, we of the IACHR found had been violated by the State of Costa Rica. These are Articles 5(1), 7, 11(2) and 17(2) in relation to Article 1(1) of the Convention to the detriment of all eighteen (18) victims.

These then were the human rights found by us in our judgment.

What then is the legal effect in law, when, as in Costa Rica, a Superior Court, from which there is no appeal, by its decision prohibits access to reproductive technologies such as IVF and emergency contraception?

One must conclude that such a judicial prohibition would:

* derogate from the right of every woman and every man, if they so wish, to procreate and would in fact completely abrogate their right to a private life, to found a family and to have a family life, and to have access to reproductive health services and treatments.

To illustrate this I quote again from our judgment which clarifies the effects such a prohibition would have on such rights:-

142. "Article 11 of the American Convention requires the State to protect individuals against the arbitrary actions of State institutions that affect private and family life. It prohibits any arbitrary or abusive interference with the private life of the individual, indicating different spheres of this, such as the private life of the family. Thus, the Court has held that the private sphere is characterized by being exempt from and immune to abusive or arbitrary interference or attacks by third parties or by public

authorities.⁴ In addition, this Court has interpreted Article 7 of the American Convention broadly when indicating that it includes a concept of liberty in a broad sense as the ability to do and not do all that is lawfully permitted. In other words, every person has the right to organize, in keeping with the law, his or her individual and social life according to his or her own choices and beliefs. Liberty, thus defined, is a basic human right, inherent in the attributes of the person, that is evident throughout the American Convention.⁵ The Court has also underscored the concept of liberty and the possibility of all human beings to self-determination and to choose freely the options and circumstances that give meaning to their life, according to their own choices and beliefs.⁶

143. The scope of the protection of the right to private life has been interpreted in broad terms by the international human rights courts, when indicating that this goes beyond the right to privacy.⁷ The protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world.⁸ The effective exercise of the right to private life is decisive for the possibility of exercising personal autonomy on the future course of relevant events for a person's quality of life.⁹ Private life includes the way in which individual views himself and how he decides to

⁴ Cf. *Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006 Series C No. 148, para. 194, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 161.

⁵ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 52.

⁶ Cf. *Case of Atala Riffo and daughters v. Chile*, para. 136. *Mutatis mutandi*, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 52.

⁷ Cf. *Case of Atala Riffo and daughters v. Chile*, para. 135.

project this view towards others,¹⁰ and is an essential condition for the free development of the personality. Furthermore, the Court has indicated that motherhood is an essential part of the free development of a woman's personality.¹¹ Based on the foregoing, the Court considers that the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense.¹²

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

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

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

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

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

We reiterated “that Article 11(2) of the American Convention is closely related to the right recognized in Article 17 of this instrument.¹³ Article 17 of the American Convention recognizes the central role of the family and family life in a person’s existence and in society in general. The Court has already indicated that the family’s right to protection entails, among other obligations, facilitating, in the broadest possible terms, the development and strength of the family unit.¹⁴ This is such a basic right of the American Convention that it cannot be waived even in extreme circumstances.¹⁵ Article 17(2) of the American Convention protects the right to found a family, which is also comprehensively protected in different international human rights instruments.¹⁶

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

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

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

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

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

For its part, the United Nations Human Rights Committee has indicated that the possibility of procreating is part of the right to found a family.¹⁷

Second, the right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right. The right to reproductive autonomy is also recognized in Article 16(e) of the Convention for the Elimination of All Forms of Discrimination against Women, according to which women enjoy the right “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights.” This right is violated when the means by which a woman can exercise the right to control her fertility are restricted.¹⁸ Thus, the protection of private life includes respect for the decisions both to become a mother or a father, and a couple’s decision to become genetic parents.”

We also pointed out that “in the context of the right to personal integrity, the IACHR has analyzed some of the situations that cause particular distress and anxiety to the individual,¹⁹ as well as some serious impacts of the lack of medical care or problems of accessibility to certain health procedures.²⁰”

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

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

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

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

We said further in our judgment – “Consequently, the rights to private life and to personal integrity are also directly and immediately linked to health care. The lack of legal safeguards that take reproductive health into consideration can result in a serious impairment of the right to reproductive autonomy and freedom. Therefore, there is a connection between personal autonomy, reproductive freedom, and physical and mental integrity.”

We dealt in some detail on what has been accepted is meant by the term ‘reproductive health’, and the right of access to IVF, so we referred to and adopted various definitions and provisions, these are:-

- the Committee on Economic, Social and Cultural Rights definition – “reproductive health means that women and men have the freedom to decide if and when to reproduce, and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as the right of access to appropriate health care services.”²¹
- the Programme of Action of the International Conference on Population and Development, held in Cairo in 1994,----- According to the International Conference on Population and Development (1994), “[r]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant UN consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.”²² Moreover, adopting a broad and integrated concept of sexual and reproductive health, it stated that:

“Reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity – in all matters relating to the reproductive system and to its functions and processes. Consequently, reproductive health implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so. Implicit in this is right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as

²¹ Committee on Economic, Social and Cultural Right, General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12 of the International Covenant on Civil and Political Rights), E/C.12/2000/4, 11 August 2000 para. 14, footnote 12.

²² Cf. Programme of Action of the International Conference on Population and Development, Cairo, 1994, para. 7.3; UN A/CONF.171/13/Rev.1 (1995).

other methods of their choice for regulation of fertility, which are not against the law, and the right of access to health-care services that will enable women to go safely through pregnancy and childbirth.”²³

Such a judicial prohibition clearly violates the right to reproductive autonomy in every sense and every way. In my personal opinion, the decision on the use of or not to use reproductive health techniques and services ought to be between the woman or the parties and their specialised medical adviser and no-one else.

And that “*in vitro* fertilization techniques should be provided in accordance with ethical guidelines and appropriate medical standards.”²⁴

- In the Declaration of the Fourth World Conference on Women (1995), the States agreed to “guarantee equal access to and equal treatment of men and women in [...] health care and to promote sexual and reproductive health.”²⁵
- The Platform for Action, approved jointly with the Declaration, defined reproductive health care as the “constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.”²⁶

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

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

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

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

- According to the Pan-American Health Organization (PAHO), sexual and reproductive health “implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so.”²⁷. The right to reproductive health entails the rights of men and women to be informed and to have free choice of and access to methods to regulate fertility, that are safe, effective, easily accessible and acceptable.

We then stated as our judgment;-

147. Finally, the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right. The right to enjoy the benefits of scientific progress has been internationally recognized²⁸ and, in the inter-American context, it is contemplated in Article XIII of the American Declaration²⁹ and in Article 14(1)(b) of the Protocol of San Salvador. It is worth mentioning that the General Assembly of the United Nations, in its declaration on this right, described its connection to the satisfaction of the material and spiritual needs of all sectors of the population.³⁰ Therefore, and in keeping with Article 29(b) of the American Convention, the scope of the rights to private life, reproductive autonomy and to found a family, derived from Articles 11(2) and 17(2) of the Convention, extends to the right of everyone to benefit from scientific progress and its applications. The right to have access to

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

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

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

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

scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, *de iure* or *de facto*, to exercise the reproductive decisions that correspond to each individual.

The judicial prohibition was also

- * without a doubt discriminatory as its effect would be directed to an identifiable needy and vulnerable group of persons suffering from a WHO listed disease within such a society.

- * it also ignored those who need such treatment in order to procreate

because of their physical disability and the general position that as a disease, infertility is in fact a disability and the rights related to those

in such circumstances would apply to them and that this was clearly overlooked by the Constitutional Chamber.

In this regard we said:-

‘The right of persons with disabilities to have access to the necessary techniques to resolve reproductive health problems can be inferred from Article 25 of the Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”).³¹’

“Article 18 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) states that “[e]veryone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality.” The Inter-American Convention for the Elimination of all Forms of Discrimination against Persons with Disabilities (hereinafter “ICEFDPD”) defines the term “disability” as “a physical, mental or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.

“Anyone in a situation of vulnerability is subject to special protection owing to the special duties that the State must comply with in order to satisfy the general obligation to respect and guarantee human rights. The Court recalls that it is not sufficient that the States abstain from violating rights; rather it is essential that they adopt positive measures, to be determined based on the specific needs for protection of the subject of law, either owing to his personal condition or to the specific situation in which he finds himself,³² such as with a disability.³³ In this regard, States are obliged to facilitate the inclusion of persons with disabilities by means of equality of conditions, opportunities and participation in all spheres of society,³⁴ in order to guarantee that

31 Article 25(1) establishes: Health: States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall: (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes.”

32 Cf. *Case of the “Mapiripán Massacre” v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 134, paras. 111 and 113, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 244.

33 Cf. *Case of Ximenes López v. Brazil*, para. 103, and *Case of Furlan and family v. Argentina*, para. 134.

the said limitations are dismantled. Thus, the States must promote social inclusion practices and adopt measures of positive differentiation to remove the said barriers.³⁵

Based on these considerations and taking into account the definition developed by the WHO according to which infertility is a disease of the reproductive system (*supra* para. 288), the Court considers that infertility is a functional limitation recognized as a disease and that persons with infertility in Costa Rica, faced with the barriers created by the Constitutional Chamber's decision, should consider that they are protected by the rights of persons with disabilities, which include the right to have access to the necessary techniques to resolve reproductive health problems. This condition requires special attention in order that they have reproductive autonomy. "

All these were CLEARLY complete incursions into the private lives and family life of the men and women who were prevented from utilising reproduction techniques even when they needed and wished to have them and thus were violations of their human rights , as we clarified in our judgment.

- However, it most overtly discriminates against infertile women who would be banned from having the opportunity to try to have a child and would clearly violate their rights to equal treatment and is therefore discriminatory of them.

In this regard, we said in our judgment continuing our analysis of the effect of the judicial prohibition that:-

"The Court considers that the ban on IVF can affect both men and women and may have differentiated disproportionate impacts owing to the existence of stereotypes and prejudices in society.

³ 34 *Cf. Case of Furlan and family v. Argentina*, para. 134. *Cf.* Article 5 of the Standard rules on the equalization of opportunities for persons with disabilities.

³ 35 *Cf. Case of Furlan and family v. Argentina*, para. 134, and Committee on Economic, Social and Cultural Rights, General Comment No. 5, para. 13.

Regarding the situation of infertile women, expert witness Hunt explained that “in many societies infertility is attributed mainly and disproportionately to women owing to the persisting gender stereotype that defines a woman as the basic creator of the family.” Citing the conclusions of research by the WHO Department of Reproductive Health and Research (RHR), he indicated that:

Responsibility for infertility is usually shared by the couple [...]. However, for biological and social reasons, the blame for infertility is not shared equally. In most societies, the psychological and social burden of fertility is borne especially by women. A woman’s situation is frequently identified with her fertility, and the absence of children may be seen as a social disgrace or cause for divorce. The suffering of the infertile woman can be very real.”³⁶

The Court observes that the WHO has indicated that, while the role and status of women in society should not be defined solely by their reproductive capacity, femininity is often defined by motherhood. In these situations, the personal suffering of the infertile woman is exacerbated and can lead to unstable marriage, domestic violence, stigmatization and even ostracism.”³⁷ According to data from the Pan-American Health Organization, there is a gender gap with regard to sexual and reproductive health, because ailments related to sexual and reproductive health affect around 20% of women and 14% of men.³⁸

The Committee on the Elimination of Discrimination against Women has indicated that, when a decision to postpone “surgery due to pregnancy is influenced by the stereotype that protection of the fetus should prevail over the health of the mother,” this is discriminatory.³⁹

³ 36 Affidavit provided by expert witness Paul Hunt (merits report, volume VI, folio 2206).

³ 37 Preamble, *Current Practices and Controversies in Assisted Reproduction: Report of the meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction"*, Geneva: WHO (2002) XV-XVII to XV. Cited in the affidavit provided by expert witness Paul Hunt (merits report, volume VI, folio 2206).

³ 38 Cf. Pan-American Health Organization (PAHO), 'Chapter 2: Health Conditions and Trends' in *Health in the Americas 2007, Volume I Regional*, Washington, 2007. Cited in the affidavit provided by expert witness Paul Hunt (merits report, volume VI).

The Court considers that the instant case reveals a similar situation of the influence of stereotypes, in which the Constitutional Chamber gave absolute prevalence to the protection of the fertilized eggs without considering the situation of disability of some of the women.

In addition, although infertility can affect both men and women, the use of assisted reproduction technologies is especially related to a woman's body. Even though the ban on IVF is not expressly addressed at women, and thus appears neutral, it has a disproportionately negative impact on women.

We then stated how the Constitutional Chamber's prohibition interrupted the treatment of some of the victims and the effect particularly on the women, predicated on all the paragraphs above quoted and then looked at the effect on men. We referred to the Expert Witness Neuburger's opinion which we accepted. He said, *inter alia*:-

"that "fertile disability causes men to feel a strong sense of impotence and, consequently, a questioning of their gender identity. Concealing their fertile dysfunction socially is the usual defensive strategy because they fear being laughed at or questioned by other men."⁴⁰

We then concluded as follows:-

"The Court emphasizes that these gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them. The Court is not validating these stereotypes and only recognizes them and defines them in order to describe the disproportionate impact of the interference caused by the Constitutional Chamber's judgment."

³ 39 Committee on the Elimination of Discrimination against Women, *Case of L.C. v. Peru*, Communication No. 22/2009, para. 8.15, Doc. UN CEDAW/c/50/D/22/2009 (2011).

⁴ 40 Affidavit provided by expert witness Alicia Neuburger (merits report, volume V, folios 2519 and 2520).

* The judicial prohibition also ignored the impact of such a ban on those in financial difficulties.

We therefore considered the evidence of the effect on the financial inability of 10 then presumed victims of the prohibition, who could not afford to leave Costa Rica and have IVF treatment done abroad and I quote:-

“In his testimony during the public hearing before this Court, Mr. Mejías Carballo declared that he and his former wife felt “very sad [...] because they could not travel to another country because they did not have the resources; and they could not do it here in Costa Rica because it had been banned.”⁴¹ In her affidavit, Grettel Artavia Murillo indicated that she and her former partner, Miguel Mejías, felt “totally desperate and tremendously frustrated, and [their] relationship began to have many problems on seeing the hopes of becoming parents curtailed, together with the impossibility of going abroad to undergo this practice owing to a lack of resources, which effectively resulted in a lessening of their individual usefulness and, thus, a net loss of [their] social well-being.”⁴² Ana Cristina Castillo León explained that they “did not have the necessary financial resources to go abroad to obtain” IVF.⁴³ Furthermore Mr. Vargas stated that “the only alternative was to consider traveling to Spain or Colombia to undergo IVF; however, the corresponding costs had tripled for [them], and [they] simply felt defeated, discriminated against and punished by a court that had curtailed the possibility of having access to a medical treatment that was permitted in every other country in the world.”⁴⁴

We at the Court concluded that in such circumstances the judicial ban pertaining to these rights resulted in clear violations of them.

41 Likewise, Mr. Mejías declared that he wanted to go abroad to undergo the treatment but he “did not have the money and had already spend a great deal and [he] subsist[ed] on a State pension, and everyone knows that State pensions are not sufficient to cover an expenses like that; therefore [they] could not go.” *Cf.* Statement made by Mr. Mejías Carballo at the public hearing held in this case.

42 *Cf.* Affidavit of Grettel Artavia Murillo (file of annexes to the pleadings and motions brief, volume I, folio 4077)

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

44 *Cf.* Affidavit of Giovanni Vargas (file of annexes to the pleadings and motions briefs, volume IV, folio 5280).

I now go to the combined the 3rd and 4th subject areas, that is to say,

The 3rd within this framework is our analysis of the impact that the prohibition in Costa Rica had on IVF, or rather on the persons affected by it, based on the argument "to protect the right to life from conception," in conjunction with the 4th, which is the answer of the IACHR to this proposition in our decision in the case.

We examined, based on the evidence, the differences and similarities between loss of embryos in both natural pregnancies and in IVF.

We decided that we need not determine any scientific theories on the issue but that we must stick to the evidence in the case.

We then said:-

"Bearing in mind that embryonic loss occurs in both natural pregnancies and when IVF is applied, the argument of the existence of conscious and voluntary manipulation of cells in the context of IVF can only be understood in relation to the argument developed by the Constitutional Chamber concerning the absolute protection of the right to life of the embryo, which has been invalidated in preceding sections of this Judgment (*supra* para. 264). To the contrary, the Court observes that expert witness Zegers-Hochschild emphasized that "[t]he process that generates human life includes embryonic death as part of a natural and necessary process. Of every 10 embryos spontaneously generated in the human species, no more than 2 to 3 are able to survive natural selection and be born as a person. The remaining 7 or 8 embryos die in the female genital tract, generally without the parents' knowledge."⁴⁵

⁴⁵ Opinion provided by expert witness Zegers-Hochschild at the public hearing held in this case. He explained that "[t]he results of ART vary significantly according to the age of the woman and the number of embryos transferred and, in some cases, to the severity of the condition that gave rise to the disease. [...] The proportion of chromosomally abnormal eggs is very high in the human species. This means that a large percentage of fertilized eggs do not advance in embryonic development and a high proportion of transferred embryos do not implant and do not result in a pregnancy. [...] The analysis of these data reveals that [...] the technique of IVF or [intracytoplasmic sperm injection] ICSI does not generate embryos of a lesser biological value than those generated spontaneously in a woman's body, [and] that embryonic death as part of a medical treatment, does not occur as a direct result of the technique, but as the result of the poor quality of the oocyte and embryo that are natural to both women and men. In women with healthy eggs, the possibility of conceiving from one embryo generated *in vitro* is no different from one generated spontaneously. In itself, the IVF/ICSI does not affect the possibility of implantation and conception. Hence, the lower rates of pregnancy in women with IVF are not due to the interference of the technique; but rather they are mainly the result of the underlying disease that determines a lower reproductive performance. [...] The process that creates human life includes embryonic death as part of a natural and necessary process. Of every 10 embryos generated spontaneously in the human species, no more than 2 to 3 are able to survive natural selection and to be born as a person. The remaining 7 or 8 embryos die in the female genital tract, generally without the parent's knowledge. The question that must be answered is whether the ART, such as IVF or ICSI contribute to the death of embryos because they have been fertilized outside a woman's body and then transferred to her. The answer to this question is that neither IVF or ICSI affect the possibility of survival of embryos and, evidently, do not kill them."

Bearing in mind the above, the Court finds it disproportionate to aspire to an absolute protection of the embryo in relation to a risk that is common and even inherent in processes where the IVF technique has not been used”.

Court also observes that Costa Rica permits artificial insemination techniques even though the use of such techniques does not guarantee that each egg will result in a pregnancy, thus entailing the possible loss of embryos. The decision to become pregnant, even by natural fertilization may also be preceded by a conscious act that takes measures to increase the probability of the egg being fertilized. According to the State’s final arguments:

Artificial insemination is one of the treatments offered by the Costa Rican Social Security Institute. At times, as a result of hormone treatment and as an individual response, patients may present greater

The stimulation of the ovaries than expected; consequently, when this follicle production is 6 or more in both ovaries, the cycle is annulled.⁴⁶

In brief, embryonic loss exists in both natural pregnancy and in techniques such as artificial insemination. The Court observes that scientific debate exists about the differences between the type of embryonic losses that occur in these processes and their reasons. But the analysis made above allows the Court to conclude that, taking into account the embryonic losses that occur in a natural pregnancy and in other reproduction techniques”

We therefore concluded as follows-

“A weighing up of the severity of the limitation of the right to private life and to found a family compared to the importance of the treaty-based protection of prenatal life allows it to be affirmed that the effects on the right to private life, intimacy, reproductive autonomy, access to reproductive health services, and to found a family is severe because, in the practice, these rights are annulled for those persons whose only possible treatment for infertility is IVF. In addition, the interference had a differentiated impact on the victims owing to their situation of disability, gender stereotypes and, for some of the victims, their financial situation.

In contrast, the impact on the protection of prenatal life is very slight, because the risk of embryonic loss is present both in IVF and in natural pregnancy. The Court underlines that the embryo, prior to implantation, is not covered by the terms of Article 4 of the Convention, and recalls the principle of the gradual and incremental protection of prenatal life (*supra* para. 264).

⁴ 46 The State’s final written arguments (merits report, volume XI , folio 5314).

Therefore, the Court concludes that the Constitutional Chamber based itself on an absolute protection of the embryo that, by failing to weigh up or take into account the other competing rights, involved an arbitrary and excessive interference in private and family life that makes this interference disproportionate. Moreover, the interference had discriminatory effects. In addition, taking into account these conclusions about the assessment and the considerations concerning Article 4(1) of the Convention (*supra* para. 264), the Court does not consider it pertinent to rule on the State's argument that it has a margin of appreciation to establish prohibitions such as the one established by the Constitutional Chamber.

Final conclusion of the merits of the case

Based on all the considerations in this chapter, the Court declares the violation of Articles 5(1), 7, 11(2) and 17(2), in relation to Article 1(1) of the American Convention, to the detriment of Gretel Artavia Murillo, Miguel Mejías Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchoz Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víctor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.”

We therefore granted what we considered the appropriate reparations for the victims, which most importantly included a reversal of the Constitutional Chambers decision and prohibition

We should remember that this was a majority decision of 5 to 1 and the 5 were quite certain of the conclusion. I trust this clarifies our judgment on the violations of conventional rights occasioned by the judicial prohibition of IVF by the judgment of the Constitutional Chamber of the Supreme Court of Costa Rica.

Thank you.