A PRO-CHOICE READING OF A PRO-LIFE TREATY: THE INTER-AMERICAN COURT ON HUMAN RIGHTS' DISTORTED INTERPRETATION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS IN ARTAVIA V. COSTA RICA

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INTRODUCTION

It has been over a year since *Artavia Murillo et al. v. Costa Rica*,[2] was decided by the Inter-American Court on Human Rights. In *Artavia*, the Court's first decision on embryonic life and artificial procreation, the Inter-American Court addressed the meaning of Article 4(1) of the American Convention on Human Rights, which reads as follows: "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."[3] Other relevant sections of the American Convention included Article 1(2) "For the purposes of this Convention, 'person' means every human being," and Article 3 "Every person has the right to recognition as a person before the law."[4] Previous Inter-American Court judges and commissioners have understood the convention as recognizing a right to life from conception and the human embryo and fetus' personhood and humanity.[5]

Costa Rica's unique ban of in vitro fertilization (IVF),[6] was motivated by moral concern over the loss and destruction of human embryos during IVF procedures,[7] given that Costa Rican law recognizes the unborn child as a person, who is entitled to the right to life from conception onwards.[8] The ban was qualified in the sense that it contained

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[2] Artavia Murillo et al. v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf [hereinafter *Artavia*].

[3] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

[4] *Id.*

[5] *See infra* Part III.B.

[6] According to court records, Costa Rica was the only country in the world to ban in vitro fertilization. *See Artavia*, ¶ 67.

[7] *See* Organization of American States, Archive of admissibility hearings recording testimony of Gerardo Trejos and Marta Garza in Public Hearings of the 133 Period of Sessions, Case 12.361 and Petitions 1368/04, 16/05, 678/06, 1191/06 – In vitro fertilization, Costa Rica, Gerardo Trejos - Government of Costa Rica, Inter-Am. Comm'n H.R.: Public Hearings (Oct. 28, 2008), http://www.cidh.org/Audiencias/select.aspx.

[8] L. 7739, febrero 6, 1998, CÓDIGO DE LA NIÑEZ Y LA ADOLESCENCIA [COD. NIN. ADOL.] (Childhood and Adolescence Code) art. 2, 12 (Costa Rica), *available at* http://www.oas.org/dil/esp/Codigo_Ninez_Adolescencia_Costa_Rica.pdf.

a limited exception under which IVF could become legal: the Costa Rican Supreme Court stated that the procedure may eventually meet constitutional scrutiny if it evolved into techniques that would not entail deliberate or predictable embryonic death.[9] Nevertheless, the exception was found too restrictive by several infertile couples, who filed a petition against Costa Rica before the Inter-American Commission on Human Rights (Commission) in 2001 and 2010, challenging the ban's legality under the American Convention in *Ana Victoria Sanchez Villalobos v. Costa Rica*[10] and *Daniel Gerardo Gomez, Aída Marcela Garita et al. v. Costa Rica*, respectively.[11] Both petitions were declared admissible by the IACHR, but only the first reached a decision by the Inter-American Court. That petition was renamed *Gretel Artavia Murillo v. Costa Rica*, given the withdrawal of Ms. Sanchez Villalobos and her husband from the petition due to their change of mind in favor of the human embryo's right to life.[12]

In *Artavia*, the Court handed down a restrictive interpretation of the right to life from conception, holding that – at least before implantation – the human embryo is not a person entitled to human rights protection under the American Convention,[13] while defining the term "conception" to occur at implantation, not at fertilization.[14] The Court also read Article 4(1)'s phrase "in general, from the moment of conception" to mean that only gradual or incremental protection should be given to prenatal life, depending on the unborn child's physical stage of development.[15] In addition, it held that "personal decisions" – including but not limited to those decisions intending to produce biological children by IVF – were protected under the American Convention on Human Rights.[16] Finally, the Court ordered Costa Rica to

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[9] *See Artavia*, ¶¶ 76, 155–56.

[10] Ana Victoria Sanchez Villalobos and Others v. Costa Rica, Petition 12.361, Inter-Am. Comm'n H.R. Report No. 25/04, OEA/Ser.L./V/II.122, doc. 5 rev. ¶ 1 (Mar. 11, 2004) (Admissibility Report), *available at* http://www.cidh.org/women/CostaRica.12361sp.htm.

[11] Gerardo Gómez v. Costa Rica, Petition 1368-04, Inter-Am. Comm'n H.R. Report No. 156/10, OEA/ser.L./V/II.122, at 237 (2010) (Admissibility Report), *available at* http://www.cidh.org/annualrep/2010eng/crad1368-04en.doc.

[12] *Mujer comprende que vida comienza en concepción y retira demanda contra Costa Rica* [*Woman Understands that Life begins at Conception and Dismisses Suit Against Costa Rica*], ACIPRENSA (Dec. 11, 2008, 5:41 AM), http://www.aciprensa.com/noticias/mujer-comprende-que-vida-comienza-en-concepcion-y-retira-demanda-contra-costa-rica/#.UheupGzD8dU.

[13] *Artavia*, ¶ 223.

[14] *Artavia*, ¶ 189 et seq.

[15] *Artavia*, ¶ 264.

[16] *Artavia*, ¶¶ 136–62.

authorize IVF and subsidize IVF services through its Social Security system.[17]

This article critiques the Court's judgment in *Artavia* and concludes its findings are in contradiction with a good-faith application of international norms of treaty interpretation, i.e. those stated in the Vienna Convention on the Law of Treaties[18] and the American Convention, Article 29.[19] Specifically, the article focuses on the Court's restrictive interpretation of Article 4(1) of the American Convention on the right to life from conception – namely its definition of conception as implantation, and its rejection of in vitro embryos' personhood and right to life.

I. THE *ARTAVIA* COURT'S PRO-CHOICE PERSUASION

The *Artavia* judgment is unapologetically a pro-choice decision. The holding was hardly a surprise given some signs of the judges' previous sympathies for the creation of abortion rights and their demeanor during the public hearings.[20] One could argue that personal opinions and preferences on abortion should not, in theory, affect a judge's decision on related matters; but, in practice, pro-choice judges like Diego García Sayán,[21] Alberto Pérez Pérez,[22] and Margarette May

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[17] *See Artavia* ¶ 338.

[18] Vienna Convention on the Law of Treaties art. 32, May 22, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_ 1969.pdf [hereinafter Vienna Convention].

[19] American Convention, *supra* note 3, arts. 29–31 (good faith and non-restrictive approach); Vienna Convention, *supra* note 18, art. 31(1) (good faith).

[20] Jimena Soto, *Diputada Rita Cháves acusa a Corte de parcialidad en caso de FIV* [*Congresswoman Rita Chaves accuses Court of bias in IVF case*], CRHOY (SEPT. 6, 2012), http://www.crhoy.com/diputada-acusa-a-corte-de-parcialidad-en-caso-de-fiv/.

[21] *See 75 Opiniones Sobre El Aborto, Un Tema Para Hablar, Una Agenda Para Discutir* [*75 opinions on abortion, a topic to talk about, an agenda to discuss*], PROMSEX (2011), http://www.promsex.org/documentacion/publicaciones/item/181-75-opiniones-sobre-el-aborto-un-tema-para-hablar-una-agenda-para-discutir/181-75-opiniones-sobre-el-aborto-un-tema-para-hablar-una-agenda-para-discutir.html (where García Sayán supports legalization of abortion and condemns the Catholic Church for interfering with decriminalization debates). *See also* Diego García Sayán, *Muertes anunciadas, derecho a la vida* [*Deaths Announced, the right to live*], LAREPUBLICA.PE (Mar. 13, 2009, 12:38 AM), http://www.larepublica.pe/atando-cabos/13/03/2009/muertes-anunciadas-derecho-la-vida (where García Sayán refers to legalization and liberalization of abortion as a necessary "public health" measure that would benefit all and celebrates Mexico City's liberalization of abortion).

[22] *See* Fernando Zamora Castellanos, *Crisis en la Corte Interamericana de Derechos Humanos* [*Crisis at the Inter-American Court on Human Rights*], EL IMPARCIAL (Feb. 20, 2014), http://www.elimparcial.es/mundo/crisis-en-la-corte-interamericana-de-derechos-humanos-

Macaulay[23] may struggle with impartiality when applying a convention that clearly protects embryonic life. The fact that Inter-American Court judges only work as such part-time, and for a relatively low salary while still pursuing other professional and advocacy activities,[24] may potentially create unexpected conflicts of interest in controversial human rights issues, like abortion or artificial reproduction. It certainly does little to promote judicial loyalty to the Organization of American States General Assembly, the legislative body to which the Court is accountable. Commentators have pointed out that judges may feel greater loyalty to other constituents and promote agendas foreign to the Inter-American system, in detriment of judicial independence.[25]

Judicial bias against pro-life arguments by the representatives of the Costa Rican state became apparent during the public hearing at the Inter-American Court, where Judge Pérez Pérez mocked Costa Rica's argument that conception happens at fertilization by referring to it as a "magical moment" of sorts.[26] In addition, Judge Macaulay angrily asked if the state of Costa Rica intended to ban sex, arguing that nature is as inefficient in protecting embryos as IVF,[27] while García Sayán congratulated IVF practitioner Zegers on his presentation and praised the birth of babies conceived by IVF in Chile.[28] Likewise, Judge Leonardo

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130920.html (indicating that Judge Pérez supported the Latin American Campaign for the right to Abort on Facebook).

[23] Macaulay had promoted abortion rights in Jamaica, her native country, before her affirmative vote in *Artavia*. *See Most Jamaicans Against Legalising Abortion*, JAMAICA GLEANER (Mar. 2, 2005), http://jamaica-gleaner.com/gleaner/20050302/lead/lead3.html (stating Macaulay recommended, along with several medical practitioners, that abortion be legalized in Jamaica).

[24] *Overview 2011-2015 Strengthening Inter-American justice through predictable and harmonious financing*, INTER-AM. CT. H.R. 3 (June 8, 2011), http://scm.oas.org/pdfs/2011/CP27196E.pdf (indicating that judges receive a salary of US$2,000 per month during their appointment). Members of the Inter-American Commission on Human Rights may also have other employment while serving as Commissioners. *See* J. Jesús Orozco, *The Strengthening Process: The Inside View*, APORTESDPLF, Apr. 2014, at 4, 7, *available at* http://www.dplf.org/sites/default/files/aportes_19_web_0.pdf.

[25] José Francisco García G. & Sergio Verdugo R., *Radiografía Política del Sistema Interamericano* [*Political X-ray of the Inter-American System of Human Rights*] LIBERTAD Y DESARROLLO 12 (Dec. 2011), http://www.lyd.com/wp-content/files_mf/sij7radiografiapoliticaalsistemainteramericanodeddhhjfgarciaysverdugodiciembre2011.pdf.

[26] *Audiencia Pública. Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica. Parte 4* [*Public Hearing. Artavia Murillo and others (in vitro fertilization) v. Costa Rica Case. Part 4*], VIMEO, http://vimeo.com/49172353 (statement made at 2:14:00) [hereinafter Artavia Public Hearing]. Translations to English in this paper are the author's, unless specifically indicated so.

[27] *Id*. at 2:34:30 onwards.

[28] See *id*.; *see also* Fernando Zamora Castellanos, *Crisis en la Corte Interamericana de Derechos Humanos* [Crisis at the Inter-American Court of Human Rights], EL IMPARCIAL (Feb. 20, 2014),

Franco expressed concern over Costa Rica's stunted development in terms of "progressive" human rights causes while Judge Rhadys Abreu indicated that decriminalization of abortion in some countries demonstrated that the unborn's right to life is not absolute.[29] Pro-life organizations that were present at the public hearing reported that the judges' contempt for the state's arguments regarding the human embryo's right to life was so blatant, that they "constantly gesticulated" and visibly showed their disapproval of the state's arguments during the hearing.[30]

The *Artavia* judgment's pro-choice slant may have become apparent during hearings, but the decision's language and reasoning alone reveal the judges' ideological stance on the issue. Judge Vio Grossi warned that the Court should not act like the Commission,[31] a quasi-judicial body that advocates for purported victims of alleged human rights violations before the Court. This observation may have alluded to the fact that the *Artavia* judgment does not read like a judicial decision by an impartial judge or fact-finder, but more like an abortion rights advocacy document. The judgment can hardly conceal the Court's ideological sympathies with abortion rights and its discomfort with the convention's recognition of a prenatal right to life, which the judgment attempted to reduce to its minimal expression, through a one-sided application of international norms of treaty interpretation, illustrated as follows.

II. THE *ARTAVIA* COURT'S IMPROPER USE OF INTERNATIONAL NORMS OF TREATY INTERPRETATION IN INTERPRETING ARTICLE 4(1) ON THE RIGHT TO LIFE FROM CONCEPTION

http://www.elimparcial.es/mundo/crisis-en-la-corte-interamericana-de-derechos-humanos-130920.html (commenting on García Sayán's congratulatory greeting of Zegers at the hearings).

29 Artavia Public Hearing, *supra* note 26, at 00:04:05 onwards.

30 Carlos Polo, *Tres jueces de Corte Interamericana asumen posición abortista en caso Fecundación in vitro* [*Three Inter-American Court judges adopt pro-abortion position in in vitro fertilization case*], POPULATION RESEARCH INSTITUTE, (http://www.lapop.org/index.php/boletines/427-boletin-163-tres-jueces-de-corte-interamericana-asumen-posicion-abortista-en-caso-fecundacion-in-vitro (last visited Jan. 10, 2014); *see also* Fernando Zamora Castellanos, *supra* note 28 (commenting on Macaulay's sarcastic gesturing during the hearing); See also *Denuncian parcialidad de jueces de Corte IDH a favor del aborto* [*Inter-American Court judges' bias in favor of abortion denounced*], ACIPRENSA, http://www.aciprensa.com/noticias/denuncian-parcialidad-de-jueces-de-corte-idh-a-favor-del-aborto-22790/ (last visited Jan. 10, 2014).

31 *Artavia*, (Vio Grossi, J., dissenting, 1).

If the *Artavia* decision sheds light on anything, it is that artificial reproduction is inseparably linked to the destruction of embryonic life; a fact that the Court found to be undeniable – in order to produce a live birth via in vitro fertilization, one or more embryos are sacrificed.[32] Despite Judge García Sayán's celebration of IVF as a life-affirming technology,[33] the Court recognized that "to date, there is no option for practicing IVF without some possibility of embryonic loss."[34] Therefore, the debate did not center on whether or not embryos died during IVF procedures, nor on how many died, but on whether embryos had a right to life at all.[35] The Court concluded that they did not, at least before implantation.[36]

A. DEFINITION OF CONCEPTION AS IMPLANTATION

The American Convention's text clearly protects the right of "every human being" to the legal status of a "person [who] has the right to have his life respected" beginning at "the moment of conception;"[37] thus, instead of openly denying that life begins at conception, the *Artavia* Court, defined the term "conception" in the most restrictive possible manner, as meaning pregnancy or implantation rather than fertilization.[38] Such a restrictive interpretation, however, is prohibited by the American Convention's rules of interpretation in Article 29(a): "no provision of this Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and

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[32] *Id*. ¶¶ 159, 269 (noting that "to date, there is no option for practicing IVF without some possibility of embryonic loss"); *see also* Thaddeus M. Baklinski, *100 Polish Scientists Condemn In Vitro Fertilization*, LIFE SITE NEWS (Jan. 11, 2010), http://www.lifesitenews.com/news/archive//ldn/2010/jan/10011103 (declaration by Polish scientists indicating that "the in vitro procedure aiming to transmit human life is inseparably linked with destruction of a human life in its prenatal phase. Data published by various medical centers performing in vitro fertilization show that during this procedure 60-95% of conceived human beings die").

[33] *See Artavia*, (Diego Garcia-Sayán, J., concurring, ¶ 12), *available at* http://www.corteidh.or.cr/docs/casos/votos/vsc_sayan_257_ing.doc.

[34] *Artavia*, ¶ 159.

[35] *Id*. ¶¶ 174–90.

[36] *Id*. ¶ 264.

[37] American Convention, *supra* note 3, art. 4(1).

[38] Guanajuato Declaration, About In Vitro Fertilization, ¶ 2, 3 (April 20, 2013) *available at* http://declaraciondeguanajuato.org/english.php [hereinafter Guanajuato Declaration]

freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein."[39]

1. The Court's Departure from the Ordinary Meaning of the Term Conception

According to international rules of treaty interpretation, as codified in the Vienna Convention Article 31(1), the text of the American Convention should be used as a primary source of interpretation, using the ordinary meaning rule: "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."[40] The Court, however, ignored the ordinary, most commonly understood meaning of conception as fertilization in order to give the term a special meaning, as demonstrated in the dissent by Judge Eduardo Vio Grossi.[41] Yet the Court provided no proof that the parties intended to give that term such a special meaning, as required by the Vienna Convention.[42]

In interpreting the ordinary meaning of the term "conception" in Article 4(1), the Court explicitly rejected states parties' definition of the term in their domestic legislation and held that, for the purposes of Article 4(1), selected "scientific literature" must prevail.[43] The fact that the Court chose to give greater weight to selected scientific literature over states parties´ definitions of the term may be problematic in and of itself given the preeminent role given to state practice subsequent to the adoption of the treaty in the Vienna Convention.[44] But it is the Court's choice of limited, selective scientific literature that may first strike a reader of the *Artavia* judgment as suspect.[45]

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[39] American Convention, *supra* note 3, art. 29(a).

[40] Vienna Convention, *supra* note 18, art. 31(1) (emphasis added).

[41] *Artavia*, (Vio Grossi, J., dissenting at 9).

[42] Vienna Convention, *supra* note 18, art. 31(4).

[43] *Artavia*, ¶ 176.

[44] State practice is a primary source of treaty interpretation according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, a provision that the Inter-American Court has relied on for its own interpretation of the Convention. *See* Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 48 (Sept. 8, 1983).

[45] *See, e.g.*, Guanajuato Declaration, *supra* note 38, ¶ 8 (pointing out that, by relying on selective scientific evidence, the Court had incurred in methodological mistakes and imprecisions).

Justice Vio Grossi pointed out that, both before and after the adoption of the American Convention, the ordinary legal meaning of the term conception was understood to be that of fertilization of the ovum by the sperm.[46] He indicated that "an important part of medical science—if not the majority—shares this understanding."[47] However, in *Artavia*, the Inter-American Court decided that in using the word "conception" the convention was not attempting to protect human life from its very beginning, but rather, for some unstated reason, was seeking to protect it later. The Court found that the term conception was equivalent to implantation,[48] that is, the beginning of pregnancy, prior to which there would be no entitlement to the right to life under the American Convention.[49]

In arriving to this conclusion, the Court relied on the view of Dr. Fernando Zegers Hochschild, an IVF practitioner who was directly involved in the artificial reproduction industry,[50] a potential conflict of interest that the Court never addressed. Zegers Hochschild, the Commission's expert witness, is a Chilean expert on artificial reproduction and the founder and former Director of the Unit of Reproductive Medicine at a private IVF clinic,[51]in which he continued to work as senior staff at the time of the *Artavia* trial.[52] Prior to the *Artavia* decision, Zegers had written that "we are convinced that a new life begins at fertilization;"[53] however, in *Artavia*, Zegers argued that "the starting point for the development of the embryo, and *subsequently of its*

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46 *Artavia*, (Vio Grossi, J., dissenting at 9, 14).

47 *Id*. (Vio Grossi, J., dissenting at 9) (citing majority opinion, ¶¶ 79, 266–84).

48 *Id*. ¶ 189.

49 *Id*. ¶¶ 186, 264.

50 *See* Lafferriere, Jorge Nicolás, *La Corte Interamericana de Derechos Humanos y un injusto fallo sobre el embrión humano ante las biotecnologías* [The Inter-American Court of Human Rights and an unjust ruling on the human embryo against biotechnology], REVISTA DE DERECHO DE FAMILIA Y LAS PERSONAS, No. 2, 2013, at 179–97 (Arg.).

51 *ICMART – Fernando Zegers-Hochschild, MD*, INT'L COMM. MONITORING ASSISTED REPROD. TECH., http://www.icmartivf.org/zegers-hochschild.html (last visited May 6, 2014).

52 *See id*.

53 "Estamos convencidos de que una nueva vida comienza con la fecundación." Horacio B. Croxatto & Fernando Zegers Hochschild, *Anticoncepción de emergencia, Ciencia y Moral* [Emergency Contraception, Science and Morality], in *Anticoncepción de emergencia: Antecedentes del debate* [Emergency contraception, Background of the debate], 95 ESTUDIOS PUBLICOS [CEP] 400-401, 400 (2004) (Chile), *available at* http://www.cepchile.cl/dms/archivo_3400_1687/r95_dossier_pildoradiadespues05.pdf (arguing that levonorgestrel prevented fertilization, not implantation of the human embryo). "Estamos convencidos de que una nueva vida comienza con la fecundación."

human life, is its implantation in the uterus."[54] These contradictory statements raise questions about Zegers' credibility as a witness.

Rather than confronting the evidence or analyzing the merits of the arguments for defining conception as fertilization, the Court simply characterized them as "associated with concepts that confer certain metaphysical attributes on embryos and as "beliefs" that should not be imposed "on others who do not share them."[55] This is an unfounded statement, however, since none of the witnesses' testimony or scientific literature submitted to the Court referred to the metaphysical attributes of embryos. The court acknowledged witness testimony arguing for conception as fertilization, such as the testimony of former IACHR Commissioner Marco Monroy Cabra and Dr. Maureen L. Condic,[56] but failed to provide any assessment of it except for the bald statement that others disagreed with them.[57] By simply relying on pejorative labeling, the Court avoided the merits of the evidence presented by the state of Costa Rica, and reached an arbitrary conclusion on the definition of the term conception.[58]

In spite of its assertion that "there is no one agreed definition of the beginning of life,"[59] the Court decided to settle the issue arbitrarily by defining conception as fertilization. The Court noted that there was no consensus on the beginning of human life among international tribunals, citing *Roe v. Wade*.[60] The reference was obviously inappropriate because the United States is not a party to the American Convention and the U.S. Supreme Court is not an international tribunal. Even assuming *Roe v. Wade* was a decision by an international tribunal or a state party, which it is not, the Court should, at the very least, have adopted Roe's middle ground approach in abstaining from unilaterally settling the question of when human life begins.[61] Instead, the Inter-American Court opted for unilaterally imposing its own definition of conception as pregnancy.

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[54] *Artavia*, ¶ 183 (citing written summary of the expert opinion provided by Fernando Zegers-Hochschild at the public hearing before the Court (merits report, volume VI, folio 2846)) (emphasis added).

[55] *Id*. ¶ 185.

[56] *See id*. ¶ 182.

[57] *See id*. ¶ 184.

[58] Email interview with Jorge Oviedo Alvarez, Deputy Solicitor General, and member of the legal defense team for the state in Artavia Murillo v. Costa Rica (Dec. 25 2012).

[59] *Artavia*, ¶ 185.

[60] *Id*. ¶ 262.

[61] Roe v. Wade, 410 U.S. 113, 119, 159 (1973).

The Court's adoption of this definition led it to the strained conclusion that the American Convention protected unborn human life only through the woman, and not as an independent life itself,[62] a deduction that a Chilean scholar qualified as absurd and with no basis in the convention's text whatsoever.[63] The Court's conclusion was based on Zegers' view that "conception or gestation is a phenomenon of the woman, not the embryo," which equated conception with pregnancy,[64] i.e. the mother's reception of the embryo. The Court thus rejected the embryo's independent existence from the moment of conception by stating that "conception only occurs in the woman's body", in spite of the fact that we commonly speak (without any hesitation or confusion) about an embryo having been "conceived" *in vitro*, i.e. quite apart from any woman's body.[65] Thus, the Court uses the human embryo's need to depend on another person against the embryo, rather than as a trigger for human rights protection as it has done with post-birth children or the disabled.[66] The dissent pointed out that such an interpretation disentitles the unborn from human rights protection and contradicts the spirit of the American Convention, which specifically sought to protect the human embryo independently of the mother.[67] The said intent is illustrated in Article 4(5) of the Convention, prohibiting the application of the death penalty to pregnant women, thus protecting the unborn child, and only him, from execution.

In adopting its definition of conception, the Court avoided using the 1970 edition of the Dictionary of the Royal Spanish Academy, which contemplated synonymous definitions of conception and fertilization.[68] Instead, the Court relied on Zegers' suggestion to use the 1946 edition of the Dictionary of the Royal Spanish Academy,[69] even though the

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[62] *Artavia*, ¶ 187.

[63] *See* Ian Henríquez Herrera, Comentario al Fallo de la Corte Interamericana de Derechos Humanos en el caso Artavia Murillo y otros [Commentary to the Inter-American Court of Human Rights judgment in Artavia Murillo and others], III REVISTA INTERNACIONAL DE DERECHOS HUMANOS 55, 61 (2013) (Arg.) (forthcoming).

[64] *Artavia*, ¶¶ 181, 187.

[65] *Id.* ¶ 186.

[66] See *Manifiesto de San José* [San Jose Manifesto], ENCUENTRO MATRIMONIAL MUNDIAL COSTA RICA, ¶¶ 25–27 (Nov. 15, 2013, 2:30pm) (indicating that the Court's dialectic of power artificially pits the human embryo against his biological parents), *available at* http://www.encuentromatrimonialcr.org/nuevo-een-2013/manifiestosanjose1-8.pdf.

[67] *Artavia*, (Vio Grossi, J., dissenting at 19).

[68] *See Artavia*, (Vio Grossi, J., dissenting at 9, 16, 19); *Manifiesto de San José*, *supra* note 66, ¶ 13.

[69] The court sided with this opinion. *Id.*, ¶¶ 181, 187–89.

convention was not adopted until 1969, and was not entered into force until 1978.[70] These synonymous definitions remain until the present day, reflecting the ordinary understanding that the terms "fertilization" and "to make a woman conceive" are synonyms.[71]

Costa Rica objected to the use of the 1946 edition of the Dictionary of the Royal Spanish Academy, asserting that it is not "the reference work normally used to understand scientific terms," and its "definition of conception [has not] been updated in line with scientific advances since 1947."[72] These appeals, however, were lost on the Court. Since the Inter-American system reunites Spanish, Portuguese, English, and French-speaking countries, further clarification could have been provided by consulting reliable dictionaries in those languages, some of which did define conception as fertilization, as pointed out by Chilean scholar Alvaro Paúl.[73] The Court, however, did not look at any of these dictionaries.

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[70] *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)*, OAS (last visited May 23, 2014), http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

[71] *Artavia*, (Vio Grossi, J., dissenting at 9); see also *Preñar Definition* [to impregnate], REAL ACADEMIA ESPAÑOLA, http://lema.rae.es/drae/?val=pre%C3%B1ar. The use of "conceive" to mean "receive" or "take in and hold" is ancient, perhaps even approaching archaic. The Oxford Dictionary, for instance, traces its origins back to the Old French term concevoir, from Latin concipere, from com- 'together' + capere 'take'. *See Conceive Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/conceive?q=conceive. It is noteworthy to mention that the modern Oxford English Dictionary defines conception as both fertilization and impregnation, using the terms as synonymous. Prior to the discovery of the ovum in the 1830s, (Karl Ernst von Baer, *Epistola de Ovo Mammalium et Hominis Genesi* (Leipzig, 1827)) it had long been common to imagine that a "fertile" woman simply "conceived," i.e. took in and held, the male seed and gave it a place to grow. But, in the light of modern genetic knowledge, it sounds odd today to say, with the King James Bible, "Sara herself received strength to conceive seed, and was delivered of a child." *Hebrews* 11:11 (King James). Since the Royal Academy long understood itself to be a guardian of tradition in language, it is not surprising that it began with this early meaning in defining the word "conceive." But that very old meaning was not the ordinary way the word "conception" was used in educated discussion of human gestation during the time relevant for the interpretation of Article 4(1).

[72] *Artavia*, ¶ 168.

[73] See Alvaro Paúl, *Decision-Making Process of the Inter-American Court: A Commentary Based on the "In Vitro Fertilization" Case*, 34 (Oct. 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303637 (draft).

2. State Practice and States Parties' Intent in Interpretation of the Term Conception

According to the Vienna Convention on the Law of Treaties, Articles 31(2), (3), and 32, the Court should have looked at the treaty context, subsequent agreements between the parties, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,"[74] and any relevant rules of international law before turning to the preparatory work of the American Convention, which is only a "supplementary means of interpretation" under the Vienna Convention[75] have protected the human embryo from conception onwards and have invoked the American Convention in doing so, as illustrated in the following paragraphs.

Had the Court taken into account subsequent state practice, it would have found that several states parties to the American Convention have treated the terms conception and fertilization as synonymous.[76] Ecuador's Juvenile Code, for instance, establishes a right to life from conception and, in the same provision, prohibits genetic research or manipulation from fertilization until birth.[77] In contrast, the judgment does not mention any state law or statute that defines conception as implantation, an omission that speaks for itself.

Likewise, the amicus brief submitted in support of Costa Rica by former Inter-American Court Judge and former Colombian Supreme Court Justice Rafael Nieto Navia, who was merely identified as a professor in the judgment,[78] pointed out that the highest courts of five Latin American countries (Argentina, Chile, Ecuador, Honduras, and Peru) have interpreted conception to mean fertilization in upholding bans on emergency contraception due to its abortifacient effects on the embryo before implantation, and have invoked the American Convention when doing so.

In *Portal de Belén – Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s/amparo,* the Argentinian Supreme Court, relying on scientific evidence, recognized the definition of conception as fertilization– the union of the sperm and

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[74] Vienna Convention, *supra* note 18, art. 31(3)(b).

[75] *Id*. art. 32.

[76] *Artavia*, (Vio Grossi, J., dissenting at 9).

[77] CÓDIGO DE LA NIÑEZ Y ADOLESCENCIA, art. 20 (Ecuador), *available at* http://www.law.yale.edu/rcw/rcw/jurisdictions/ams/ecuador/Ecuador_Code.htm

[77] *Artavia*, ¶ 13.

ovum– as the beginning of a human being's existence, clearly distinct from the moment of implantation.[79] The Argentinian Supreme Court found that the drug's effects preventing implantation, although imperceptible to the mother, constituted an effective and imminent threat to the human embryo's right to life, one that could not be subsequently repaired.[80]

Similarly, both Chile's Supreme Court and constitutional court have recognized that conception equals fertilization.[81] The Chilean Supreme Court, in 2001, recognized the human embryo as an individual belonging to the human species and, as such, deserving of constitutional and legal protection to achieve its full development until birth.[82] The constitutional court, in 2009, held that persons under Chilean jurisdiction were entitled to life from conception, understood as fertilization.[83] The court acknowledged WHO's definition of pregnancy as beginning with implantation, but deferred to scientific evidence on the beginning of human life at fertilization or conception, where the embryo possesses an individual genetic code, independent from his mother's or father's.[84] It and held that a person is entitled to constitutional protection since conception, not implantation.[85] Likewise, the Constitutional Chamber of the Honduran Supreme Court recognized that conception means at fertilization.[86] It found that emergency contraception or the morning-after

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[79] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2002, "Portal de Belén – Asociación Civil sin Fines de Lucro c. Ministerio de Salud y Acción Social de la Nación s/amparo," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2001-D-1) (Arg.), *available at* http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=516601 [hereinafter *Nativity Scene*].

[80] *Id*. at 4.

[81] *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 30 de agosto 2001, "Philippi Izquierdo c. Laboratorio Chile S.A.," Rol de la causa: 2186-2001 (Chile); Tribunal Constitucional [T.C.] [Constitutional Court], 18 abril 2008, Requerimiento de inconstitucionalidad deducido en contra de algunas disposiciones de las "Normas Nacionales sobre Regulación de la Fertilidad," aprobadas por el Decreto Supremo N° 48, de 2007, del Ministerio de Salud, Rol de la causa: 740-2007 (Chile), *available at* http://www.tribunalconstitucional.cl/wp/descargar_expediente.php?id=34407 [hereinafter *Chile Fertility Regulations*].

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] Corte Suprema de Justicia de la República de Honduras [Supreme Court of Honduras], Dictamen Decreto 54-2009, 21 de junio 2012 (Hond.), *available at* http://providahn.org/dictamen-de-la-pildora-del-dia-siguiente-pae/ *or download* at

pill violated the human embryo's right to life given the drug's potential to prevent implantation of the human embryo in the uterine lining.[87]

Ecuador's Constitutional Court[88]and Peru's Constitutional Court[89] have understood conception to mean fertilization when reversing executive authorization for distribution of emergency contraception. Both states invoked their national constitutions and the American Convention when recognizing the human embryo's entitlement to the right to life before implantation: the Peruvian Court pointed out that the whole Peruvian domestic legal system as well as international treaties ratified by Peru, including the American Convention, protected the life of the unborn from the moment of conception.[90] The Court stated Peru ratified its understanding of conception as fertilization: the moment when a new human being is created from the fusion of his parents gametes, "a process that occurs before implantation."[91]

In addition, several Mexican states have specifically defined conception as fertilization in their constitutions and state laws. The constitutions of Campeche,[92] Coahuila,[93] Durango,[94] Jalisco, [95] Nayarit,[96]

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http://www.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id_decision=438 [hereinafter *Supreme Court of Honduras*].

87 *Id.*

88 Tribunal Constitucional [Constitutional Court], 14 de Junio 2006, "José Fernando Roser Rohde c. Instituto Nacional de Higiene y Medicina Tropical "Leopoldo Izquieta Pérez" y el Ministro de Salud S/ Acción de Amparo," Caso No. 0014-2005-RA, (Ecuador), *available at* http://www.derechoecuador.com/index2.php?option=com_content&do_pdf=1&id=1994#anchor330581.

89 Tribunal Constitucional, [T.C.] [Constitutional Court] 16 Octubre 2009, ONG "Acción de Lucha Anticorrupción" Sentencia del Tribunal Constitucional, EXP. No. 02005-2009-PA/TC, ¶ 12 (Peru), *available at* http://www.tc.gob.pe/jurisprudencia/2009/02005-2009-AA.html [hereinafter *Anticorrupción*].

90 *Id.* ¶¶ 4, 12.

91 *Id.* ¶ 53.

92 Constitución Política del Estado Libre y Soberano de Campeche [C.P.], art. 6, Diario Oficial de la Federación [DO], 30 Julio 1917 (Mex.), *available at* http://www.smapacampeche.gob.mx/documentos/Leyes/constitucion%20del%20estado%20de%20campeche.pdf.

93 Código Civil del Estado de Coahuila [C.C.C.] [Civil Code of the State of Coahuila], art. 95, Diario Oficial de la Federación [DO], 25 Junio 1999 (Mex.), *available at* http://www.ordenjuridico.gob.mx/estatal.php?liberado=no&edo=5.

94 Constitución Política del Estado v de Durango [C.P.], art. 1, Diario Oficial de la Federación [DO], 14 Marzo 1918 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/01361697535684614088680/p0000001.htm#I_0_.

95 Constitución Política del Estado de Jalisco [C.P.], art. 4, Diario Oficial de la Federación [DO], 14 Marzo 1918 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/09259629022136195209079/p0000001.htm#I_0_.

Oaxaca, [97] Sonora,[98] Querétaro,[99] Tamaulipas[100] and Yucatán[101] expressly state their understanding of conception as the moment of "fertilization." The state of Nayarit,[102] in particular, invoked the American Convention and the Convention on the Rights of the Child when amending its constitution to recognize a right to life from fertilization, whether "natural or artificial" until natural death.[103] The Querétaro Civil Code specifies that conception means fertilization, whether natural or artificial.[104] Furthermore, the Tabasco Civil Code, which states that the unborn shall be protected by law, extends this protection to human embryos created through artificial reproductive technologies, "even when outside of the mother's womb," which would protect them from destruction before implantation.[105]

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[96] Constitución Política del Estado de Nayarit [C.P.], art. 7, Diario Oficial de la Federación [DO], 5 Febrero 1918 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/01361608657806726311802/p0000001.htm#I_0_.

[97] Constitución Política del Estado de Oaxaca [C.P.], art. 12, Diario Oficial de la Federación [DO], 14 Marzo 1918 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/56815172101469662765679/p0000001.htm#I_0_.

[98] Constitución Política del Estado de Sonora [C.P.], art. 1, Diario Oficial de la Federación [DO], 15 Septiembre 1917 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/80273844431460617422202/p0000001.htm#I_0_.

[99] Constitución Política del Estado de Querétaro [C.P.], art. 2, Diario Oficial de la Federación [DO], 1 Octubre 1915 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/01371418788944818540035/index.htm.

[100] Constitución Política del Estado de Tamaulipas [C.P.], art. 16, Diario Oficial de la Federación [DO], 5 Febrero 1921 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/45704061091469651665679/p0000001.htm#I_0_.

[101] Constitución Política del Estado de Yucatàn [C.P.], art. 1, Diario Oficial de la Federación [DO], 11 Enero 1918 (Mex.), *available at* http://bib.cervantesvirtual.com/servlet/SirveObras/01479510099325740832268/p0000001.htm#I_0_.

[102] Constitución Política del Estado de Nayarit, art. 7.

[103] *Id.* Dec. 16, 2010 Decree, *available at* http://info4.juridicas.unam.mx/adprojus/leg/19/765/83.htm?s=.

[104] Código Civil del Estado de Querétaro [C.C.Q.][Civil Code of the State of Querétaro], art. 22 Diario Oficial de la Federación [DO], 21 Octubre 2009 (Mex.), *available at* http://www.ordenjuridico.gob.mx/estatal.php?liberado=si&edo=22 (accessed by selecting Código and then the Civil Code of Querétaro).

[105] Código Civil para el Estado de Tabasco [C.C.T.] [Civil Code of the State of Tabasco], art. 31 Diario Oficial de la Federación [DO], 9 Abril 1997 (Mex.), *available at* http://www.ordenjuridico.gob.mx/estatal.php?liberado=si&edo=27 (accessed by selecting Código and then the Civil Code of Tabasco).

Artavia does not appear to be based on the states' parties legislative intent, or on their subsequent agreement by state practice, but on "jurisprudential innovation," as indicated by Judge García Sayán, who compared the judgment to other "pioneer" decisions, such as *Atala Riffo v. Chile* (on discrimination based on sexual orientation)."[106] The above evidence of states parties' understanding of the term conception as meaning fertilization may have been intentionally ignored by the Court, which instead relied on the *travaux preparatoires* to argue that states parties understood conception as implantation. In attempting to resist the conclusion that states parties to the convention could not have understood conception to mean implantation, while at the same time trying to prove that the term was so defined at the adoption of the convention, the *Artavia* Court contradicted itself. When looking at legislative intent behind the treaty text, by its own admission, the Court revealed that, at the time of the convention's adoption, states parties could not have possibly understood fertilization and implantation as two different stages, given that IVF was invented in 1978; "prior to IVF, science had not considered the possibility of carrying out fertilization outside a woman's body."[107] Curiously, it then argued that states did not mention fertilization during the *travaux preparatoires*,[108] which proves nothing because the *travaux* did not mention implantation either, and according to the court's own admission could not have.

Judge Vio Grossi pointed out that the Court's admission that "the definition of conception that the drafters of the American Convention had at the time has changed" to mean implantation,[109] implies a recognition that the drafters did intend to define conception as fertilization, contradicting the Court's own argument.[110] According to Vio Grossi, the "fertilization" meaning of "conception" was not in doubt among the drafters.[111]

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[106] *See* Diego García-Sayán, *Looking at the Horizon: Inter-American Achievements and Challenges*, APORTESDPLF, Apr. 2014, at 52, 54, *available at* http://www.dplf.org/sites/default/files/aportes_19_web_0.pdf.

[107] *Artavia*, ¶ 179.

[108] *Id.* ¶ 187.

[109] *Id.* ¶ 179.

[110] *Id.* (Vio Grossi, J., dissenting at 15).

[111] *Id.*

3. Disregard for the American Convention's Pro Homine Principle

The *pro homine* principle, also called *pro personae* principle,[112] is codified in Article 29(c) of the American Convention:[113] "No provision of this Convention shall be interpreted as . . . precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government." This rule has been repeatedly applied by the Inter-American Court to children and illegal immigrants,[114] and should have been used in favor of the human embryo in *Artavia*, as pointed out by an Argentinian federal court.[115]

A proper reading under Article 29 required the Court to apply the *pro homine* principle to the human embryo's right to life in the way that Latin American courts have when interpreting the convention. For instance, when dealing with emergency contraception, the Peruvian Constitutional Court noted the divide over the definition of conception among scientists and jurists, and, applied the *pro homine* principle, concluding that when in doubt the Court should err on the side of preserving fundamental rights.[116] Similarly, the Chilean Constitutional Court in 2008,[117] which invoked the Inter-American Court's Consultative Opinion OC-5/85, held that judicial reasoning should defer to the interpretation that would favor a person's right to life vis-à-vis of any other interpretation that would presuppose denying that right.[118] Likewise, the Argentinian,[119] Peruvian[120] and Honduran[121] high courts

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[112] *See* Ticona Estrada et al. v. Bolivia Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 191 ¶ 11 (Nov. 27, 2008); Raxcacó-Reyes v. Guatemala Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 133 ¶ 12 (Sep. 15, 2005).

[113] *See* Acevedo-Jaramillo et al. v. Peru Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 144, ¶ 283 (Feb. 7, 2006); *see also* "Five Pensioners" v. Peru Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 143 (Feb. 28, 2003).

[114] *See* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am Ct. H.R. (ser. A) No. 18, at 37, 78 (Sep. 17, 2003), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf; s*ee also* Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, at 30 (Aug. 28, 2002), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf.

[115] Juzgado Federal de Salta No. 1 [Juzg. Fed.] [Federal Court of Salta N. 1], 8/7/2013, "Lodi Ortiz Andrea Melisa – Larran Cristian c/ Swiss Medical s/ amparo," Expte. No. 61000007/13, (Arg.).

[116] *Anticorrupción*, *supra* note 89, ¶¶ 24, 33–34.

[117] *Chile Fertility Regulations*, *supra* note 81, at 139–40.

[118] *Nativity Scene*, *supra* note 79, at 4.

[119] *Id.* ¶ 15.

[120] *Anticorrupción*, *supra* note 89, ¶¶ 33–34.

[121] *Supreme Court of Honduras*, *supra* note 86, at 9–10.

have applied the *pro homine* principle protecting human beings from the time of fertilization onwards.

In contrast, the *Artavia* Court stopped Costa Rica from applying the *pro homine* principle to the human embryo. The justification was that Article 4(1) allowed exceptions to the right to life for human embryos.[122] Such explicit rejection of the *pro homine* principle, an exception that the Court created specifically for the human embryo, contradicts the Court's own principle of proportionality,[123] and its own case law on the fundamental character of the right to life.[124] Furthermore, the Inter-American Court has repeatedly held that, based on the fundamental role ascribed to this right by the convention, states must adopt all necessary measures to create a legal framework that deters any possible threat to the right to life.[125] It has also held that states must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life,[126] and that the object and purpose of the convention, as an instrument for the protection of the human being, requires that the right to life be interpreted and enforced so that its guarantees are truly practical and effective (*effet utile*).[127] Judge

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[122] *Artavia*, ¶ 258.

[123] *Id.* ¶ 259 (Jan. 31, 2005).

[124] Pueblo Bello Massacre v. Colombia, Merits, Reparations, and Costs Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 120 (Jan. 31, 2005), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf.

[125] Baldeón-García v. Peru. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 83–85 (Apr. 6, 2006). *See also Pueblo Bello Massacre*, ¶ 120; Mapiripán Massacre v. Colombia. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 232 (Sept. 15, 2005); Huilce Tecse v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 66 (Mar. 3, 2005); Juvenile Reeducation Inst. v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 158 (Sept. 2, 2004); Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 129 (July 8, 2004); 19 Merchants v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 153 (July 5, 2004); Myrna Mack-Chang v. Guatemala, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 153 (Nov. 25, 2003); Juan Humberto Sánchez v. Honduras, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 110 (June 7, 2003); Bámaca-Velásquez v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 172 (Nov. 25, 2000); "Street Children" (Villagrán-Morales et al.) v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144–46 (Nov. 19, 1999) *cited by* Sawhoyamaxa Indigenous Community v. Uruguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 151–53 (Mar. 29, 2006).

[126] *Baldeón-García v. Peru*, ¶ 83–85.

[127] *Id. See also* Hilaire v. Trinidad & Tobago, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 80, ¶ 83, (Sept. 1, 2001); Constitutional Court v. Peru, Competence, Judgment,

Vio Grossi argued that this is precisely what Costa Rica's IVF ban set out to do.[128] Therefore, forcing Costa Rica to authorize and subsidize artificial reproduction contradicts a state's positive duty to protect the life of unborn human beings under the convention, and contradicts the convention's *pro homine* principle.

The Court should not have restricted the enjoyment of a right given greater recognition in domestic law through a broader definition of persons, in virtue of Article 29 of the Convention. The American Convention Article 29 preempts the Court from "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party" and restricting "other rights or guarantees that are inherent in the human personality," but the Court did exactly that by reversing Costa Rica's Supreme Court protection of the human embryo[129] in *Artavia*.[130]

B. REJECTION OF THE HUMAN EMBRYO'S PERSONHOOD AND RIGHT TO LIFE BEFORE IMPLANTATION

1. Ordinary Meaning of the Term "Person"

The ordinary meaning rule was also undermined in the *Artavia* Court's interpretation of the term "person" in the American Convention. The personhood of the human embryo and the human fetus is plainly and unambiguously stated in the text of Article 4(1) of the American Convention, which protects the right to life of "every person . . . from the moment of conception."[131] Previous Inter-American Court judges and commissioners have confirmed this understanding. Former Judge Julio Barberis wrote that the convention does not leave room for doubt that the unborn is a "person" from conception, "it is simply accepting in the law what is real in nature."[132] Former Inter-American Court Judge Rafael

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Inter-Am. Ct. H.R. (ser. C) No. 55, ¶ 36 (Sept. 24, 1999); Ivcher-Bronstein v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, ¶ 37 (Sept. 24, 1999).

128 *Artavia* (Vio Grossi, J., dissenting at 6).

129 *Voto de mayoría de Sala Cuarta: Fecundación in vitro es inconstitucional* [4th Chamber majority vote: in vitro fertilization is unconstitutional], Exp: 95-001734-0007-CO Res: 2000-02306, LA NACIÓN (Costa Rica, Oct. 2000), *available at* http://wvw.nacion.com/ln_ee/2000/octubre/12/sentencia.html.

130 *Artavia*, ¶¶ 222–23, 264.

131 American Convention, *supra* note 3, art. 4(1).

132 Julio A. Barberis, *El derecho a la vida en el pacto de San Jose de Costa rica* [The right to life in the San Jose, Costa Rica Pact] *in* OS RUMOS DO DIREITO INTERNACIONAL DOS DIREITOS

Nieto Navia has indicated that a good-faith interpretation according to the ordinary meaning of the terms would lead to the self-evident conclusion that, in Article 4(1), states parties recognized the unborn as persons from the moment of conception.[133] Then-Judge Augusto Cançado Trindade referred to the unborn as "children" in his separate opinion in the case of the Castro-Castro prison.[134] Then-Commissioner Marco Gerardo Monroy Cabra indicated that the American Declaration of the Rights and Duties of Man included the human embryo from fertilization under the term "human being" and "person."[135] Moreover, it should not be forgotten that it was a former Inter-American Court Chief Justice Rodolfo Piza Escalante who wrote the Costa Rican Supreme Court opinion finding that IVF violated the human embryo's right to life and human dignity under the American Convention, Article 4(1).[136]

The *Artavia* Court, determined that the ordinary meaning of the word person was conditioned to the meaning of the word conception[137] and, because it had held that conception equals pregnancy, subsequently concluded that human embryos were excluded from the category of "persons" before implantation.[138] According to Judge Vio Grossi, this reading was in contradiction with the object and purpose of the treaty, which was to recognize the unborn as a person at every stage of development.[139]

HUMANOS; ENSAIOS EM HOMANEGEM AO PROFESSOR ANTÔNIO AUGUSTO CANÇADO TRINDADE: LIBER AMICORUM CANÇADO TRINDADE 20 (Renato Zerbini Ribeiro Leão et al. eds.) (2005), *available at* http://www.corteidh.or.cr/tablas/22962.pdf.

133 *See* Rafael Nieto Navia, *Aspectos Internacionales de la demanda contra la penalización del aborto* [International aspects of the lawsuit against criminalization of abortion], 9 REVISTA PERSONA Y BIOÉTICA, no. 1, 2005, 21–42 (Colom.) *available at* http://personaybioetica.unisabana.edu.co/index.php/personaybioetica/article/download/904/985.

134 Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 61 (Nov. 25,2006) (Judge Cançado Trindade lamented "the extreme pre-natal violence, put in evidence in the brutalities to which pregnant women were submitted in the Castro-Castro prison," as he wondered about "the consequences of this situation of extreme violence in the mind-or the subconscious-of the children born from the mother's womb so disrespected and violated, even before their birth."), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf.

135 *See* Baby Boy v. United States, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L./V/II.54, doc. 9 rev. 1 (1980–1981) (Luis Demetrio Tinoco Castro, Comm'r, dissenting), *available at* http://www.cidh.org/annualrep/80.81eng/USA2141b.htm [hereinafter *American Declaration*].

136 *See Artavia*, ¶¶ 73–76.

137 *Id.* ¶ 176.

138 *Id.* ¶¶ 222–23, 264.

139 *Id.* (Vio Grossi, J., dissenting at 6).

2. Treaty Context

In interpreting article 4(1) of the American Convention, the Court should have looked at the context, which includes the rest of the treaty itself.[140] Remarkably, even though the Court announced an independent analysis of the scope of the term "human being" defined as person in Article 1(2) of the Convention, the said analysis is nowhere to be found in the decision.[141] In fact, the Court does not in any way argue that the embryo had no human nature before implantation,[142] even though it logically had to in the light of the stipulation that "For purposes of this Convention, 'person' means every human being."[143] Had the Court carried out this independent analysis, it would have had a hard time denying that the human embryo belongs to the human species,[144] a fact that the European Court on Human Rights has recognized by stating that "it may be regarded as common ground between States that the embryo/fetus belongs to the human race."[145]

If the post-fertilization embryo is a human being then that admission would logically lead to the conclusion that he or she is a person with the same right to life that other juridical persons enjoy within each member state.[146] The Court states that its systematic analysis of the convention and particularly of article 4(1) ends without finding it admissible to assign personal status to the embryo,[147] but that analysis

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[140] Vienna Convention, *supra* note 18, art. 31(2).

[141] *See Artavia*, ¶¶ 173, 181–85 (where the Court announces it will analyze the term human being, but simply fails to go beyond simply announcing the fact of disagreement).

[142] Jorge Nicolás Lafferriere, *Invisibilizar al embrión ante los intereses biotecnológicos* [Invisibilizing the embryo before biotechnological interests], 245 REVISTA JURIDICA LA LEY [L.L.] 4 (2012) (Arg.).

[143] American Convention, *supra* note 3, art. 1(2).

[144] *See* ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE (2008). Note that the petitioners had argued, at the IACHR public hearings, that unborn child was "an entity pertaining to the mineral world or the animal world and therefore not a human person," that only from the moment of birth can a human being be considered a person and enjoy a right to life. The state refuted this assertion by stating that the human embryo could not be equated to animal or mineral life, but, evidently, to the superior realm of the human species. *See* IACHR public hearings.

[145] Vo v. France, 2004-VIII Eur. Ct. H.R. 1, ¶ 84, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887#{"itemid":["001-61887"]}.

[146] *See* American Convention, *supra* note 3, arts. 1(2), 3 (which defines "person" to include all human beings, which requires that signatory states grant every person juridical status as a person).

[147] *Artavia*, ¶ 223 (while the court rejects the personhood of the human embryo, it does implicitly grant that the human fetus may be granted such recognition in a "gradual and incremental" manner).

never reached any conclusion as to whether the embryo is a human being. Indeed, Article 1(2) and Article 3 may still be read to require each state to protect each unborn person's right to life.

Article 1(2) and Article 3 of the American Convention affirm the right of every human being to recognition as a legal person. The Court itself has stated that the breach of such recognition implies the absolute denial of the possibility of being a holder of any rights and of assuming any obligations,[148] and renders individual human beings vulnerable to human rights violations by the state or private parties.[149] Judge Manuel Ventura, in a case involving children's rights, stated that "personal identity starts from the moment of conception and its construction continues throughout the life of the individual" and that the "elements and attributes, which comprise personal identity, include such varied aspects as a person's origin or 'biological reality.'"[150] To reject the human embryo's legal personhood while acknowledging his or her biological existence may, therefore, be a serious violation of Article 3 of the American Convention.

3. State Practice and Understanding of the Term Person

Had the Court given subsequent state practice appropriate weight, as mandated in Vienna Convention articles 31(3)(b) and 32, it would have found that most states parties have acknowledged the humanity and personhood of the unborn from his or her earliest stage of development in their national laws. For instance, children's codes of Costa Rica,[151] El Salvador,[152] Honduras,[153] Ecuador,[154] Guatemala,[155]

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[148] *See Bámaca-Velásquez*, ¶ 179.

[149] See The Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R., (ser. C) No. 130, ¶ 179 (Sept. 8, 2005); *Bámaca-Velásquez*, ¶ 179.

[150] Serrano-Cruz Sisters v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 132 (Mar. 1, 2005) (Ventura-Robles, J., dissenting), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_120_ing.pdf.

[151] CÓDIGO DE LA NIÑEZ Y LA ADOLESCENCIA, arts. 2, 12 (Costa Rica).

[152] LEY DE PROTECCIÓN DE LA NIÑEZ Y ADOLESCENCA, art. 3 (El Sal.), *available at* http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-proteccion-integral-de-la-ninez-y-adolecencia.

[153] CÓDIGO DE LA NIÑEZ Y ADOLESCENCIA, art. 12 (Hond.), *available at* http://www.oas.org/dil/esp/Codigo_Ninez_Adolescencia_Honduras.pdf.

[154] CÓDIGO DE LA NIÑEZ Y ADOLESCENCIA, art. 2 (Ecuador).

Nicaragua,[156] Panama,[157] refer to the unborn child as a "person" or a "human being" who is entitled to legal rights, including the right to life at every stage of development, thereby mirroring the American Convention.

States have never understood the unborn's right to life and his or her right to be recognized as a person to be contingent on his or her ability to exercise all civil and political rights;[158] however, the Court argued that the human embryo is not a person because he or she cannot be possibly entitled to all rights attributed to persons in the American Convention.[159] Obviously, under that reasoning, other incapacitated persons –like children or the mentally disabled– would not fit within the definition of persons either, since they cannot exercise all rights in the Convention.[160] Such argument also contradicts past Inter-American Court decisions where the Court has reiterated that denying the legal existence of civilly incompetent persons would be a violation of Article 3 of the convention on the right to legal personhood.[161] The Court has interpreted this article in the Convention as protecting children and incompetent persons who may not be able to fully realize voting rights or property rights, but are nevertheless entitled to inalienable and inherent rights granted to all persons.[162]

Furthermore, had the Court looked at subsequent state practice, it would have found that states parties' civil codes protect the unborn, particularly his or her right to life, despite his other legal incapacity or even non-personhood for civil law purposes. The civil codes of Bolivia,[163] Brazil,[164] Chile,[165] Colombia,[166] Ecuador,[167] El Salvador,[168]

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[155] LEY DE PROTECCION INTEGRAL DE LA NIÑEZ Y ADOLESCENCA, arts. 2, 9 (Guat.), *available at* http://www.oas.org/dil/esp/Ley_de_Proteccion_Integral_de_la_Ninez_y_Adolescencia_Guatemala.pdf.

[156] CÓDIGO DE LA NIÑEZ Y LA ADOLESCENCIA, art. 12 (Nicar.), *available at* http://www.oas.org/dil/esp/Codigo_de_la_Ninez_y_la_Adolescencia_Nicaragua.pdf.

[157] LEY 14 QUE CREA LA SECRETARÍA NACIONAL DE NIÑEZ, ADOLESCENCIA Y FAMILIA, art. 2(3) (Pan.), *available at* http://www.gacetaoficial.gob.pa/pdfTemp/26211/15846.pdf.

[158] *See infra* notes 192-203.

[159] *Artavia*, ¶ 222.

[160] *See id*. (Vio Grossi, J., dissenting at 18).

[161] Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 41 (Aug. 28, 2002).

[162] *Id*.

[163] CÓDIGO CIVIL arts. 1, 663, 1008 (1975) (Bol.), *available at* http://www.oas.org/dil/esp/Codigo_Civil_Bolivia.pdf.

[164] CÓDIGO CIVIL [C.C.] art. 2 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/Leis/2002/L10406.htm.

[165] CÓDIGO CIVIL [CÓD.CIV.] arts. 74, 75 (Chile), *available at* http://www.oas.org/dil/esp/Codigo_Civil_Chile.pdf.

Honduras,[169] Mexico,[170] Nicaragua,[171] Panama,[172] Paraguay[173] and Peru,[174] specifically state that the law protects the life of the unborn despite its lack of legal personhood or civil capacity, which begins at birth. The Argentinian civil code uses the term "unborn persons."[175] The Nicaraguan Civil Code designates "unborn persons" as having a "natural existence" that should be protected, even if they do not yet possess all legal rights.[176] The Mexican Federal Civil Code states that legal capacity is acquired at birth, but from the moment an individual is conceived, he or she is protected by law.[177] The Peruvian Civil Code states that human life begins at conception and contains a presumption in favor of the unborn's entitlement to fundamental rights, specifically stating that only property rights may be conditioned upon his or her birth.[178]

4. Inconclusive Historical Interpretation based on the Convention's Preparatory Work

The Court stated that neither the preparatory work of the American Declaration nor that of the convention offered a definitive answer on the issue of personhood of the human embryo,[179] but

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[166] CÓDIGO CIVIL [C.C.] art. 90 (Colom.), *available at* http://www.oas.org/dil/esp/Codigo_Civil_Colombia.pdf.

[167] CÓDIGO CIVIL arts. 60, 61 (Ecuador), *available at* http://www.iberred.org/sites/default/files/codigo_civil_ecuador.pdf.

[168] CÓDIGO CIVIL arts. 72, 73 (El Sal.), *available at* http://www.oas.org/dil/esp/Codigo_Civil_El_Salvador.pdf.

[169] CÓDIGO CIVIL arts. 51, 52 (Hond.), *available at* http://www.oas.org/dil/esp/Codigo_Civil_Honduras.pdf.

[170] CÓDIGO CIVIL FEDERAL [CC] [FEDERAL CIVIL CODE] art. 22, *as amended*, Diario Oficial de la Fedración [DO], 28 de enero de 2010 (Mex.), *available at* http://www.oas.org/dil/esp/C%C3%B3digo%20Civil%20Federal%20Mexico.pdf.

[171] CÓDIGO CIVIL arts. 7, 13 (Nicar.), *available at* http://www.oas.org/dil/esp/Codigo_Civil_Nicaragua.pdf.

[172] CÓDIGO CIVIL DE LA REPÚBLICA DE PANAMA arts. 41–43 (Pan.), *available at* http://docs.panama.justia.com/federales/codigos/codigo-civil.pdf.

[173] CÓDIGO CIVIL DEL PARAGUAY arts. 28, 37, *available at* http://www.oas.org/dil/esp/Codigo_Civil_Paraguay.pdf.

[174] CÓDIGO CIVIL art. 1 (Peru), *available at* http://www.oas.org/dil/esp/Codigo_Civil_Peru.pdf.

[175] CÓDIGO CIVIL [CÓD.CIV.] [CIVIL CODE] art. 63 (Arg.), *available at* http://www.oas.org/dil/esp/Codigo_Civil_de_la_Republica_Argentina.pdf.

[176] CÓDIGO CIVIL arts. 11, 19, 20 (Nicar.).

[177] CÓDIGO CIVIL FEDERAL [CC] [FEDERAL CIVIL CODE] art. 22, as amended, Diario Oficial de la Fedración [DO], 28 de enero de 2010.

[178] CÓDIGO CIVIL art. 1 (Peru).

[179] *Artavia*, ¶¶ 200, 221.

nevertheless asserted that the human embryo is not a person according to their historical interpretation.[180] These findings are obviously contradictory: an inconclusive source, by definition, cannot lead to a definitive conclusion either in favor or against the recognition of the human embryo's personhood. The decision that states parties had intended to exclude human embryos from the term person is therefore unsubstantiated and misleading.

The Court essentially replicated the Commission's analysis in *Baby Boy v. United States*.[181] The non-binding resolution argued that the elimination of the term "unborn" as a specifically protected category of persons in the American Declaration and the existence of laws authorizing abortion under some circumstances in Latin American countries in 1947, at the time of the Declaration's adoption (not the Convention's) revealed that the states parties intended the declaration to make right to life exceptions for elective abortion at the domestic level.[182] The Commission's rationale was that states parties' intent to permit abortion under the convention would later lead to the inclusion of the terms "in general," which would qualify the right to life in the American Convention.[183] These reasons, however, may be insufficient to support such a conclusion.

The American Declaration's preparatory work demonstrates that Latin American states intended to include human rights protection for the unborn child from its inception. The Inter-American Juridical Committee of Río de Janeiro's Preliminary draft of an American Declaration on Human Rights read: "every person has the right to life, including those who are not yet born[,] as well as the incurable, the insane, and the mentally retarded."[184] The phrase was synthesized at the Bogotá Conference, as expressed by the Sixth Committee Rapporteur, Mr. Lopez de Mesa, in these terms: "likewise, it was decided to draft them (the rights and duties) in their mere essence, without exemplary or restrictive listings, which carry with them the risk of useless diffusion and of the

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[180] *Id.* ¶ 223.
[181] *Id.* ¶ 220.
[182] *Id.* ¶¶ 194–213.
[183] *Id.* ¶ 220.
[184] Actas y Documentos of the Interamerican Specialized Conference on Human Rights, OEA/Ser.K/XVI/1.2, 449 (Nov. 7-22, 1969), *available at* http://www.corteidh.or.cr/tablas/15388.pdf (unofficial translation) [hereinafter Actas y Documentos].

dangerous confusion of their limits."[185] It was the need for conciseness and inclusiveness, that motivated dropping the specific inclusion of unborn children and the mentally disabled from Article I of the American Declaration, not the drafting committee's desire to exclude them, as indicated by former Commissioner Tinoco.[186]

Likewise, the convention's preparatory work shows that states parties intended to protect unborn life since its first draft by the Inter-American Council of Jurists, where the right to life from the moment of conception was explicitly recognized, and remained until the adoption of the final text.[187] Although the ambiguous expression "in general" was added by the Commission[188] and eventually adopted, no indication was given at the conference that states parties intended to create abortion rights by its inclusion.[189]

The Commission's creative interpretation of the Convention's preparatory work in *Baby Boy* has been discredited by many commentators, including former Inter-American Court judges.[190] Current Commissioner Dinah Shelton wrote that the Commission's conclusions in *Baby Boy* had been reached through "questionable reasoning, faulty analysis and little or no attention paid to the usual canons of construction of international documents."[191] Former Inter-American Court Judge Julio Barberis was critical of the report, pointing out that the incompatibility of domestic laws with international obligations does not lead to the derogation of the latter, therefore the existence of laws allowing abortion in some Latin American countries does not lead to the derogation of the right to life from conception in the American Convention.[192]

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[185] *American Declaration*, *supra* note 135, ¶ 2. See also previous calls for the Committee to make the Preliminary draft more concise, dropping excessive detail and stating only fundamental principles in Actas y Documentos at 461.

[186] *American Declaration*, *supra* note 135, ¶ 2 (citing Actas y Documentos, *supra* note 99, at 472–78, 510–16).

[187] *See American Declaration*, *supra* note 135, ¶ 5 (Dr. Marco Gerardo Monroy Cabra, dissenting). *See also id.* ¶ 2. (Dr. Luis Demetrio Tinoco Castro, dissenting).

[188] *Id.*, ¶ 22 (majority opinion).

[189] *See* Actas y Documentos at 121.

[190] *See, e.g.* Julio, Barberis, *El derecho a la vida en el pacto de San Jose de Costa rica* [The right to life in the San Jose, Costa Rica Pact] *in* OS RUMOS DO DIREITO INTERNACIONAL DOS DIREITOS HUMANOS ; ENSAIOS EM HOMANEGEM AO PROFESSOR ANTÔNIO AUGUSTO CANÇADO TRINDADE: LIBER AMICORUM CANÇADO TRINDADE 11-26 (Renato Zerbini Ribeiro Leão et al. eds.) (2005) (critiquing the Commission's interpretation of the American Declaration in Baby Boy v. United States).

[191] *See* Dinah Shelton, *Abortion and Right to Life in the Inter-American System: The Case of Baby Boy*, 2 HUM. RTS. L.J. 309, 312–313 (1981).

[192] Barberis, *supra* note 190, at 17.

Commentator Rita Joseph referred to the resolution as an "ideologically driven misrepresentation" and suggested the Commission in *Baby Boy* may have read into the historical records what was never there.[193]

Like *Baby Boy*, *Artavia* argued that states parties had intended to give the terms "in general" in Article 4(1) a special meaning, namely, that of excluding human embryos from the category of persons.[194] This conclusion was criticized by Judge Vio Grossi, who indicated that there was no evidence that the terms "in general" had a special meaning.[195] Judge Vio Grossi also argued that a term's "special meaning" is not found in a treaty's preparatory work, but in related international agreements or state practice,[196] and that the Court should have simply resorted to the ordinary meaning of the expression.[197] Even assuming the use of the *travaux* to determine a term's special meaning was appropriate, the fact that isolated statements in favor of abortion were rejected during the preparatory work demonstrates that states parties did not favor such a reading of the Convention.[198]

5. Inappropriate Application of Systemic Interpretation

The *Artavia* judgment applied a questionable form of systemic interpretation,[199] under which it allowed itself to rely on other international treaties and regional human rights protections systems that do not explicitly protect unborn life when interpreting the American Convention, which does.[200] Judge Vio Grossi invoked the international law principle of *lex specialis derogat legi generali*, according to which the American Convention's specific recognition of the right to life from conception should prevail over more general treaties that are silent on the

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193 RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD 217–18 (2009).

194 *Artavia*, ¶¶ 193, 223.

195 *Id*. (Vio Grossi, J., dissenting at 17).

196 *Id*.

197 *Id*. (Vio Grossi, J., dissenting at 7–8).

198 *Artavia*, ¶ 221.

199 *See* González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs. Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 43 (Nov. 16, 2009) *cited in Artavia*, ¶ 191. *See also* Alvaro Paúl, Commentary, *Decision-Making Process of the Inter-American Court: A Commentary Based on the "In Vitro Fertilization" Case*, ILSA J. INT'L & COMP. L. (forthcoming) at 19-22, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303637 (for further comment on the Court's jurisdiction outside the Inter-American System on Human Rights).

200 *Artavia* (Vio Grossi, J., dissenting at 17–18).

subject, not the other way around.[201] Under this principle, the use of the European Court on Human Rights' jurisprudence or the Elimination of Discrimination against Women (CEDAW) Committee decisions as sources of interpretation of the American Convention would be conspicuously inappropriate, as former Judge Nieto Navia has pointed out.[202] The European Convention and CEDAW texts are silent on the unborn child and have been interpreted to grant him lesser protection than the American Convention text does, thus their use would be bound to yield a restrictive interpretation.

Furthermore, according to international norms of treaty interpretation in the Vienna Convention, the Court may certainly rely on "any relevant rules of international law applicable in the relations *between the parties*,"[203] but may not rely on treaties to which neither Costa Rica nor any Latin American or Caribbean state is a party, as it did in *Artavia*.[204] For instance, the Court could use the Convention on the Rights of the Child or the International Covenant on Civil and Political Rights, given that all states parties to the American Convention – including Costa Rica– are also parties to it, but not the European Convention on Human Rights and the Maputo Protocol, regional treaties to which obviously neither Costa Rica nor any other American state is a signatory or party.

Putting the propriety of this version of systemic interpretation aside, the Court carried out an improper application of its own version of the method by selectively omitting international human rights instruments that contain explicit human rights protections to the human embryo from its overview of relevant international human rights law. For instance, in its analysis of the universal system on human rights, the Court omitted human rights protection given to the embryo before implantation in the Declaration on Human Cloning,[205] which Latin

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[201] *Id*. (Vio Grossi, J., dissenting at 18).

[202] See Nieto Navia, *supra* note 133, at 36.

[203] Vienna Convention, *supra* note 18, art. 31(3)(c) (emphasis added).

[204] *Artavia* (Vio Grossi, J., dissenting at 17–18).

[205] United Nations Declaration on Human Cloning, G.A. Res. 59/280, U.N. DOC. A/RES/59/280 (Mar. 8 2005), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/280&Lang=E. See its precursor the Universal Declaration on the Human Genome and Human Rights adopted at the UNESCO 29th General Conference on 11 November 1997, which bans reproductive cloning only. Universal Declaration on the Human Genome and Human Rights, Nov. 11, 1997, *available at* http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html.

American and Caribbean states, including Costa Rica, overwhelmingly voted in favor of. The declaration calls upon states to prohibit both therapeutic and reproductive human cloning and genetic engineering techniques on human embryos which the declaration denounces as incompatible with human dignity and the protection of human life.[206]

During the declaration's approval, Mexico and Costa Rica voiced their intent to protect "human dignity" and "human life" through the adoption of the said declaration.[207] Costa Rica was actually the precursor of the United Nations ban on all forms of human cloning and was the first state to introduce a draft international convention for the prohibition of all forms of human cloning, which referred to the human embryo before implantation as a human being.[208] Selective use of the international *corpus juris* of human rights law is most evident, however, in the Court's one-sided use of European Court on Human Rights jurisprudence, which Inter-American Court Judges Eduardo Vio Grossi[209] and Alberto Pérez Pérez[210] have argued to be non-binding in any event.

6. *Selective Use of European Standards on Human Embryo's Legal Status*

The European Court on Human Rights itself has acknowledged the fundamental differences between the American Convention and the European Convention in regards to the protection of the right to life from conception. In *Vo v. France*, the European Court recognized that the American Convention's protection of the unborn child's life beginning at

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[206] The declaration was supported by affirmative votes from Bolivia, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Suriname and Trinidad and Tobago, among others. The delegations of Dominica, Peru and Venezuela were absent from the vote. Argentina, Barbados, Colombia and Uruguay abstained. Brazil and Jamaica voted against it. *See* Press Release, General Assembly, General Assembly adopts United Nations Declaration on Human Cloning by Vote of 84-34-37, U.N. Press Release GA/10333 (Aug. 3, 2005), *available at* http://www.un.org/News/Press/docs/2005/ga10333.doc.htm.

[207] *See id*.

[208] Permanent Rep. of Costa Rica to the U.N., Letter dated 2 April 2003 from the Permanent Representative of Costa Rica to the United Nations addressed to the Secretary-General, U.N. Doc. A/58/73 (Apr. 17, 2003), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/330/84/PDF/N0333084.pdf?OpenElement.

[209] *Artavia*, (Vio Grossi, J., dissenting at 17–18).

[210] Atala-Riffo & Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012) ¶ 4 (partially dissenting opinión of Judge Alberto Pérez-Pérez).

conception may be incompatible with legal abortion, as opposed to the European Convention on Human Rights, which is silent on the subject.[211]

One of the key differences between both systems' legal protection of prenatal life is that the European Court on Human Rights allows states, within their margin of appreciation, to determine in their internal order "when the right to life begins."[212] The Court has so far refused to address whether the unborn is a "person" within the meaning of Article 2 of the convention and has deferred to state jurisdiction on this matter,[213] while stating that such margin of appreciation is not unlimited, and may entail an obligation to protect the unborn.[214] It has also stated that where there is no consensus among states parties over legal protection of public policy interests, "particularly where the case raises sensitive moral or ethical issues, the margin will be wider."[215] In that vein, the European Parliament has also recognized that "considering the ethical, social and cultural dimension of abortions, it is for Member States to develop and implement their policies and legal frameworks. The Commission does not have the intention to complement national health policies in this respect."[216]

Unlike the European Court on Human Rights, the Inter-American Court has not fully developed doctrines that defer some matters to national sovereignty or promote plurality of interpretation.[217] Such doctrines seem desirable given the region's cultural, political and, social diversity and would allow for a response to criticism on the "democratic deficit" of international organizations.[218] Although the *Artavia* Court relied heavily on European Court jurisprudence, it refused to apply the same safeguards that the European system provides against judicial arbitrariness. Notably, the *Artavia* Court refused to borrow from

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[211] Vo v. France, App. No. 53924/00, 2004-VIII, Eur. Ct. H.R. ¶ 75 (2004).

[212] *Id.* ¶ 82.

[213] *Id.* ¶ 75.

[214] Grégor Puppinck, *Abortion and the European Convention on Human Rights*, 142 IRISH J. LEGAL STUD. Vol. 3(2), 154–55, *available at* http://ijls.ie/wp-content/uploads/2013/07/IJLS_Vol_3_Issue_2_Article_8_7_Comparative_Puppinck.pdf.

[215] Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. (10 April 2007), ¶ 77.

[216] *See* European Parliament, Parliamentary Questions, Answer given by Mr. Dalli on behalf of the Commission 30 April 2012, E-002933/2012, OJ C 240 E, 21/08/2013, *available at* http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-002933&language=EN.

[217] *See Radiografía Política del Sistema Interamericano*, *supra* note 25, at 5.

[218] *See id.* at 5, 27.

the Court's doctrine of the margin of appreciation,[219] even though the state of Costa Rica specifically requested it do so,[220] as it sometimes has. Presiding Judge Diego García Sayán has identified at least one set of circumstances where local specification of human rights can be considered reasonable, even if somewhat mistaken. In the context of nondiscrimination and the rights of indigenous people, García Sayán has promoted such juridical pluralism: "individual rights are exercised in communities and they must be interpreted precisely in each specific context" and "juridical pluralism is a concept with increasing acceptance and legitimacy that the Inter-American Court applies when developing its jurisprudence in cases of this type."[221] In *Artavia*, however, the Court bluntly refused to even considering doing so, without any reasoning other than its overall findings on the right to life and the right to privacy.[222]

Moreover, the *Artavia* Court relied on selective statements by the now-defunct European Commission of Human Rights and the European Court on Human Rights to support its rejection of the human embryo's personhood and right to life,[223] but misrepresented their scope and ignored precedent to the contrary. The European Commission did not always exclude the unborn child from the protection afforded by the right to life and instead left the matter for states to decide.[224] For instance, in *X. v The United Kingdom*, the Commission affirmed that the term "everyone" includes the fetus, as he "cannot be excluded" from the protection afforded by Article 6(1).[225] Furthermore, the majority opinion misrepresented the holding in *Vo v. France* as concluding that the human embryo was not a person,[226] when in fact, the European Court explicitly refused to answer the question of whether the unborn is a human person

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[219] *Vo*, ¶ 82.

[220] *Artavia* ¶¶ 169–70.

[221] Diego García-Sayán, *The Inter-American Court and Constitutionalism In Latin America*, 89 TEX. L. REV. 1835, 1857 (2011).

[222] *See Artavia* ¶ 316.

[223] *Id*. ¶¶ 234–42.

[224] H. v. Norway, Case No. 17004/90, Eur. Comm. H.R., Decision of 19 May 1992, Decision and Reports vol. 73, 155, 167; Brüggemann & Scheuten v. the Federal Republic of Germany, Case No. 6959/75, Eur. Comm. H.R., Decision of 17 March 1978, Decision and Reports vol. 10, 100, 116; X. v. the United Kingdom, Case No. 7215/75, Eur. Comm. H.R., Decision of 5 November 1981, Decision and Reports vol. 19, 244, 249, in December of the previous Commission May 13, 1980 at ¶ 7; Boso v. Italy, App. No. 50490/99, 13 Hum. Rts. Case Dig. 1059 (2002) (cited in Puppinck, *supra* note 214, at 152).

[225] *X. v. United Kingdom*, ¶ 7.

[226] *Artavia*, ¶ 247.

under the European Convention.[227] *Vo*'s specific language is included in the *Artavia* judgment itself, which cites the European Court's conclusion that "it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention."[228]

In addition, the European Court on Human Rights has indicated that the Oviedo Convention's silence on the personhood of the human embryo comes from the absence of unanimity or regional consensus on the embryo's personhood,[229] not from a rejection of the human embryo's personhood, as the *Artavia* Court suggested. The Oviedo Convention prohibits the creation of human embryos for research purposes and mandates "adequate protection of the embryo" where the law allows research on embryos in vitro.[230] Moreover, the Additional Protocol to the Lisbon Treaty on the Prohibition of Cloning Human Beings actually uses the terms "human being" and "embryo" as synonymous,[231] protecting the human embryo to a greater extent than that described in *Artavia*.

Furthermore, the European Court on Human Rights holding in *Evans v. UK* did not amount to a general holding that embryos do not have rights under the convention, as the *Artavia* suggested; instead the Court's holding is limited to cases where embryos are not afforded rights under domestic law. The Court concludes that:

> the embryos created by the applicant and J. do not have a right to life within the meaning of Article 2 . . . [given that] . . . in the absence of any European consensus on the scientific and legal definition of the

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[227] See *Artavia*, ¶ 237.

[228] *Vo*, ¶ 85. Previous to this conclusion, the Court also stated that "it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law [. . .]– require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2," a statement that was misrepresented as depriving the unborn of personhood in Artavia, even though it was immediately followed by the conclusion "that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention." *See Artavia*, ¶ 237.

[229] *Vo*, ¶ 84 (cited in *Artavia* ¶¶ 248–49).

[230] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Council of Eur., art. 18, Apr. 4, 1997, C.E.T.S. 164, *available at* http://conventions.coe.int/treaty/en/treaties/html/164.htm.

[231] Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, Council of Eur., Preamble & art. 1, Jan. 12, 1998, C.E.T.S. 168, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/168.htm.

> beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.[232]

Contrary to the *Artavia* Court's suggestion,[233] the European Court on Human Rights has never excluded prenatal life from its field of application.[234] In fact, the European Court has stated that the unborn may be included in convention's scope of protection, even when the national legislation allows abortion. [235] For instance, the Court has found that fathers and grandparents may have *locus standi* to prevent an abortion under the convention, if their state legally prohibits abortion and they are willing to raise the child.[236] It has also stated that states may have a legitimate interest in limiting the number of abortions and in protecting morals.[237] Likewise, the Court has stated that the free-will or the autonomy of the woman do not, on its own, suffice to justify an abortion.[238] The Grand Chamber of the European Court of Human Rights, in *A, B and C v. Ireland*, where three women challenged Ireland's nearly full ban on abortion that only allows a "life of the mother" exception, unambiguously stated that Article 8 of the Convention "cannot . . . be interpreted as conferring a right to abortion."[239] Subsequent case law has

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[232] Evans v. United Kingdom, App. No. 6339/05, 43 Eur. H.R. Rep. 21, ¶ 54 (2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80046.

[233] *Artavia*, ¶ 236.

[234] Puppinck, *supra* note 214, at 154–55.

[235] *Id.* at 147–52.

[236] Boso v. Italy, App. No. 50490/99, 13 Hum. Rts. Case Dig. 1059 (2002). *See also* EJIL:Talk! – Abortion on Demand and the European Convention on Human Rights, EJIL:TALK! (Feb. 23, 2013), http://www.ejiltalk.org/abortion-on-demand-and-the-european-convention-on-human-rights/ [hereinafter EJIL:TALK!].

[237] Odièvre v. France, App. No. 42326/98, 38 Eur. H.R. Rep. 43, ¶ 45 (2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60935. *See also* EJIL:TALK!, *supra* note 236.

[238] A., B., & C. v. Ireland, App. No. 25579/05, ¶¶ 214, 249 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":["878721"],"itemid":["001-102332"]}; R. R. v. Poland, App. No. 27617/04, 53 Eur. H.R. Rep. 31, ¶ 187 (2011); P. and S. v. Poland, App. No. 57375/08 (2012), *available at* http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=003-4140612-4882633#{"itemid":["003-4140612-4882633"]}; *see also* Tysiac v. Poland, App. No. 5410/03, 45 Eur. H.R. Rep. 42, ¶ 116 (2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812#{"itemid":["001-79812"]}.

[239] *A., B., & C. v. Ireland*, App. No. 25579/05 at ¶¶ 214, 227, 246, 249. The court stated that even where recognized, abortion rights may be weighed against the unborn's child right to life. *Id.* ¶ 213. The court concluded that Ireland did not violate Article 8 in regard to the first and second applicants because "Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn." *Id.* ¶¶ 241–42. Moreover, the court reiterated that "[a] broad margin of appreciation" is given to European states in regards to abortion prohibitions, given the "acute sensitivity of the moral and

reaffirmed the principle that there is no right to have an abortion or to perform it.[240]

When redefining the term conception to mean implantation, the *Artavia* Court selectively ignored the European Court of Justice holding that human life begins at fertilization,[241] and that it deserves legal protection from that moment, in *Oliver Brüstle v. Greenpeace*.[242] In that case, the Luxembourg-based Court defined the human embryo as an organism "capable of the commencing the process of development of a human," regardless of whether it was created by IVF or cloning.[243] The Court specified that this definition is "an autonomous concept of European Union law."[244] It also applied the principle of dignity and integrity of the person to the human embryo.[245] Reference to these crucial sections of the holding by the European Court of Justice was omitted in the *Artavia* decision, where the *Artavia* Court focused exclusively on the limited prohibition on patenting established in the judgment.[246]

Although it cited German domestic law,[247] the *Artavia* judgment ignored the German Embryo Protection Act that requires that no more than three embryos be fertilized in vitro, and that all be implanted in the womb in order to avoid any loss of life, and that defines an embryo as "the *fertilized* human egg cell capable of development."[248] The judgment

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ethical issues raised by the question of abortion" and "the importance of the public interest at stake," in this case the public interest being "the protection accorded under Irish law to the right to life of the unborn." *Id.* ¶ 233. This margin of appreciation, the court stated, could be narrowed by the existence of a European consensus to the contrary. *See id.* ¶ 234. However, the court did not consider that the European consensus "decisively narrows the broad margin of appreciation of the State."

240 *See P. & S. v. Poland*, App. No. 57375/08; *Silva Monteiro Martins Ribeiro v. Portugal*, App. No. 16471/02 (2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67313#{"itemid":["001-67313"]}. Jean-Jacques Amy v. Belgium, App. No. 11684/85 (1988), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-24113#{"itemid":["001-24113"]}.

241 The European Court of Justice held that any human ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis constitute a "human embryo." *See* Case C-34/10, Brüstle v. Greenpeace, ¶¶ 35–37, 53, *available at* http://curia.europa.eu/juris/liste.jsf?language=en&num=C-34/10.

242 *Id.* ¶ 53.

243 *Id.* ¶ 26.

244 Puppinck, *supra* note 214, at 154–55.

245 *Brüstle v. Greenpeace*, ¶ 6.

246 *Artavia*, ¶ 250.

247 *Id.* ¶ 254.

248 Embryonenschutzgesetz [ESchG] [Law on the Protection of Embryos], Dec. 13, 1990, BGBL. I at 2746, § 8(1) (emphasis added).

mentions the 1993 German Constitutional Court decision striking down a law permitting easier access to abortion,[249] but fails to note that the decision acknowledged that the unborn child, at least in the period after implantation (which was the period at issue before the high court), has its "own" constitutional right to life.[250] The German court added that the degree of legal protection owed to the fetus is independent of the stage of pregnancy.[251] The German Constitutional Court further pointed out that this protection was valid independent of any particular religious beliefs over which the legal order of a religion-and-worldview-neutral state can make no judgments.[252] Ironically, the *Artavia* Court's radical denial of the human embryo's personhood and right to life before implantation gave the human embryo less protection than he or she would have received under the European Convention, even though the American Convention's text explicitly protects him or her and the European Convention does not.

7. Inappropriate Interpretation of International Human Rights Treaties outside the Artavia Court's Jurisdiction

In addition to distorting the American Convention's meaning, the *Artavia* Court inappropriately interpreted other international human right instruments as denying the unborn, particularly the human embryo, a right to life, as illustrated below. Such restrictive interpretation of other treaties outside its jurisdiction is in open contradiction with Article 29 of the American Convention, which forbids interpretation that excludes or restricts human rights recognized in other international treaties to which states are parties: "No provision of this Convention shall be interpreted as: . . . 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."[253] Article 41 of the Convention on the Rights of the Child contains a similar clause, which provides that nothing in the present convention shall affect any national laws or provisions in other international treaties to which a state

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[249] *Artavia*, ¶ 261.

[250] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 28, 1993, 88 BVerfGE 203, 251-252.

[251] *Id.* at 254.

[252] *Id.* at 252.

[253] American Convention, *supra* note 3, art. 29.

is party that "are more conducive to the realization of the rights of the child."[254]

The Court inappropriately interpreted the Universal Declaration on Human Rights in the manner prohibited by Article 29 by concluding that its lack of specific reference to the unborn constituted evidence that signatory states did not intend to protect him, citing its *travaux préparatoires*.[255] Commentator Rita Joseph has pointed out that it is true that the Universal Declaration's text, like that of most international human rights instruments, does not contain specific categories of protected persons, but the purpose of such language is not to exclude those categories, but to be as inclusive as possible.[256] If the purpose of omitting specific references to different age groups or categories were to exclude them from human rights protection, she has said, then women or children might not be included in the Declaration's term "everyone" in Article 3.[257]A closer look at the Universal Declaration's *travaux préparatoires*[258] would show that states did not at any point state that human rights recognition begins at birth. It would also show that they actually rejected the second paragraph of the corresponding draft Article of the Declaration, which recognized potential exceptions to the right to life for abortions on disabled women.[259] Chile and Uruguay, two Latin American states, in particular, opposed these terms.[260]

Similarly, the Court argued that the International Covenant on Civil and Political Rights did not protect the human embryo, despite its provision that "every human being has the inherent right to life" on similar grounds.[261] It also relied on selective proposals against prenatal rights in the International Covenant on Civil and Political Rights *travaux préparatoires*[262] and on the Human Rights Committee's non-binding

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[254] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, art. 41 (Nov. 20, 1989).

[255] *Artavia*, ¶ 224.

[256] RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD 218 (2009).

[257] RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD 218 (2009).

[258] UN Doc. E/CN.4/SR/35 (1947) cited in Artavia, ¶ 224.

[259] U.N. E.S.C., Comm'n on Human Rights, 2nd Sess., 35th mtg. at 12-14, U.N. Doc. E/CN.4/SR.35 (Dec. 12, 1947).

[260] *Id*.

[261] International Covenant on Civil and Political Rights, Article 6(1), G.A. Res. 2200 (XXI) A, Annex, U.N. GAOR, 47th Sess. Supp. No. 16, U.N. Doc. A/RES/2200(XXI)A (Dec. 16, 1966) [hereinafter ICCPR].

[262] *Artavia*, ¶ 225.

recommendations.[263] It did not, however, address the treaty text, in particular, the covenant's specific prohibition of the death penalty on pregnant women,[264] which clearly shows that the unborn's life is individually protected by the treaty, in addition to the mother's.

Notably, the Court denied that the Declaration and Convention on the Rights of the Child[265] protected a prenatal right to life or recognized the human embryo as a person,[266] in spite of the fact that the text of both instruments states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*."[267] According to the Vienna Convention, Article 31(2), a treaty's preamble is an essential part of the treaty text itself;[268] therefore, an eventual argument that the preamble has no value for the purposes of interpretation would be uninformed. Furthermore, the Convention on the Rights of the Child, as well as the Declaration of the Rights of the Child, recognize the unborn child's right to life, health, and development, including "adequate pre-natal . . . care" for the child[269] and the mother.[270] Despite the clarity of its text, the Court chose to rely on supplementary methods of interpretation to find a supposed statement to the contrary, which should be used only to confirm the ordinary meaning of treaty terms or to clarify an ambiguity, as Judge Vio Grossi indicated in his dissenting opinion.[271]

The majority opinion relied, not on the preparatory work as a whole, but only on a potentially invalid, isolated statement by a handful

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[263] *Artavia*, ¶ 226.

[264] ICCPR, *supra* note 261, art. 6(5).

[265] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959).

[266] *Artavia*, ¶¶ 231, 244.

[267] Convention on the Rights of the Child, *supra* note 254, Preamble. A member of the Commission on Human Rights, Luis Demetrio Tinoco Castro, stated that this paragraph in the U.N. Declaration of the Rights of the Child inspired the Juridical Committee that drafted the American Declaration on the Rights and Duties of Man by expressly recognizing that "the human being exists, has rights, and needs protection, including legal protection, in the period preceding his birth." *See American Declaration*, *supra* note 135. (Emphasis added).

[268] Vienna Convention, art. 31(2).

[269] Declaration of the Rights of the Child, *supra* note 265.

[270] Convention on the Rights of the Child, *supra* note 254, art. 24(2)(d). Scholars have indicated that the Convention on the Rights of the Child was intended to cover children during the entire pre-natal period. *See e.g.*, BRUCE ABRAMSON, VIOLENCE AGAINST BABIES: PROTECTION OF PRE- AND POST-NATAL CHILDREN UNDER THE FRAMEWORK OF THE CONVENTION ON THE RIGHTS OF THE CHILD 60 (rev. ed. 2006), *available at* http://www.law2.byu.edu/wfpc/policy%20issues/VIOLENCE%20AGAINST%20BABIES.pdf.

[271] *Artavia*, (Vio Grossi, J., dissenting at 17).

of states in the course of the *travaux préparatoires* to argue that states specifically intended to exclude the Preamble reference to the unborn child in the interpretation of Article 1 of the Convention on the Rights of the Child in defining the term child.[272] The Court entirely ignored the existence of the U.N. Juridical Counsel's report evaluating the validity of this statement, also a part of the *travaux préparatoires,* which concluded that the working group's statement may be invalid and ineffective in interpreting the Convention.[273] A working group, integrated by seven states–none of which were Latin American–requested that the following paragraph be added to the preparatory work records: "In adopting this preambular paragraph, the drafting group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by states parties."[274]

The United Nations Juridical Counsel Carl August Fleschnauer later pointed out that the working group's obvious intent was to undermine the Preamble's protection to the unborn child.[275] The request met opposition from the delegation of Senegal, due to which the United Kingdom asked the United Nations Juridical Counsel, Carl August Fleschnauer, to confirm whether such statement could be taken into account in an eventual interpretation of Article 1 of the Convention on the Rights of the Child.[276] The U.N. Juridical Counsel's report evaluating this request states that, although there is no prohibition against the inclusion of such statements in the preparatory work records, its value for interpretative purposes in regards to Article 1 is uncertain, given that the proposed statement sought to "deprive a preambular paragraph of its usual purpose," which is to constitute a part of the basis for the interpretation of the treaty.[277] He also suggested that such a "strange" statement may have no effect on an eventual interpretation of the Convention on the Rights of the Child, given that Article 32 of the Vienna Convention establishes the preparatory work of a treaty as

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[272] *Artavia*, ¶¶ 231–32.

[273] Report of the Working Group on a draft convention on the rights of the child, Comm'n on Human Rights, 45th Sess., Nov. 28, 1988-Dec. 9, 1988, Feb. 21, 1989-Feb. 23, 1989, ¶ 43, Annex, U.N. Doc. E/CN.4/1989/48 (Mar. 2, 1989). The Counsel's report explains why the working group's statement may be invalid and ineffective in interpreting the convention.

[274] *Id*. ¶ 43. The working group consisted of Germany, Ireland, Italy, the Netherlands, Poland, Sweden, and the United States.

[275] *Id*. at Annex, ¶ 1.

[276] *Id*.

[277] *Id*. at Annex.

supplementary means of interpretation only, where the treaty terms are unclear.[278]

Even if the said declaration were a valid source of interpretation of the Convention on the Rights of the Child, which is highly debatable according to the UN Juridical Counsel, the statement does not say what the Court says it does. The proposal's language would admittedly allow individual states to grant the human embryo a lesser status than the convention's Preamble, but in no way would it force states to do so. The statement does not imply, as the *Artavia* Court claimed, that states parties to the Convention on the Rights of the Child "did not intend to extend to the unborn child the provisions of the Convention, especially the right to life."[279] It only indicates that individual states may decide not to use the Preamble when defining the term "child," leaving open the possibility of using other arguments leading to an embryo-protective interpretation of the Convention. The Court's misleading reading distorts and exaggerates the scope of the working group's statement. Had the Court looked at all statements submitted during the Declaration and Convention on the Rights of the Child's preparatory work, it would have found that several Latin American states affirmed their view that the child's right to life was protected from the moment of conception, and a proposal to that effect was introduced by Argentina and supported by several Latin American states, including Costa Rica.[280]

8. Misapplication of Evolving Interpretation

The *Artavia* Court also copied the European system in applying the principle that the American Convention is a "living instrument, whose interpretation must keep abreast of the passage of time and current living conditions."[281] An overbroad interpretation of this standard presents the risk of subjectivity in interpretation, where judges pick and choose among modern developments in human rights advocacy to support what they believe to be progressive causes, rather than looking at

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[278] *Id.*

[279] *Artavia*, ¶ 231.

[280] *See* Ricardo Bach de Chazal, *Inconstitucionalidad y No Convencionalidad Del Aborto Voluntario* [Unconstitutionality and unconventionality of voluntary abortion], NOTIVIDA 8 (July 2011), http://www.notivida.org/Articulos/Aborto/INCONSTITUCIONALIDAD%20Y%20NO%20CONVENCIONALIDAD%20DEL%20ABORTO%20VOLUNTARIO.pdf.

[281] *Artavia*, ¶ 245.

legislative intent or the treaty text.[282] It may also give the Court unfettered discretion to rewrite and define the Convention according to its preferences, of which *Artavia* is a good illustration.[283]

Judge Vio Grossi pointed out that a proper evolving interpretation would have looked at the elements in Article 31(3) of the Vienna Convention, that is a) subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, b) subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, and c) any relevant rules of international law applicable in the relations between the parties.[284] The Court did not systematically analyze these three elements, but did at least partially address some of them.

The Court observed that most states parties to the American Convention simply have no regulation on IVF, and, on this basis, came to the unwarranted conclusion that states interpreted the convention as favoring IVF and granting prenatal life only "gradual and incremental" protection.[285] Judge Vio Grossi rebutted this conclusion by noting that out of twenty-five states, only eleven allowed IVF *de facto* and only three regulated assisted reproduction, in all cases with restrictions and using language similar to that of the Costa Rican Supreme Court.[286] The Court's assertion that the majority of member states interpret the convention as permitting IVF would then be untrue, on one hand, because eleven out of twenty-five is not a majority, and on the other, because there is no evidence that these states have permitted IVF in virtue of the American Convention.[287] The regional "consensus, or common ground or a convergence of standards among the states party [sic]" required in a true evolving application, as stated by Judge Pérez Pérez,[288] would then be inexistent in regard to IVF.

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[282] For an analogous critique of the United States' living Constitution concept, *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–47 (Princeton 1997); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 394 (1985).

[283] El Mercurio, *Jurisdicción de Corte Interamericana* [Inter-American Court of Jurisdiction], EL MERCURIO – BLOGS (Jan. 4, 2013), http://www.elmercurio.com/blogs/2013/01/04/8118/Jurisdiccion-de-Corte-Interamericana.aspx (discussing a critique of evolving interpretation by Philosophy of Law Professor Max Silva Abbott of University of San Sebastián).

[284] *Artavia*, (Vio Grossi, J., dissenting at 4–5, 20).

[285] *Artavia*, ¶ 256 (majority opinion).

[286] *Artavia*, (Vio Grossi, J., dissenting at 20).

[287] *Id*.

[288] Atala-Riffo & Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012) ¶ 20 (partially dissenting opinión of Judge Alberto Pérez-Pérez).

Had the Court looked further into evolving consensus on the personhood of the human embryo among states parties, it would have found that many states have recognized the humanity of the embryo and have recognized his or her entitlement to the right to life before implantation. El Salvador's Act on Comprehensive Protection of Children and Adolescents prohibits genetic or medical research that may place the human embryo's life, physical integrity, or dignity at risk.[289] Its criminal code establishes jail penalties and professional sanctions for human genetic modification for non-therapeutic purposes; it bans reproductive cloning and the use of prenatal technologies for sex selection purposes.[290] Fines may also apply for fetal injury resulting from genetic modification.[291]

Similarly, Peru's Code of Children and Adolescents protects the unborn child's life from embryonic research or genetic modification which may be contrary to his or her integrity and development.[292] The Colombian Criminal Code prohibits genetic modification of embryos for reproductive purposes, permitting it for therapeutic and research purposes, and establishes jail penalties for violators.[293] It also prohibits cloning and trafficking of human embryos and establishes jail penalties for violators.[294] Nicaragua also bans non-therapeutic genetic modification, race selection of human embryos, and all human cloning, imposing imprisonment penalties, and professional sanctions on perpetrators.[295] Likewise, embryonic research would be included in its prohibition to create human embryos for non-reproductive purposes.[296] Criminal codes of Panama[297] and Guatemala[298] contain similar provisions.

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[289] LEY DE PROTECCIÓN INTEGRAL DE LA NIÑEZ Y ADOLESCENCA art. 19 (El Sal.), *available at* http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-proteccion-integral-de-la-ninez-y-adolecencia.

[290] CÓDIGO PENAL, art. 140 (El Sal.), *available at* http://www.oas.org/dil/esp/Codigo_Penal_El_Salvador.pdf.

[291] *Id.* art. 141.

[292] CÓDIGO DE LOS NIÑOS Y ADOLESCENTES, art. 1 (Peru), *available at* http://www.oas.org/dil/esp/Codigo_de_la_Ninez_y_la_Adolescencia_Peru.pdf.

[293] LEY 599 DE 2000, CÓDIGO PENAL, art.132 (Colom.), http://www.oas.org/dil/esp/Codigo_Penal_Colombia.pdf.

[294] *Id.* arts. 133, 134.

[295] CÓDIGO PENAL, art. 146 (Nicar.), *available at* http://www.oas.org/juridico/mla/sp/nic/sp_nic_Nuevo_Codigo_Penal_%20Nicaragua_2007.pdf.

[296] *Id.*

[297] CÓDIGO PENAL DE LA REPÚBLICA DE PANAMÁ, arts. 145, 147 (Pan.), *available at* http://www.oas.org/juridico/mla/sp/pan/sp_pan-int-text-cp.pdf; *see also* LEY N. 3, DE 15 DE ENERO DE 2004, QUE PROHÍBE TODA FORMA DE CLONACIÓN HUMANA Y DICTA OTRAS

The Court decision did acknowledge that many Latin American states prohibit human cloning, the use of artificial reproduction for non-reproductive purposes, prohibit embryo reduction, and limit the freezing of human embryos,[299] although those laws were disregarded in their conclusion. The alluded laws include Chile's Act N. 20.120 on scientific research on the human being or his or her genome which includes the human embryo in the category of human beings, prohibits all human cloning–whether reproductive or therapeutic–, bans embryonic stem cell research, and establishes criminal and professional sanctions for infractors.[300] Chile's IVF regulations also prohibit embryo freezing and storage as well as the creation of embryos for research purposes.[301] Brazil's Medical Council's Resolution prohibits not only embryo reduction, but also sex selection or eugenic selection of human embryos and non-therapeutic interventions on them.[302] Peru's health code prohibits heterologous IVF, the production of human embryos for non-reproductive purposes, and human cloning.[303]

III. CONCLUSION

The American Convention on Human Rights has consistently been identified as a pro-life treaty, one granting comprehensive protection to the unborn's right to life, by states parties, non-parties, commissioners, former judges, foreign courts, and observers of the Inter-American system on human rights, among others, as illustrated in section III. Nevertheless, judicial bias in favor of abortion rights in *Artavia* undermined a good-faith interpretation of the convention: the judges' personal views on human life prevailed over legislative intent, effectively redefining terms given a clear meaning in the American Convention.

DISPOSICIONES (Pan.), http://biblio.juridicas.unam.mx/libros/5/2292/73.pdf (banning human cloning in Panama).

298 CÓDIGO PENAL, art. 225(C) (Guat.), http://www.oas.org/dil/esp/Codigo_Penal_Guatemala.pdf.

299 *Artavia*, ¶ 255.

300 Law N. 20.120, art. 1-2, 5-6, 17, Septiembre 22, 2006, DIARIO OFICIAL [D.O.] (Chile), *available at* http://www.gobiernotransparentechile.cl/directorio/entidad/15/242/normativa_a7c.

301 Extenta No. 1072, ¶ 7, Junio 28, 1985, (Chile), *available at* http://www.gobiernotransparentechile.cl/directorio/entidad/15/235/normativa_a7c?x=0&y=0&page_number=2&sort=nombre&direction=desc.

302 Resolução Cfm No. 1.358/1992, art. 7, Conselho Federal De Medicina (Braz.), *available at* http://www.portalmedico.org.br/resolucoes/CFM/1992/1358_1992.htm (revoked in 2010).

303 Law No. 26842, art. 7, Health Law (Peru), *available at* http://www1.umn.edu/humanrts/research/peru-Ley%2026842%20Ley%20General%20de%20Salud.pdf.

Although international rules of treaty interpretation were invoked, their application was superficial, one-sided, and incomplete. The judgment's use of questionable evidence, selective exclusion of unfavorable evidence and inaccurate reporting have attracted criticism throughout Latin America,[304] with reason. The decision was characterized by many as capricious and arbitrary.[305] A declaration by Latin American jurists, medical doctors, philosophers, biologists, academics, and scientists was signed in Guanajuato, Mexico,[306] condemning the Court's poor reasoning and dogmatic conclusions. Another was adopted in Costa Rica at the country's first pro-life congress, the *Manifiesto de San José*, which also rejected the ruling and denounced it as ideologically tainted, deceptive, and arbitrary.[307]

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[304] El Mercurio, *Jurisdicción de Corte Interamericana* [Inter-American Court of Jurisdiction], EL MERCURIO – BLOGS (Jan. 4, 2013), http://www.elmercurio.com/blogs/2013/01/04/8118/Jurisdiccion-de-Corte-Interamericana.aspx (discussing a critique of evolving interpretation by Philosophy of Law Professor Max Silva Abbott of University of San Sebastián); *Nicaragua propone someter a reforma la Convención Americana sobre Derechos Humanos* [Nicaragua proposes amending the American Convention on Human Rights], LAPRENSA (Mar. 7, 2013, 5:15 PM), http://www.laprensa.com.ni/2013/03/07/poderes/137338-nicaragua-propone-someter-a; Miryan Andújar de Zamora, *Instrumentalización del embrión humano: ante los deseos de los adultos y la falta de límites en los avances biotecnológicos* [Instrumentalization of the human embryo: before the desires of adults and the lack of limits on biotechnological advances], CENTRO DE BIOETICA PERSONA Y FAMILA (last visited July 31, 2014), http://centrodebioetica.org/2013/01/instrumentalizacion-del-embrion-humano-ante-los-deseos-de-los-adultos-y-la-falta-de-limites-en-los-avances-biotecnologicos/ (analyzing Artavia's arguments on conception as implantation and the non-personhood of the human embryo from a bioethical perspective); Piero Tozzi, *La Corte Interamericana contra el estado de derecho* [the Inter-American Court against the rule of law], YOINFLUYO (Jan. 7, 2013), http://www.yoinfluyo.com/yi20/int-internacional/principal-internacional/2786-la-corte-interamericana-contra-el-estado-de-derecho; Credibilidad de CIDH en entredicho tras fallo en favor de fecundación in vitro [Inter-American Court's credibility undermined after ruling in favor of in vitro fertilization], ACIPRENSA, (Jan. 11, 2013, 4:29 AM), http://www.aciprensa.com/noticias/credibilidad-de-cidh-en-entredicho-tras-fallo-a-favor-de-fecundacion-in-vitro-37110/; *Gobiernos de América Latina: Denunciar la Convención Americana de Derechos Humanos* [Latin American Governments: Denounce the American Convention of Human Rights] (online petition), CHANGE.ORG, (last visited Jan. 11, 2014), http://tinyurl.com/amn5hpl.

[305] *See* Daniel A. Herrera & Lafferriere, Jorge Nicolás, *¿Hacia un positivism judicial internacional? Reflexiones sobre un fallo de la Corte Interamericana de Derechos Humanos y la relativización del derecho a la vida* [Towards an international legal positivism? Reflections on a ruling by the Inter-American Court of Human Rights and the relativization of the right to life], 16 LA LEY [L.L.] (2013-B) (Arg.); *see also* Herrera, supra note 63, at 55–77, 74–75 (qualifying the decision as weakly argued and illogical).

[306] *See* Guanajuato Declaration, *supra* note 38.

[307] *See Manifiesto de San José*, *supra* note 66; *see also Congreso en Costa Rica finaliza con firme defensa de la vida* [Costa Rican congress ends with firm defense of life], ACIPRENSA (Nov. 6,

In *Artavia*, the Inter-American Court interpreted the convention in a way that would amend the convention by creating new state obligations to authorize artificial reproduction while altering the true meaning of the right life from conception, recognized therein.[308] The Court's appropriation of states parties' rule-making authority or power of amendment, as stated by justice Vio Grossi,[309] acting *ultra vires*, undermines its own credibility as an international judicial body.

2013, 2:16 AM), http://www.aciprensa.com/noticias/congreso-en-costa-rica-finaliza-con-firme-defensa-de-la-vida-76402/#.UoZ1LGwo4dU (on Costa Rica's first pro-life congress).

[308] *See Manifiesto de San José*, *supra* note 66 (pointing out that Artavia violated Article 29 of the American Convention in its entirety and amounted to an amendment, rather than an interpretation of the treaty).

[309] *Artavia*, (Vio Grossi, J., dissenting at 1, 23).