DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI.
INTER-AMERICAN COURT OF HUMAN RIGHTS,
CASE OF ARTAVIA MURILLO ET AL.
("*IN VITRO* FERTILIZATION") *v.* COSTA RICA
JUDGMENT OF NOVEMBER 28, 2012
(Preliminary Objections, Merits, Reparations and Costs)

INTRODUCTION.

This dissenting opinion[1] is issued with the utmost respect and consideration towards the Inter-American Court of Human Rights (hereinafter "the Court") and, certainly, to all of its members. The arguments that will be presented are, of course, limited solely and exclusively to what was addressed in the above judgment (hereinafter "the Judgment").[2] This opinion refers, particularly, to Article 4(1) of the American Convention on Human Rights (hereinafter "the Convention"), because the author of this opinion considers that the analysis of this Article was a determining factor in the outcome of all other issues of this case.

The commentaries made in dissenting opinion are, certainly, based on the law and not on the author's wishes. This opinion also bears in mind that the Court must interpret and apply the Convention,[3] instead of assuming the role of the Inter-American Commission of Human Rights[4] or the lawmaking function. The latter belongs to the States, which have the exclusive power to modify the Convention.[5] Finally—and especially—, this dissenting opinion notes that the Court must determine the States'

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[1] Art. 66(2) of the Convention: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment"; and Art. 24(3) of the Statute of the Court: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate." In this particular, see also *Declaration of Complaints*, presented to the Court on August 17, 2011, *regarding* part of the conjoint Concurring Opinion issued in relation to the Court's orders "Provisional Measures Regarding Colombia. Case of Gutiérrez Soler," June 30, 2011, "Provisional Measure Regarding the United Mexican States, Case of Rosendo Catú *et Al.*," July 1, 2011, and "Provisional Measures Regarding the Republic of Honduras, Case of Kawas Fernández v. Honduras," July 5, 2011.

[2] Art. 65(2) of the Rules of the Court: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

[3] Art. 62(3) of the Convention: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

[4] First sentence of Art. 4(1) of the Convention: "The main function of the Commission shall be to promote respect for and defense of human rights."

[5] Art. 76(1) of the Convention: "Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General"; and Art. 39 of the Vienna Convention: "*General rule regarding the amendment of treaties*. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."

will, expressed in the Convention and in subsequent agreements and practices, so as to require from them what they really agreed to.[6]

The reasoning of this dissenting opinion has two main prongs. The first is an analysis of Article 4(1), due to the fact that the violation of this provision is the ultimate issue of this case. The second refers to the way this Judgment made a shift in the Court's case law referring to this Article.

I.- ARTICLE 4(1) OF THE CONVENTION.

In turn, the analysis of Article 4(1) of the Convention raises three issues. The first refers to the Judgment's perspective when addressing this case. The second regards the interpretation of this Article. The third concerns the Court's case law on this issue.

A.- Perspective used for deciding this case.

There is no doubt that the Judgment's perspective when addressing this case will influence its outcome. This is why it is necessary, first and foremost, to refer to this perspective.

In this regard, the Judgment states that it will, as the first issue on the merits of this case,

> "determine the scope of the rights to personal integrity and to private and family life, as relevant to decide the dispute."[7]

Then, it states that

> "the purpose of this case focuses on establishing whether the Constitutional Chamber's judgment resulted in a disproportionate restriction of the rights of the presumed victims"[8]

The Judgment is obviously referring to the Decision of March 15, 2000, of the Constitutional Chamber of the Supreme Court of Justice of the Republic of Costa Rica (hereinafter "the Decision"). The Decision declared unconstitutional the Executive Decree No. 24029-S of February 3, 1995, regulating *in vitro* fertilization, because it infringed Article 4(1) of the Convention ("Right to Life").

In this regard, the Judgment states that "[h]aving verified that interference existed, owing both to the prohibitive effect resulting from the Constitutional Chamber's judgment caused in general, and to the impact it had on the presumed victims in this case, the Court considers it necessary to proceed to examine whether this interference or restriction was justified." Hence, it "considers it pertinent to examine in detail the main argument developed by the Constitutional Chamber: that the American

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[6] Art. 2(1)(a) of the Vienna Convention on the Law of Treaties (hereinafter Vienna Convention): "*Use of terms*. 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

[7] Para. 141 of the Judgment. Hereinafter, the expressions "para." or "paras." shall be understood as making reference to the Judgment.

[8] Para. 171.

Convention makes the absolute protection of the 'right to life' of the embryo compulsory and, consequently, makes it obligatory to prohibit IVF because it entails the loss of embryos", stating also that it will "analyze whether the interpretation of the Convention that substantiated the interferences that occurred […] is admissible in light of this treaty, bearing in mind the pertinent sources of international law."[9]

Now, it is true that the Inter-American Commission on Human Rights (hereinafter "the Commission") and the victims' representatives (hereinafter "the Representatives"), alleged that the aforementioned Decision violated the following Articles of the Convention: 11(2) ("Right to Privacy"), 17(2) ("Rights of the Family") and 24 ("Right to Equal Protection"), in conjunction with Articles 1(1) ("Obligation to Respect Rights") and 2 ("Domestic Legal Effects"). Nevertheless, it is also true that one of the Representatives also alleged the violation of Articles 4(1) ("Right to Life"), 5(1) ("Right to Humane Treatment"), and 7 ("Right to Personal Liberty").[10] In addition, the aforementioned Decision is explicitly based on Article 4(1).

Hence, the issue at stake should not have been addressed in the way the Court did, but from the opposite perspective.

In fact, considering the applicable customary law,[11] this case should determine whether, in light of the Convention,[12] the aforementioned Decision[13] is internationally licit or not.[14] This requires, first and foremost, contrasting this act of the State with Article 4(1), with the international obligation that the very State adduced as its justification. Only once this issue is elucidated will it be possible to address the conformity of the Decision with Articles 5(1), 11(2), 17(2) and 24.

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[9] Para. 162 [note of the translator: and 171].

[10] Para. 7.

[11] Contained in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, prepared by the International Law Commission of the U.N., adopted by Resolution approved by the General Assembly [*based on the Report of the Sixth Committee (A/56/589 and Corr. 1)*] 56/83. Responsibility of States for internationally wrongful acts, 85th plenary meeting, 12 December 2001, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr. 1 and 2). 2 *Ibid*. (hereinafter "Draft on the State's International Responsibility").

[12] Art. 62(3) of the Convention, already referred to.

[13] Art. 4 of the Draft on the State's International Responsibility: "*Conduct of organs of a State*. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

[14] Articles of the Draft on the State's International Responsibility: "*Article 1. Responsibility of a State for its internationally wrongful acts*. Every internationally wrongful act of a State entails the international responsibility of that State"; "*Article 2. Elements of an internationally wrongful act of a State*. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State"; and "*Article 3. Characterization of an act of a State as internationally wrongful*. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

Thus, it was more logical for the Judgment to understand and address this case, primarily, as a possible violation of Article 4(1), rather than dealing with it the way it did.

By acting as it did, the Judgment not only follows the procedural and argumentative rationales that were legitimately suggested by the Commission and the Representatives in light of their own interests and procedural roles. It also ends up, in practice, minimizing and subordinating the "right to life" to the other previously referred rights. The perspective chosen by the Judgment has, in conclusion, the paramount practical effect of privileging these rights over the "right to life."

B.- Interpretation of Article 4(1).

As it was asserted, and in contrast to the path followed by the Judgment, the main issue raised in this case was the determination of whether the State, when issuing the relevant Decision, incurred in international responsibility[15] for violating Article 4(1) of the Convention, which provides:

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

The interpretation of a provision of the Convention consists in elucidating the will of the Member States to the Convention, as it was expressed in this treaty. This must be done in accordance with the rules of the Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"), which contains both the treaty-based and customary rules on this matter. Due to their importance for this case, it is necessary to quote them.

Article 31 of the Vienna Convention provides:

> "*General rule of interpretation*
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

[15] Art. 12 of the Draft on the State's International Responsibility: "*Existence of a breach of an international obligation*. There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32 of the same Convention provides:

"*Supplementary means of interpretation*
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

Now, in order to be able to interpret the aforementioned Article 4(1), it seems necessary to refer to the basic issues that are raised by this case, this is: the rights holder, the protection of this right, and the arbitrary deprivation of it.

1.- Holder of this right.

After considering Article 31(1) of the Vienna Convention, it is evident that the aforementioned Article 4(1) enshrines a right consisting in that the holder's "life [is] respected." That is the "object and purpose" of the said provision, the actual purpose for its establishment, not to be voided of meaning.

Accordingly, this provision presupposes that the holder of this right—whose life must be respected—exists.

In addition, this provision is clear when stating that the rights holder is "every person," which means that this Article makes no distinction whatsoever among the holders of said right. In fact, this is in full accord with the Convention´s previous assertion that States undertake to respect and ensure rights

"to all persons subject to their jurisdiction […] without any discrimination […]."[16]

And, by virtue of the "special meaning" rule of treaty interpretation, established in Article 31(4) of the Vienna Convention, the interpreter must follow what is provided in Article 1(2) of the Convention when interpreting the word "person." The latter Article provides:

"For the purposes of this Convention, 'person' means every human being."

As a conclusion, even though it may seem to be a truism, it can be asserted that Article 4(1) of the Convention recognizes or enshrines the right of "every person" or "human being," without any discrimination, to the respect of "his"—already existing—life. This means that the previously quoted provision, every sentence of it—as also all

[16] Art. 1(1) of the Convention: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

of the Convention—, refer exclusively to the "person" or "human being". They refer to his or her rights, not to other interests or to other beings.

2.- Legal protection of the right.

Article 4(1) provides in its second sentence and following a period, that "this right [that is, that of "every person… to have his life respected"] shall be protected by law and, in general, from the moment of conception." This sentence demands the interpretation of three expressions: first, what is understood as "law;" secondly, the meaning of "and, in general;" and thirdly, the term "conception."

a.-"Law".

When prescribing that the aforementioned right "shall be protected by law", the Convention imposed on the State the obligation to enact juridical norms to that effect. This obligation is also established, in more general and broad terms, in the previously quoted Article 2 of the Convention.[17]

It must be understood that the Convention uses the word "law" in its broad sense. That is, as a juridical norm, be it constitutional, legal or regulatory, enacted by the competent State body for regulating, in a general and mandatory fashion, the conduct or activity of all of a country's population. [18]

It must be also borne in mind that Article 4(1)'s stipulation that the right of "every person […] to have his life respected" must be "protected by law", does not mean that the Court cannot assess this law's compliance with International Law, whether this law is internationally licit, especially in light of the Convention.

As a commentary related solely to the case at hand, it must be highlighted that Article 21 of the 1949 Political Constitution of the State already provided that "human life is inviolable". It must also be considered that the Decision that gave rise to this case concluded explicitly that "the contested regulation *(Executive Decree No. 24029-S of February 3, 1995, issued by the Health Ministry)* is unconstitutional due to its violation of Article 21 of the Political Constitution and of Article 4 of the Inter-American Convention on Human Rights".[19] Hence, it could be understood that, by doing this, the State was fulfilling Article 4(1)'s instruction of protecting by law the right of "every person […] to have his life respected."

b.- "And, in general".

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[17] Art. 2 of the Convention: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[18] The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86, May 9, 1986. Series A No. 6.

[19] Para. 76.

As to the meaning and scope of Article 4(1)'s expression "and, in general," it should be borne in mind that the Convention gives no "special meaning" to these terms, so they must be interpreted according to their "ordinary meaning."[20]

Among the definitions of the ordinary meaning of the term "general"—which are the same as those existing when agreeing on the Convention—are: "common, frequent, usual" and "common to all the individuals that constitute a whole, or to many objects, even if they are of a different nature." Among the meanings of the expression "in general" are those of "commonly, generally," and "without specifying or identifying anything in particular."

In order to better understand these terms, it may be useful to consider their antonyms in the way they were understood by the time of the Convention[21]—which is the same as their current understanding. These antonyms are the terms "particular," which means "belonging exclusively to something, or belonging to it especially", "special, extraordinary, or rarely seen," "singular or individual, as opposed to universal or general;" "singular," whose definitions are "sole (unique in its kind)," "extraordinary, rare or excellent;" and "unusual," meaning "not usual, infrequent."

The rule regarding the "context" of the terms[22] must be also taken into account. Hence, it should be added that when the Article links the expressions "and, in general" with the obligation to "pro[tect] by law" the right of "every person […] to have his life respected," this provision is stating that this protection must be provided "from the moment of conception" of the relevant "person."

In turn, the rule of the "object and purpose" of a treaty must be used for interpreting the expression "and, in general." The object and purpose of the Convention is to require States to respect human rights and to ensure their free and full exercise.[23] In turn, the object and purpose of Article 4(1) is the respect of life. Hence, the expression "and, in general" must have an *effet utile* to this end, so that it contributes effectively to this object and purpose, not providing an exception to it or, *a fortiori*, a negation of the right to life.

In this regard, it must be noted that three countries proposed at the Specialized Inter-American Conference on Human Rights—where the Convention was approved—the elimination of the sentence "and, in general, from the moment of conception," so that abortion would not be forbidden. However, the majority of States participating in said Conference rejected this proposal, incorporating the aforementioned sentence in the Convention.[24] In other words, there was an evident intention of leaving no doubt as to the broad protection that the law must give to the right of every person to have his or her life respected, a protection that must be provided even when the person has been conceived or has not yet been born.

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[20] Art. 31(1) of the Vienna Convention.

[21] *Ibid.*

[22] Art. 32(1) of the Vienna Convention.

[23] Art. 1(1) of the Convention, previously quoted.

[24] Paras. 203 to 205.

Consequently, the aforementioned sentence was established in order to allow States to grant the unborn the legal protection that must be given to the right of "every person […] to have his life respected" "from the moment of conception." In other words, such protection must be "common" to those who are born and to the unborn. Consequently, no distinction can be made in this respect among them, "even if they are of a different nature," because they "constitute a whole." There is human life in both the born and the unborn. Both are a human being, a person.

The legally protected good in Article 4(1) is, then and ultimately, the right to life of "every person." This is why the Convention decided to leave no doubt as to the fact that Article 4(1) protects life, irrespective of its stage of development.

In this regard, the expression "in general" constitutes a reference to the way the law may protect the unborn. Needless to say, this protection could be different to that which is granted to the person who is already born.

Consequently, the expression "and, in general" makes no reference to an exception, to an exclusion. Quite the opposite, this expression is inclusive. It makes applicable the obligation, to protect the right to life of every person by law, from the moment of conception.

c.- "Conception".

Because of the aforementioned, in order to understand the relevant provision of Article 4(1), it is essential to elucidate the sense and scope of the term "conception," included in this Article. It is from that moment that the State must protect by law the right "to have […] life respected." In other words, the sense of this provision is clear, it states that this right exists "from the moment of conception."

The file and other background material show that, when signing the Convention, there was no determination as to what should be understood by "conception." This has not been specified afterwards either. On the other hand, the Convention gave no "special meaning" to this term.[25] It neither made a reference to the understanding of this concept according to medical science. Hence, the applicable rule in this case is, without any doubt, that of the "ordinary meaning" of the term.[26] In particular, the meaning must be the one existing by the time of adopting the Convention in 1969.

According to the 1956 version of the Spanish Dictionary of the *Real Academia Española*[27]—applicable back then—, the term "conception" was understood as the "action and effect of conceiving;" "to conceive" was read as "for the female to become pregnant;" that of "pregnant" meant "the woman or the female of any species that has conceived, and has the fetus or creature in its womb;" that of "to make pregnant" as "to impregnate;" that of "impregnate" as "to make the female conceive;" and that of "fertilization" as "the union of the masculine and feminine reproductive elements, originating a new being."

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[25] Art. 31(4) of the Vienna Convention.

[26] *Ibid*.

[27] 18th edition.

And almost at the same time of adopting the Convention, that is, in the 1970 version of the aforementioned dictionary,[28] the term "to make pregnant" was understood as "to impregnate, to fertilize, to make a woman conceive." The current dictionary also gives this definition.[29]

The foregoing means that it was understood—and it still is—that the being, in this case the human, originates with "the union of the masculine and feminine reproductive elements." When this happens, it is recognized that this "creature" is inside the woman's "womb." Hence, it was understood that the terms *fertilization* and *to make the woman conceive* were synonyms.

Therefore, the term "conception," used by Article 4(1) of the Convention, should be legally understood—notwithstanding any other consideration—as the fertilization of the egg by the spermatozoid. This, nothing else, was agreed when adopting the Convention in 1969. This is still the legal understanding of this term. Furthermore, an important part of medical science—if not the majority—[30]shares this understanding.[31] This does not mean that medical science must be disregarded, but that its teachings must be considered only insofar as they are incorporated in the law.

In this regard, due attention must be paid also to the fact that, according to the rules of treaty interpretation, there are no other agreements or treaties among the States parties to the Convention enshrining a different concept.[32] Member States have neither made subsequent agreements nor adopted practices in the application of the Convention that may indicate an alteration of this concept.[33] On the other hand, there is no applicable customary rule that may go against the aforementioned interpretation. Finally, it cannot be asserted that domestic legislations of these States have created a general principle of law enshrining a meaning diverse to the aforementioned.[34]

Furthermore, it is evident and clear that Article 4(1) refers to the "conception" of "every person" whose right to life must be protected by law. This is in perfect agreement with the *context of terms*,[35] because this Article, as the Convention,[36] refers only to the object "every person." It does not refer to a different entity, object or reality.

Hence, if the aforementioned provision would have sought to grant or extend this protection—that must be given by law to the right of every person to have his or her life respected—to an entity, object or reality other than the person, it would have

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[28] 19th edition.

[29] 22nd edition.

[30] Notes 266 to 284 of the Judgment.

[31] Paras. 79 ff.

[32] Art. 31(2) of the Convention.
[33] Art. 31(3)(a) and (b) of the Vienna Convention.
[34] Art. 31(3)(c) of the Vienna Convention.

[35] Art. 31(3) of the Vienna Convention.

[36] Art. 1(1) of the Convention, previously quoted.

stated it clearly. It could have utilized a sentence or paragraph in the aforementioned Article 4(1), or it could have enshrined a different Article. It could have even stated it in a different treaty. However, none of this happened. Thus, the relevant Article and the Convention refer solely and exclusively to the "person," to the "human being."

To sum up, the Convention considers that there is life in a person from the moment when he or she is conceived; in other words, that someone is a "person" or a "human being" from the "moment of conception," which happens when the egg is fertilized by the spermatozoid. The Convention provides that from this moment there is a "right to have ["every person"'s] life respected". As a result, there is an obligation to protect this right.

A different interpretation of Article 4(1) would deprive the phrase "from the moment of conception" of its ordinary and obvious meaning. A different interpretation would end up assigning no object to this phrase, even though it is strikingly clear that it refers to the "conception" of "every person".

d.- Arbitrary deprivation of this right.

Finally, when the previously referred provision establishes that no one shall be arbitrarily deprived of his or her life, it is implicitly stating that the right of "every person [...] to have his life respected" is not absolute, that it allows a restriction, as long as it is not arbitrary. This means that, according to what was understood as arbitrariness when the Convention was drafted—and what is still understood as such—, the restriction cannot be an "act or behavior against justice, reason or the law; based solely on the will or the whim."[37]

The file of this case shows that this element has not been discussed during these proceedings.

C.- The Court's case law.

The Court's case law has, in a steady and consistent fashion, made a precise description of the nature of the right of "every person [...] to have his life respected". The Court has done so in the following terms:

> "The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible",[38]

and that

[37] 18th and 22nd editions.

[38] Case of the "Street Children" (Villagrán-Morales et al. v. Guatemala), Judgment of November 19, 1999. Series C No. 63, para. 144.

> "States have the obligation to guarantee the creation of the necessary conditions to ensure that violations of this inalienable right do not occur".[39]

This has been the steady and consistent case law of the Court in this particular matter. It has been asserted in more than twelve cases.[40] It has even been reaffirmed twice this year.[41]

Now, as a consequence of the paramount importance that the Court's case law attaches to the right to life regulated in Article 4(1) of the Convention, two principles must be applied to this right with a stronger emphasis: on the one hand, the guiding principle of the Law of Treaties, the principle of "good faith,"[42] which implies the understanding that agreements are made for their actual application; on the other hand, the principle *pro homine* or *pro persona*, enshrined in the Convention,[43] according to which the rules of human rights must be interpreted in the most favorable terms for the right-holders.

In addition, the case law of the Court has used the expressions "children"[44] and "baby"[45] for referring to the unborn.

In this regard, and as a comment related specifically to the case at hand, it is noteworthy that the year before the State's Decision of March 15, 2000, this is, on 1999, the important judgment of the "Street Children" was issued—giving rise to the aforementioned case law.[46] Hence, when the State's Decision was rendered, basing

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[39] Case of the Barrios Family v. Venezuela, Merits, Reparations and Costs, Judgment of November 24, 2011. Series C No. 237, para. 48.

[40] Case of Myrna Mack-Chang v. Guatemala, Judgment of November 25, 2003, Series C No. 101, para. 152; Case of Juan Humberto-Sánchez, Judgment of June 7, 2003, Series C No. 99, para. 110; Case of 19 Tradesmen, Judgment of July 5, 2004, Series C No. 109, paras. 152 and 153; Case of the Pueblo Bello Massacre, Judgment of January 31, 2006, Series C No. 140; Case of Sawhoyamaxa Indigenous Community, Judgment of March 29, 2006, Series C No. 146, para. 150; Case Baldeón-García, Judgment of April 6, 2006, Series C No. 147, para. 82; Case of the Massacres of Ituango, Judgment of July 1, 2006, Series C No. 148, para. 128; Case Ximenes-Lopes, Judgment of July 4, 2006, Series C No. 149, para. 124; Case Montero-Aranguren et al. (Detention Center of Catia), Judgment of July 5, 2006, Series C No. 150, para. 63; and Case Albán-Cornejo et al., Judgment of November 22, 2007, Series C No. 171, para. 117.

[41] Cases of Castillo-González et al. v. Venezuela and Massacres of El Mozote and Neighboring Locations v. El Salvador, both judgments were issued in October, 2012.

[42] Art. 31(1) of the Vienna Convention.

[43] Art. 29 of the Convention: "*Restrictions Regarding Interpretation.* No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

[44] Case of the Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, Judgment of November 25, 2006, para. 292.

[45] Case of the Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment of July 8, 2004, para. 67(x).

[46] Case of the "Street Children" (Villagrán-Morales et al. v. Guatemala), Judgment of November 19, 1999, Series C No. 63, para. 144.

itself explicitly on Article 4(1) of the Convention,[47] it must be understood that it was taking into account the interpretation made in "Street Children." In other words, it should be presumed that the Decision complied with what is now called "conventionality control,"[48] and applied it.

II.- SHIFT IN THE COURT'S CASE LAW.

This Judgment brings up an important change, breaking away from the recent case law in three different ways. First, by limiting the scope of what had already been defined by the Court's case law; secondly, regarding the application of Article 4(1) to this case; and third, in as much as it leaves many questions unanswered.

A.- Limiting the scope of the Court's case law.

This judgment seems to restrict the Court's—up to now—consistent and uniform case law on the matter. This time around, the Court omits the phrase "[o]wing (to the) fundamental nature (of the right to life), restrictive approaches to it are inadmissible." Although this has happened in previous decisions, the Judgment's omission of this phrase becomes particularly relevant, because two preliminary annotations precede the reiteration of all other ideas regarding the right to life. The first annotation points out that "[t]o date, the Court's case law has not ruled on the disputes that have arisen in this case", and the second asserts that, "[i]n cases of extrajudicial executions, enforced disappearances and deaths that can be attributed to the failure of the States to adopt measures, the Court has indicated that the right to life is a fundamental human right, the full enjoyment of which is a prerequisite for the enjoyment of all other human rights."[49]

With these two annotations the Judgment would suggest that the Court's case law in reference to the right to life is only applicable to "extrajudicial executions, enforced disappearances and deaths that can be attributed to the failure of the States to adopt measures". Therefore, the right to life would not be applicable to the case under review because it applies to a different set of facts. Hence, the Judgment would be severely limiting the scope of what has already been set by the Court's case law on this matter.

B.- Inapplicability of Article 4(1) to the case under study.

The Judgment's aforementioned statements are the basis for its following assertions:

> "that "conception" in the sense of Article 4(1) occurs at the moment when the embryo becomes implanted in the uterus, which explains why, before this event, Article 4 of the Convention would not be applicable;"[50]
>
> "it is not admissible to grant the status of person to the embryo;"[51] and

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[47] Para. 76.

[48] Case of Cabrera-García and Montiel-Flores v. Mexico, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 225.

[49] Para. 172.

[50] Para. 264.

[51] Para. 223.

> "the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention."[52]

It is evident that the Judgment represents a very significant shift in the Court's case law.

In order to find a basis for this change, the Judgment resorts to the interpretation of the terms "conception" and "in general." This, because the Court considers that "for the purposes of the interpretation of Article 4(1), the definition of person stems from the mentions made in the treaty with regard to 'conception' and to 'human being'."[53] When doing so, the Court resorts to Articles 31 and 32 of the Vienna Convention, which provide for the interpretation according to the ordinary meaning of terms, the systematic and historical interpretation, and the evolutive interpretation.

1.- Method in accordance with the ordinary meaning of terms.

This is one of the issues where this vote differs from the Judgment, because the majority uses as a starting point that the "scope" of the Convention terms "conception" and "human being," "should be assessed based on the scientific literature."[54]

The Convention gave these terms no "special meaning" whereby the "intention of the parties" to the Convention is expressed.[55] Neither did it submit itself to the definition of medical science. The Judgment fails to note that because of this, the interpreter must abide by the "ordinary meaning" attributed to the aforementioned terms. The most natural and obvious meaning of them is that of the dictionary, which, as pointed out, understands conception as the union of the egg and the spermatozoid.

It is not appropriate, then, to have recourse to medical science for valuing or understanding the meaning and scope of the terms in reference. It is not what medical science understands for "conception" what matters, but what the Parties to the Convention intended by the term, which is the ordinary meaning of the term "conception" (found in the dictionary). Besides, a significant part —if not the majority—[56] of the medical science[57] agrees with the ordinary meaning of the term "conception." The scientific definition of a term is relevant in as much as it has been integrated into law, or when the law submits itself to science, neither of which occur in the case at hand.

In this regard, it is imperative to underline that the Judgment states that "some opinions view a fertilized egg as a complete human life", "may be associated with concepts that confer certain metaphysical attributes on embryos. Such concepts cannot justify preference being given to a certain type of scientific literature when interpreting the scope of the right to life established in the American Convention, because this would imply imposing specific types of beliefs on others who do not share them."[58]

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[52] Art. 264.

[53] Para. 176.

[54] *Ibid.*

[55] Art. 31(4) of the Vienna Convention.

[56] Notes 265 to 284 of the Judgment.

[57] Paras. 182 to 184.

[58] Para. 185.

The latter assertion is correct, but the position adopted by the Judgment on this matter is not in agreement with it. The Judgment reproaches that the State's Decision opted for "one of the scientific positions on this issue to define as of when it was considered that life began" and that "understood that conception would be the moment when the egg is fertilized and assumed that, as of that moment, a person existed who held the right to life."[59] However, while asserting this, the Judgment adopts the opposite view, that which makes a difference between "two complementary and essential moments of embryonic development: fertilization and implantation," and holds that "only after completion of the second moment that the cycle is concluded, and that conception can be understood to have occurred."[60]

In order to reach this conclusion the Judgment resorts to two reasons. One is of a scientific nature, "an embryo has no chance of survival if implantation does not occur."[61] The other is that "when Article 4 of the American Convention was drafted the dictionary of the Real Academia differentiated between the moment of fertilization and the moment of conception, understanding conception as implantation," and, thus, "[w]hen drafting the relevant provisions in the American Convention, the moment of fertilization was not mentioned."[62]

As to the first argument, the Judgment acknowledges that there are several scientific positions on the matter of "when life begins"[63] and of the understanding of "conception."[64] In spite of this, the Judgment sides with only one of them: that conception is produced at the moment of the embryo's implantation in the woman's uterus. The Judgment does not analyze the other positions, particularly the one that considers that "human life begins with the fusion of spermatozoid and egg, an observable 'moment of conception'."[65] This Judgment simply dismisses this position.

The Judgment's position seems to reveal some inconsistencies with other of its assertions. On the one hand, with the statement that "[t]he first birth of a baby resulting from in vitro fertilization occurred in England in 1978," and that "[i]n Latin America, the first baby born through in vitro fertilization and embryo transfer was reported in Argentina in 1984."[66] On the other hand, with the statement that "the definition of 'conception' accepted by the authors of the American Convention has changed" because "[p]rior to IVF, the possibility of fertilization occurring outside a woman's body was not contemplated scientifically."

Indeed, these statements show that, when the Convention was signed—in 1969—, it was not possible to know that "conception" and "fertilization" were two absolutely differentiated and distinct phenomena. Hence, it is impossible to share the understanding that "the definition of 'conception' accepted by the authors of the American Convention has changed." It may well be the case that some medical

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[59] Para. 177.

[60] Para. 186.

[61] Para. 187.

[62] Para. 187.

[63] Para. 177.

[64] Paras. 180 to 185.

[65] Para 182.

[66] Párr. 66.

scientists have changed their views, but the definition of the term enshrined by the Convention framers remains unchanged.

Now, it is appropriate to refer to the second argument in which the Judgment bases its position, this is, that the Dictionary of the time, 1969, "differentiated between the moment of fertilization and the moment of conception, understanding conception as implantation." This dissenting opinion has already pointed out (*infra*) that this assertion is not, strictly speaking, accurate. It is not apparent that the 1959 Dictionary considered the terms "to conceive" and "to fertilize" as antagonistic or different. Furthermore, the 1970 edition of the Dictionary, issued a year after the subscription of this Convention, define "to conceive" as "for the female to become pregnant," and the term "to make pregnant" as "to impregnate, to fertilize, to make a woman conceive." These definitions remain in the present edition of the Dictionary.

Finally, and still in relation to the interpretation method of the ordinary meaning of terms, the Judgment asserts that "The literal interpretation indicates that the expression [in general] relates to anticipating possible exceptions to a particular rule."[67] It then concludes that "the term 'in general' infers exceptions to a rule."[68]

However, this dissenting vote has pointed out (*infra*) that the Dictionary's understanding of the expression "in general" has nothing to do with the establishment of exceptions. If the Convention would have wanted to establish an exception, instead of providing "in general, from the moment of conception," it would have stated, for instance: "and, exceptionally, from the moment of conception." The Convention did not do this, precisely, for providing that the law's protection of the right of "every person [to have] his life respected" *will be* granted always and in every case or circumstance—although perhaps in a somewhat different fashion—from the moment of conception.

2.- Systematic and historical interpretation.

The Judgment also refers to the historical and systematic methods of interpretation. When doing so, it mentions Article 31 of the Vienna Convention, particularly its third paragraph. It does so in order to take "'take into account not only the agreements and instruments formally related to it (Article 31(2) of the Vienna Convention), but also its context (Article 31(3))'; in other words, international human rights law."[69] Likewise, and under the same heading, the Judgment states that it will utilize the supplementary means of interpretation of Article 32 of the Vienna Convention "for determining the interpretation of Article 4(1) of the American Convention" it is relevant to consider "that Article 31(4) of the Vienna Convention, which provides that a special meaning shall be given to a term if it is established that the parties so intended."[70]

a.- Rule of the special meaning given to terms.

From a methodological standpoint, it is impossible to agree on the foregoing, because the reference to Article 31(4) of the Vienna Convention is out of context. This norm is the final or last among the rules that constitute what is known as the *general rule of interpretation*. Within them, Article 31(4) is the rule of the *special meaning of terms*, which is an exception to the norm of the *ordinary meaning of terms*. Hence, this rule

[67] Para. 188.

[68] Para. 189.

[69] Para.191.

[70] Para.193.

is not part of the norms that constitute the *supplementary means of interpretation*, provided for in Article 32, the subsequent Article of the Vienna Convention.

In other words, according to Article 31(4), the "special meaning [of a term] that the parties so intended" must be stated in one of the following ways: either in the agreements, instruments and practices referred to in Article 31, paragraphs 2 and 3 (which are distinguishable because they are intimately connected with the relevant treaty or because they refer to an agreement about its interpretation); or in a rule of international law that is applicable to the relations between the Member States.

b.- Rule of the context and of the progressive or evolutive development.

Now, following the State's allegations, the Judgment refers to the Universal Declaration of Human Rights,[71] the International Covenant on Civil and Political Rights,[72] the Convention on the Elimination of all Forms of Discrimination against Women,[73] and the Convention on the Rights of the Child.[74] It also refers to the provisions of the Universal,[75] European[76] and African human rights systems,[77] and also to the case law of the European Court of Human Rights[78] and of seven domestic constitutional courts.[79] The Judgment refers to all of them within the framework of the systematic and historical interpretation, even though it should have done so, in some cases, in application of the *rule of the context* (established in Article 31(2) of the Vienna Convention), and in other cases, in application of the rule of *progressive development of law* (provided for in Article 31(3) of the same convention).

These agreements and instruments, however, lack the relevant features for being considered as instruments or agreements made as a consequence of or in connection with the Convention. Hence, they cannot be used as a means for interpreting the Convention. They neither refer, strictly speaking, to subsequent practice, to the way how States parties to the Convention apply this treaty, whereby showing their agreement regarding the Convention's interpretation. As to the rules of international law applicable in the relations between the State parties, it is evident that they do not fulfill Article 31(4) of the Vienna Convention's requirement of being "relevant" to the case.

Even more so, the provisions of the previously referred treaties, the statements of the aforementioned judgments of international and European courts, and the provisions of domestic law of Member States to the Convention—all of which were quoted for interpreting the latter—can be neither considered a kind of customary law nor a general principle of law. They are not international custom because they are not

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[71] Para.224.

[72] Para.225.

[73] Paras.227 and 228.

[74] Paras. 229 to 233.

[75] Para. 226.

[76] Para. 234.

[77] Para. 243.

[78] Paras. 236 to 242.

[79] Paras. 252, 261, and 262.

precedents, that is, acts that are repeated constantly and uniformly with the understanding of being required by law. They are not general principles of law, either because they cannot be inferred or deduced logically from the international legal structure, or because they are not enough as for being considered common to the great majority of the States parties to the Convention.

Nevertheless, what is even more important is that these agreements or instruments are not applicable to this case, not only because some of them do not bind the Member States to the Convention, but also because they clearly do not consider the situation of the unborn or the conceived, so as to allow or not to prohibit abortion.[80]

c.- Rule regarding the prevalence of specialized law over general law.

It is due to this reality that none of these instruments contain a provision like Article 4(1) of the Convention, a particularity of the Inter-American system on human rights. The Judgment does not take this into account when interpreting this Article. It, hence, omits a rule of general legal interpretation, found in international law and in the Law of Treaties, which provides that "specialized law prevails over general law."

Article 4(1) is part of the body of international laws which—although it cannot be qualified as Latin American, regional or particular international law—are particular to the Member States to the Convention. Hence, this provision cannot be interpreted through the use of other general norms of international law or other Human Rights systems that do not include this provision. This would make the latter prevail over the American Convention, eventually modifying it in practice.

d.- Incapacity

Taking the above into account, this opinion does not share the Judgment's conclusion when making a systematic interpretation of the Convention and the American Declaration of Rights and Duties of Man, when it indicates that "it is not feasible to maintain that an embryo is the holder of and exercises the rights established in each" of the Articles of these texts. This is so, because the Judgment leaves out any consideration of the existing concepts of absolute and relative legal incapacity of persons. These concepts exist in different jurisdictions, and they may limit or preempt the exercise of these people's rights, without taking away their legal recognition as persons.

Even greater dissent needs to be expressed in the Judgment's statement that:

> "taking into account, as indicated previously, that conception can only take place within a woman's body [infra…], it can be concluded with regard to Article 4(1) of the Convention, that the direct subject of protection is fundamentally the pregnant woman, because the protection of the unborn child is implemented essentially through the protection of the woman".[81]

And this vote cannot agree with the affirmation in this paragraph because of its understanding of conception as a phenomenon that "can only take place within a woman's body," which is correct, but is based on a statement in another paragraph that "conception or gestation is an event of the woman, not of the embryo." This would lead to the conclusion that conception is an issue affecting the pregnant woman only.

Second, this statement cannot be agreed with because, if the intent had been to protect the unborn's "right to have his life respected" through protection of the pregnant woman, the Convention would have specifically stated so, which was not the case.

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[80] Paras. 226, 227, 235, 236, 237, and 249.

[81] Para. 222.

Third, this opinion dissents with the Judgment's assertion, given that article 4(1) as written, is sufficient to protect the pregnant woman and, consequently, the unborn. This protection is also found in Article 4(5) of the Convention, which prohibits the application of the death penalty on a pregnant woman. Reference to this protection can also be found in the San Salvador Protocol and the American Declaration of Rights and Duties of Man, cited by the Judgment.[82] In all these instruments the pregnant woman is seen as subject of human rights rather than an object or instrument thereof. Finally, the author of this dissenting opinion disagrees with the findings of the cited paragraph because it leads to the conclusion that not only the embryos before implantation, but also unborn or conceived children, have no inherent "right to have [their] life respected." Their right would be dependent, not only on the respect for the pregnant woman's life, but also on her will to respect the rights of her child. Such an approach is contradictory to the letter and spirit of Article 4(1) of the Convention, which evidently relate to matters such as the juridical regime of abortion.

3.- Method of evolutive interpretation.

When interpreting Article 4(1) of the Convention, the Judgment also resorts to the method of evolutive interpretation of treaties. It states that "treaties are living instruments, whose interpretation must keep abreast of the passage of time and current living conditions," and that this interpretation "is consistent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention on the Law of Treaties."[83]

And, effectively, it is so. Article 29 of the Convention[84] states that no provision of this Convention shall be interpreted as suppressing, excluding or limiting (the latter beyond the boundaries of the Convention), either the enjoyment of rights established in it or in laws of the Member States, or that are inherent to the human being or which derive from the democratic representative system of government, or the effects of the American Declaration of Rights and Duties of Man, and other international instruments of this nature. In addition, Article 31(3) of the Vienna Convention provides for evolutive interpretation of treaties, basing it on any agreement or subsequent practice between Member States regarding the interpretation of a treaty, or where there is a clear agreement of States in this particular regard, and on any relevant rules of international law applicable in the relations between the parties.

Nevertheless, the background material provided by the Judgment does not fulfill the requirements established in article 29 of the Convention. In essence, they only seek to limits what is prescribed in Article 4(1) of the Convention to such an extent that it becomes inapplicable to this case and is stripped of its content and *effet utile* as to the phrase "in general, from the moment of conception."

Regarding Article 31(3), some of the background material referred to in order to determine the status of the embryo are judgments of other judicial bodies, and consequently are unrelated to agreements and practices of States parties to the Convention and to rules of international applicable. Other background material referring to the laws of States parties to the Convention is insufficient, as it shall be illustrated below. It only demonstrates that assisted reproduction (of which in vitro

[82] *Ibid.*

[83] Para. 245.

[84] Previously quoted.

fertilization is only one among several techniques) is used in eleven out of twenty-four Member States. It also shows that, among these countries, three prohibit this technique "for purposes other than human procreation;" one of them "prohibits the freezing of embryos for deferred transfer;" another "prohibits the use of procedures 'aimed at embryonic reduction';" that that the same State establishes that "the ideal number of eggs and pre-embryos to be transferred may be no more than four, to avoid increasing the risk of multiple births;" and where "the commercialization of biological material is a crime;" and that the said State and another allows "the cryopreservation of embryos, spermatozoids and eggs."[85]

Therefore, the Judgment's conclusion that "[t]his means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed"[86] is inconsistent. This is so, not only because there is no such majority, but also because no evidence has been presented that demonstrates that the eleven States that allow assisted reproduction have done so based on their application or consideration of Article 4(1) of the Convention.

4.- <u>The principle of the most favorable interpretation and the object and purpose of the treaty</u>.

The Judgment resorts to the *rule of the object and purpose of the treaty* for proving that the right to life from conception is not absolute. In this regard, it asserts that "the object and purpose of Article 4(1) of the Convention is that the right to life should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights."[87]

It is impossible to be more in disagreement with this assertion. Interpreted in good faith and in accordance with the terms of the treaty in their context, the object and purpose of Article 4(1) cannot be other than to effectively protect by law the right of "every person […] to have his life respected […] and, in general, from the moment of conception." This means, to effectively protect the right of every person, including the conceived or the unborn.

In addition, the Judgment further contradicts itself in this regard. While the Judgment first stated that Article 4(1) of the Convention was not applicable to this particular case, it now refers to it in order to assert that there must be an "adequate balance" between the clashing rights and interests.[88] It is puzzling how could this balance be reached if the Judgment has been previously stated that "the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention."[89] This means that it would have no right to "have his life protected," which is why there would be no rights to balance, harmonize or to make compatible.

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[85] Para. 255.

[86] Para. 256.

[87] Para. 258.

[88] Para. 260.

[89] Art. 264.

Finally, in order to justify its assertions, the Judgment resorts again to decisions, either absolutely foreign to the Convention Member States, or pertaining to only three of them. These grounds are not enough for reaching the attained conclusion.

C.- Unanswered questions.

The Judgment states that, due to the fact that an "'absolute right to life of the embryo' as grounds for the restriction of [other] rights […], is not supported by the American Convention," "it is not necessary to make a detailed analysis of each of these requirements" required for restricting a right, this means, that "inferences are not abusive or arbitrary," which are "substantively and formally established by law," that pursue "a legitimate aim" and that meet "requirements of suitability, necessity and proportionality."[90]

In spite of this, the Judgment keeps on with this analysis in order "to indicate the way in which the sacrifice of the rights involved in this case was excessive in comparison to the benefits referred to with the protection of the embryo."[91] By doing this, the Judgment contradicts itself, because it does not confront this sacrifice with a right (which, according to the Judgment does not apply to this case), but with the prohibition of the technique of in vitro fertilization. If the Judgment would have confronted this sacrifice with a right, it would have harmonized the rights at stake.

Obviously, the result of the confrontation made by the Judgment cannot be different than the one that was reached.[92] This is so because—we repeat—there was no confrontation between rights, but between some rights and a technique.

However, even in this case, the background material can only be used for reaching very partial conclusions regarding the technique of in vitro fertilization. As it has been said, assisted reproduction—of which in vitro fertilization is only one method—is not practiced in the majority of Member States to the Convention. It is practiced only in eleven of the twenty-four Member States, many of which forbid some proceedings related to this technique.

The natural conclusion to these facts is not that "the Convention allows IVF to be performed,"[93] but that the majority of Member States have abstained from referring to it, probably because they have understood that this technique is not, *per se*, regulated by international law. This, together with the fact that the Judgment makes Article 4(1) inapplicable to the embryo—at least until the moment of implantation in the woman's uterus—may make the majority of Member States understand that the regulation of this technique is within their internal, domestic or exclusive jurisdiction.[94]

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[90] Para. 273.

[91] Para. 273.

[92] Paras. 277 ff.

[93] Para. 256.

[94] This concept was developed by the Permanent Court of International Justice in its advisory opinion *Nationality Decrees Issued in Tunis and Morocco* (February 7, 1923). In this opinion the Permanent Court concluded that the term domestic jurisdiction referred to issues that are not, in principle, regulated by international law, that is, matters where the State can take sovereign decisions. This may be the case, even though they may be closely related to the interests of more than one State.

This is the only reasoning that can explain why other State Parties of the Convention have prohibited certain techniques of assisted fertilization which are very similar to those which the Constitutional Chamber of the Supreme Court of the State had in mind when issuing the Decision that originated this case. This is so, even though these prohibitions could, at some point, be perceived as infringing some of the rights that the Court considers that were violated by the State.

The ultimate reason why the aforementioned Chamber of the Supreme Court declared the Decree unconstitutional and contrary to Article 4(1) of the Convention, is because the embryo "cannot be treated as an object for investigation purposes, be submitted to selection processes, kept frozen and, the most essential point for the Chamber, it is not constitutionally legitimate to expose it to a disproportionate risk of death."[95] These reasons were also suggested by three Member States when forbidding assisted fertilization "for purposes other than human procreation;" by one of them when establishing that "the commercialization of biological material is a crime;" and by another of them when prohibiting "the freezing of embryos for deferred transfer." Nevertheless, one of the previously referred States and another one allow the "the cryopreservation of embryos, spermatozoids and eggs."[96]

Finally, it must be pointed out that the Judgment makes no reference in its operative paragraphs to Article 4(1). This may happen because the Judgment dismisses the allegation regarding this Article. Nevertheless, the Court makes no reference—as it has previously done—to whether it is unnecessary to refer to this Article, or to whether the State is responsible for the alleged violation or is, on the contrary, blameless.

FINAL CONSIDERATIONS

When this dissenting opinion stated the reason why it disagreed with the Judgment, it tried to underline the importance of this case, where what is at stake is nothing less than the understanding of the "right to life" and of when does life begin.

Strictly speaking, when a juridical provision on this issue is drafted, many legitimate material sources of international law come into play; not only juridical notions, but also philosophical, moral, ethical, religious, ideological, scientific and others. Once the juridical provision is in force, however, it can only be interpreted in accordance with the formal sources of international law.

The Court has limits when exercising its interpretive function. This cannot be denied. Other jurisdictional bodies have already highlighted the difficulty—and even the inappropriateness—of deciding an issue which is within the realm (although not exclusively) of medical science, an issue regarding which there is still no consensus, even in this particular field.[97]

Nevertheless, in spite of these difficulties, the Court has had to fulfill its duty and decide the issue that was brought forth. This, however, does not exempt the States from fulfilling their own duty, which in this case is to exercise their normative function in the way they deem best. If they fail to do so, there is the risk that—as it somewhat happens in this case—the Court may not only decide on these issues, which require a

[95] Para. 76.

[96] Para. 255.

[97] Para. 185 and note 283.

more political pronouncement, but may also be obliged to assume this normative function. This would distort the Court's jurisdictional function, affecting thus the performance of the whole Inter-American system of human rights.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary