

REPORT No. 156/10
PETITION 1368-04
ADMISSIBILITY
DANIEL GERARDO GOMEZ, AIDA MARCELA GARITA ET AL.
COSTA RICA
November 1, 2010

I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter “the Commission,” “the Inter-American Commission,” or “the IACHR”) received five petitions presented by Gerardo Trejos Salas (hereinafter “the petitioner”), on December 14, 2004, on behalf of Daniel Gerardo Gómez Murillo and Aída Marcela Garita Sánchez (P 1368-04); on December 27, 2004, on behalf of Roberto Pérez Gutiérrez and Silvia María Sosa Ulate (P 16-05); on June 28, 2006, on behalf of Luis Miguel Cruz Comparaz, Raquel Sanvicente Rojas, Randall Alberto Torres Quirós, and Geanina Isela Marín Rankin (P 678-06); on October 17, 2006, on behalf of Carlos Edgardo López Vega and Albania Elizondo Rodríguez (P 1191-06); and on May 3, 2007, on behalf of Miguel Acuña Cartín and Patricia Núñez Marín (P 545-07) (hereinafter “the alleged victims”). The petitions were lodged against the State of Costa Rica (hereinafter “the State,” “the Costa Rican State,” or “Costa Rica”) with regard to the alleged violation of human rights arising from judgment 2000-02306, dated March 15, 2000, of the Constitutional Chamber of Costa Rica, which prohibited *in vitro* fertilization by declaring Presidential Decree 24029-S of February 3, 1995, unconstitutional.

2. The petitioner alleges that the aforementioned decision prevented the alleged victims from availing themselves of *in vitro* fertilization and, therefore, the State is responsible for the violation of the rights enshrined in Articles 1 (obligation to respect rights), 2 (obligation to adopt measures under domestic law), 11 (right to privacy), 17.2 (right to raise a family), and 24 (right to equal protection before the law) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”). In petitions 1191-06, 678-06, and 545-07, the petitioner also alleges that violations occurred in respect of Articles 4.1 (right to life), 5.2 (right to humane treatment), and 26 (progressive development of economic, social, and cultural rights) of the American Convention, as well as in respect of Articles 1, 2, 3, 10, 14.1.b, and 18 of the Additional Protocol to the American Convention in the area of Economic, Social, and Cultural Rights (hereinafter “Protocol of San Salvador”). As for the exhaustion of remedies under domestic jurisdiction, the petitioner maintains that domestic remedies were exhausted under Article 46.1.a of the American Convention.

3. According to the State, at the domestic level it was determined that the conditions under which *in vitro* fertilization was performed constituted a threat to human life, and this value and right take precedence over any other. As for the admissibility requirements, the State maintains that the petitions should have been found inadmissible because the allegations do not describe violations of human rights guaranteed by the American Convention and because they were submitted after the applicable deadline, that is, beyond the period of six months stipulated in Article 46.1.b of the American Convention and paragraph 32.1 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter “the Rules of Procedure of the IACHR”).

4. As provided in Article 29.d of the Rules of Procedure of the IACHR, petitions nos. 16-05, 678-06, and 1191-06 were joined on March 11, 2009, to petition 1368-04, because they deal with similar facts and allegations. Petition 545-07 was joined thereto on April 22, 2010.

5. Without prejudging the merits of the matter, the Commission concludes in this report that the petition is admissible, in the light of Articles 46 and 47 of the American Convention. Therefore, the Inter-American Commission has decided to notify the parties of its decision and proceed with the examination of the merits concerning the alleged violations of Articles 5.1, 11.2, 17.2, and 24 of the American Convention, in keeping, in each case, with the general obligation to respect and safeguard rights, as set forth in Articles 1.1 and 2 of that international instrument. As for Articles 4 and 26, also cited,

the Commission found the petition inadmissible. The Commission has also decided to publish this decision and to include it in the Commission's Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

1. Petition 1368-04 (Daniel Gerardo Gómez Murillo and Aída Marcela Garita Sánchez)

6. On December 15, 2004, la Commission received the petition and assigned it no. 1368-04. On July 17, 2006, the IACHR transmitted the pertinent sections of the petition to the Costa Rican State, requesting that within a period of two months it submit its reply, as provided in Article 30.2 of the Rules of Procedure of the IACHR. The State's reply was received on August 5, 2005.

7. In addition, the IACHR received information from the petitioners on the following dates: June 19, 2006, July 7, 2006, September 6, 2006, October 19, 2006, December 15, 2006, January 19, 2007, February 12, 2007, February 26, 2007, May 3, 2007, January 11, 2008, March 31, 2008, April 1, 2008, August 7, 2008, August 8, 2008, August 21, 2008, August 30, 2008, October 28, 2008, November 24, 2008, January 20, 2009, August 5, 2009, August 19, 2009, December 18, 2009, January 3, 2010, February 13, 16, and 17, 2010, and February 22, 2010. Those communications were duly transmitted to the State.

8. Further, the IACHR received observations from the State on the following dates: November 20, 2006, March 23, 2007, February 27, 2007, May 17, 2007, July 18, 2007, October 16, 2008, October 17, 2008, October 29, 2008, November 24, 2008, January 30, 2009, March 13, 2009, May 26, 2009, June 3, 2009, and January 22, 2010. Those communications were duly transmitted to the petitioners.

9. On October 28, 2008, during the 133rd regular period of sessions of the IACHR, a public hearing was held on petitions 1368-04, 16-05, 678-06, and 1196-06 and on case 12.361. Case 12.361 pertains to the same allegations as does this petition, that is, the alleged violation of human rights that arose from judgment 02306 of March 15, 2000, issued by the Constitutional Chamber of Costa Rica when it declared unconstitutional Presidential Decree 24029-S of February 3, 1995, which regulated the practice of in vitro fertilization in Costa Rica. The hearing was attended by the alleged victims and representatives of the Costa Rican State and included testimony from a victim in case 12.361.

2. Petition 16-05 (Roberto Pérez Gutiérrez and Silvia María Sosa)

10. On December 21, 2004, the Commission received the petition and assigned it no. 16-05. On July 17, 2006, the IACHR transmitted the relevant sections of the petition to the Costa Rican State, requesting that within a period of two months it present its reply, as provided in Article 30.2 of the Rules of Procedure of the IACHR.

11. In addition, the IACHR received information from the petitioners on the following dates: June 19, 2006, September 6, 2006, October 19, 2006, December 15, 2006, January 19, 2007, February 12, 2007, February 26, 2007, May 3, 2007, January 11, 2008, March 31, 2008, April 1, 2008, August 7, 2008, August 8, 2008, August 21, 2008, August 30, 2008, October 1, 2008, October 28, 2008, November 24, 2008, and January 20, 2009. Those communications were duly transmitted to the State.

12. Moreover, the IACHR received observations from the State on the following dates: November 20, 2006, March 23, 2007, February 27, 2007, May 17, 2007, October 16, 2008, October 29, 2008, November 24, 2008, and January 30, 2009. Those communications were duly transmitted to the petitioners.

13. On October 28, 2008, during the 133rd regular period of sessions of the IACHR, a public hearing was held on petitions 1368-04, 16-05, 678-06, and 1196-06 and on case 12.361¹. The hearing

¹ See paragraph 9 of the petition.

was attended by the alleged victims and representatives of the Costa Rican State and included testimony from a victim in case 12.361.

3. Petition 678-06 (Luis M. Cruz Comparaz, Raquel Sanvicente et al.)

14. On June 28, 2006, the Commission received the petition and assigned it no. 678-06. On July 17, 2006, the IACHR transmitted the relevant sections of the petition to the Costa Rican State, requesting that within a period of two months it present its reply, as provided in Article 30.2 of the Rules of Procedure of the IACHR. The State's reply was received on May 14, 2007. In its reply the State indicated that it had sent its observations in a communication dated November 16, 2006, when it presented observations on case 12.361. The IACHR notes that case 12.361, which has reached the merits phase, pertains to the same events as does this petition.

15. In addition, the IACHR received information from the petitioners on the following dates: September 6, 2006, October 19, 2006, December 15, 2006, January 19, 2007, February 12, 2007, February 26, 2007, May 3, 2007, January 11, 2008, March 31, 2008, April 1, 2008, August 7, 2008, August 8, 2008, August 21, 2008, August 30, 2008, October 1, 2008, October 28, 2008, November 24, 2008, and January 20, 2009. Those communications were duly transmitted to the State.

16. Moreover, the IACHR received observations from the State on the following dates: November 20, 2006, March 23, 2007, February 27, 2007, May 17, 2007, July 18, 2007, October 16, 2008, October 29, 2008, November 24, 2008, and January 30, 2009. Those communications were duly transmitted to the petitioners.

17. On October 28, 2008, during the 133rd regular period of sessions of the IACHR, a public hearing was held on petitions 1368-04, 16-05, 678-06, and 1196-06 and on case 12.361². The hearing was attended by the alleged victims and representatives of the Costa Rican State and included testimony from a victim in case 12.361.

4. Petition 1191-06 (Carlos E. López and Albania Elizondo Rodríguez)

18. On October 11, 2006, the Commission received the petition and assigned it no. 1191-06. On February 12, 2007, the IACHR transmitted the relevant sections of the petition to the Costa Rican State, requesting that within a period of two months it present its reply, as provided in Article 30.2 of the Rules of Procedure of the IACHR. The State's reply was received on April 11, 2007.

19. In addition, the IACHR received information from the petitioners on the following dates: January 19, 2007, February 26, 2007, May 3, 2007, January 11, 2008, March 31, 2008, April 1, 2008, August 7, 2008, August 8, 2008, August 21, 2008, August 30, 2008, October 28, 2008, November 24, 2008, October 28, 2008, and January 20, 2009. Those communications were duly transmitted to the State.

20. Moreover, the IACHR received observations from the State on the following dates: November 20, 2006, March 23, 2007, February 27, 2007, May 17, 2007, October 16, 2008, October 29, 2008, November 24, 2008, and January 30, 2009. Those communications were duly transmitted to the petitioners.

21. On October 28, 2008, during the 133rd regular period of sessions of the IACHR, a public hearing was held on petitions 1368-04, 16-05, 678-06, and 1196-06 and on case 12.361³. The hearing was attended by the alleged victims and representatives of the Costa Rican State and included testimony from a victim in case 12.361.

² See paragraph 9 of the petition.

³ See paragraph 9 of the petition.

22. On March 11, 2009, petitions nos. 16-05, 678-06, and 1191-06 were joined to petition 1368-04.

4. Petition 545-07 (Miguel Acuña Cartín and Patricia Núñez Marín)

23. On May 3, 2007, the Commission received the petition and assigned it no. 545-07. On May 30, 2007, the IACHR transmitted the relevant sections of the petition to the Costa Rican State, requesting that within a period of two months it present its reply, as provided in Article 30.2 of the Rules of Procedure of the IACHR. The State's reply was received on July 31, 2007. That communication was duly transmitted to the petitioners.

24. In addition, on October 28, 2008, during the 133rd regular period of sessions of the IACHR, a public hearing was held on petition 1368-04 and on case 12.361, which is in the merits phase. The hearing was attended by the representative of the alleged victims and representatives of the Costa Rican State and included testimony from an alleged victim in case 12.361, Andrea Bianchi Bruno.

25. As provided in Article 29.d of the Rules of Procedure of the IACHR, petition 545-07 was joined to petition 1368-04.

III. POSITIONS OF THE PARTIES

A. The petitioner

26. The petitioner alleges violations of the human rights of: Aída Marcela Garita Sánchez, teacher, Daniel Gerardo Gómez Murillo, chemist, Luis Miguel Cruz Comparaz, tour guide, Raquel Sanvicente Rojas, housewife, Randall Alberto Torres, graduate in English, Geanina Isela Marín Rankin, graduate in electronic engineering, Carlos Edgardo López Vega, small business owner, Albania Elizondo Rodríguez, small business owner, Roberto Pérez Gutiérrez, management assistant, Silvia María Sosa Ulate, manager, Miguel Acuña Cartín, and Patricia Núñez Marín.

27. The petitioner alleges that the human rights violation stems from judgment 2000-02306, issued by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica on March 15, 2000, which prohibited the practice of in vitro fertilization by declaring unconstitutional Presidential Decree No. 24029-S of February 3, 1995, which regulated that practice.

28. According to the petitioner, the alleged victims attempted to have biological children and, when they were unable, sought medical assistance and were diagnosed with infertility. After attempting various methods of assisted reproduction, all unsuccessful, the only viable option they had for procreating biologically was in vitro fertilization. According to testimony recorded in the case file, the alleged victims were diagnosed with infertility after the year 2000.

29. The petitioner says this procedure is used for women with blocked fallopian tubes, who are missing their fallopian tubes, or who have bilateral and irreversible injury to those tubes, whether caused by infection or trauma, and which cannot be surgically repaired. It is also used in cases of unexplained infertility, endometriosis, immunological infertility, male infertility, and other conditions.

30. The petitioner adds that assisted reproduction techniques, among them in vitro fertilization, include a broad range of procedures designed to increase the probability of conception by placing the egg and sperm in proximity using various techniques. He states that this medical procedure promotes the legitimate exercise of the rights to human reproduction and health, which are implicitly recognized in the American Convention, since they stem from the right to freedom and self-determination, the right to personal and family privacy, the right to raise a family, and the right to equality expressly recognized in the American Convention and in other international human rights instruments.

31. According to the petitioner, in vitro fertilization is a tool of scientific progress that allows infertile couples to exercise their right to health, to reproduction, and to raise a family, which are values

protected by the American Convention and by the Protocol of San Salvador. He adds that the Protocol of San Salvador recognizes the right of every person to enjoy the benefits of scientific and technological progress and, consequently, that the Costa Rican State should refrain from legally preventing infertile couples from availing themselves of such progress.

32. The petitioner alleges that Article 11 of the American Convention has been violated in the sense that said right protects persons from government interference in their private lives. He indicates that the prohibition of in vitro fertilization violates the right to protection of free and responsible decisions concerning the sexual and reproductive lives of individuals, such as decisions to raise a family and to undergo the necessary therapeutic treatments to attempt to have children. He also maintains that the State violates the privacy rights of the alleged victims, which he describes as “a realm which no one can invade, a field of activity that is the absolute province of each individual.”⁴

33. He states further that the prohibition of in vitro fertilization in Costa Rica violates the right of the alleged victims to raise their own families, enshrined in Article 17.2 of the American Convention, as well as the right to have children, which is necessary in order to exercise the right to raise a family. He also maintains that such prohibition, which affects infertile couples, violates the overall obligation of nondiscrimination established in Article 1 of the American Convention.

34. The petitioner alleges that Article 24 of the American Convention has been violated in the sense of discrimination against persons with disabilities. He affirms that there is an unwarranted difference in the treatment given to a person, or a group or category of persons (sterile persons), in relation to others (who are not sterile). He also maintains that the prohibition of in vitro fertilization created a situation of discrimination for reasons of economic status because couples with financial resources are able to go abroad while couples without such resources do not have that option.

35. The petitioner affirms that a person’s right to life is not absolute but is, rather, subject to exceptions and conditions. He also argues that the American Convention established the principle of relativity when stating in Article 4 that life, in general, is protected from the moment of conception. He also questions the legal status of the embryo, arguing that birth determines the existence of the human being and the recognition of his legal personhood; and he says that every person who comes to this world is a person before the law if he meets the two conditions of being born and being born alive.

36. The petitioner states that Ms. Ileana Henchoz Bolaños (victim in case 12.361) sued the Costa Rican Social Security Fund (case file no. 089-000178-1027-CA) to obtain in vitro fertilization. On October 14, 2008, the Superior Tribunal of Contentious Civil Treasury Matters ordered the Costa Rican Social Security Fund to provide Ms. Henchoz with in vitro fertilization because she was not prohibited from receiving such treatment under domestic law as long as the defects described by the Constitutional Chamber in its judgment 2000-02306 of March 15, 2000, did not apply.

37. The judgment was appealed by the Costa Rican Social Security Fund on August 19, 2009. The magistrates of the First Chamber of the Supreme Court of Justice reversed that ruling and found the suit groundless. The petitioner maintains that the Chamber’s central argument was that the complainant had no interest in the proceeding because, given her age, she could no longer undergo this procedure.

38. As for the exhaustion of remedies under domestic jurisdiction, the petitioner maintains that Article 11 of Costa Rica’s Constitutional Jurisdiction Act provides that judgments, decrees, or provisions of the constitutional court cannot be appealed. Consequently, no remedy is admissible and Article 46.1.a of the American Convention applies.

39. As for the deadline for presentation, the petitioner maintains that the existence of a jurisprudential rule in force under domestic law that is final and binding on all judicial, administrative, and

⁴ Communication from the petitioner, dated January 19, 2007.

legislative bodies in Costa Rica establishes *per se* a legal situation that affects the rights protected by the American Convention. Consequently, this constitutes a continuing violation of the Convention.

B. The State

40. The State maintains that it has endeavored to establish the necessary conditions to comply with the right to protection of the family, but that consideration must be given to the fact that, under Article 17.2, the exercise of the right of men and women to marry and raise a family requires that they meet the conditions stipulated under the domestic laws of the states. In this sense, it indicates that while “parents should have the right to have children, it would not seem lawful that, in order to do so, they should deprive other human beings of life.”⁵

41. The State argues that, regardless of how the modifier “in general” in Article 4.1 of the American Convention is interpreted, what is important is that the article establishes that life should be protected from the moment of conception and that the State has chosen the latter option.

42. The State affirms that the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, in its judgment 2000-0236 of March 15, 2000, did not declare *in vitro* fertilization unconstitutional as a means of assisted reproduction *per se*; actually, what the constitutional court had previously determined in interpreting national and international law “is that the procedure carried out in the year 2000 [...], beyond any possible doubt, placed the embryos at a disproportionate risk of death.”⁶ In other words, under the conditions under which the procedure was performed at the time of the Constitutional Chamber’s ruling, which allowed the insemination of up to six eggs, the procedure was found to violate the right to life. Consequently, the procedure was not in keeping with the Constitution or with Article 4 of the American Convention. According to the State, the Constitutional Chamber found that “... advances in science and biotechnology are so swift that the procedure could come to be improved to such an extent that the objections noted here would no longer apply.”⁷

43. Consequently, the State argues that the allegations do not describe a violation of rights guaranteed by the American Convention.

44. As for the admissibility requirements, the State maintains that the alleged victims did not exhaust domestic remedies. It states that this was confirmed by the judgment of October 15, 2008, by the Superior Tribunal of Contentious Civil Treasury Matters concerning the suit brought by Ileana Henchoz Bolaños (victim in case 12.361 before the IACHR), against the Costa Rican Social Security Fund (case file no. 089-000178-1027-CA). In this case, Ms. Henchoz requested the Costa Rican Social Security Fund to provide her with *in vitro* fertilization. In the first instance, the State argues that the Superior Tribunal of Contentious Civil Treasury Matters recognized the soundness of the Constitutional Chamber’s judgment because it established that *in vitro* fertilization was not prohibited in Costa Rica as long as the objections described by the Constitutional Chamber did not apply. The Tribunal stated that this medical procedure, as now developed, makes it possible, in a female reproductive cycle, to fertilize a single egg for subsequent placement in the mother’s uterus. Subsequently, the Costa Rican Social Security Fund appealed the Superior Tribunal’s judgment and, on August 19, 2009, the magistrates of the First Chamber of the Supreme Court of Justice reversed that ruling and declared the suit groundless.

45. On the other hand, at a public hearing held on October 28, 2008, during the 133rd regular period of sessions⁸, on case 12.361 and petitions 16-05, 678-06, 1191-06, and 545-07, which were later

⁵ Communication from the State, dated November 16, 2006.

⁶ Communication from the State, dated January 29, 2009.

⁷ Communication from the State, dated November 24, 2008, citing part of judgment No. 2000-2306, issued by the Constitutional Chamber on March 15, 2000.

⁸ IACHR, public hearing before the IACHR on the petitions and on case 12.361, held on October 28, 2008, during the 133rd regular period of sessions. See at: <http://www.IACHR.oas.org/prensa/publichearings/advanced.aspx?Lang=ES>

joined to petition 1368-04, the State affirmed to the IACHR that the probability of success with the fertilization of a single embryo, as described by the Superior Tribunal of Contentious Civil Treasury Matters in its first-instance judgment, dated October 15, 2008, was very low and, therefore, the procedure would have to be performed multiple times to achieve pregnancy. It also indicated that the procedure established by the Superior Tribunal of Contentious Civil Treasury Matters is largely unsuccessful and carries a high embryonic loss rate⁹.

46. The State maintains that all the joined petitions were presented after the deadline, that is, beyond the period of six months, having been presented to the IACHR in 2004, 2005, 2006, and 2007— various years, respectively, after the announcement of the final ruling on the matter¹⁰, which was issued on March 15, 2000, in judgment 2000-02306 of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personæ*, *ratione loci*, *ratione temporis*, and *ratione materiae*

47. The petitioner is empowered by Article 44 of the American Convention to submit petitions to the Commission. The petition names as alleged victims 12 natural persons in respect of whom the Costa Rican State undertook to respect and guarantee the rights enshrined in the American Convention. Costa Rica has been a state party to the American Convention since April 8, 1970, when it deposited its instrument of ratification. Therefore the Commission is competent *ratione personæ* to hear the petition.

48. The Commission, further, is competent *ratione loci* to hear the petition, since it alleges violations of rights protected in the American Convention that are said to have taken place under the jurisdiction of the state party. The Commission is competent *ratione temporis* to examine the complaint because the obligation to respect and guarantee the rights protected in the American Convention was already in force for the State on the date on which the events described in the petition allegedly took place. Finally, the Commission is competent *ratione materiae*, because the petition alleges possible violations of human rights protected by the American Convention.

49. Although the IACHR lacks competence *ratione materiae* under its system of individual petitions to rule on an individual case concerning the violations of Articles 1, 2, 3, 10, 14.1.b, and 18 of the Protocol of San Salvador alleged by the petitioner, the Commission, bearing in mind the provisions of Articles 26 and 29 of the American Convention, may consider the provisions of that Protocol in interpreting other applicable provisions of the American Convention and of other treaties in respect of which it does have competence *ratione materiae*¹¹. Therefore the Inter-American Commission shall interpret the articles of the Protocol of San Salvador to the extent that this is relevant to its application of the American Convention¹².

B. Other requirements for the admissibility of the petition

⁹ IACHR, public hearing before the IACHR on the petitions and on case 12.361, held on October 28, 2008, during the 133rd regular period of sessions. See at: <http://www.IACHR.oas.org/prensa/publichearings/advanced.aspx?Lang=ES>.

¹⁰ Communication from the State, dated May 14, 2007.

¹¹ See IACHR, Report No. 44/04, Laura Tena Colunga et al. (Inadmissibility), Mexico, October 13, 2004, paragraphs 33-40; IACHR, Jorge Odir Miranda Cortez et al. (Admissibility), El Salvador, Case 12.249, Report no. 29/01, paragraph 36.

¹² Article 19.6 of the Protocol of San Salvador provides as follows: "Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

1. Exhaustion of domestic remedies

50. Article 46.1.a of the American Convention provides that, in order for a petition presented to the Inter-American Commission under Article 44 thereof to be admissible, the remedies available under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow the national authorities to consider the alleged violation of a protected right and, if applicable, have the opportunity to resolve the matter before it may be heard by an international body.

51. As for the exhaustion of domestic remedies, the petitioner maintains that such remedies were exhausted under Article 46.1.a of the American Convention and therefore none of the alleged victims pursued a remedy at the domestic level. He states that as a result of the Constitutional Chamber's decision, in vitro fertilization in Costa Rica was effectively prohibited, and therefore no remedy could be pursued, under Article 11.2 of Costa Rica's Constitutional Jurisdiction Act, which provides that judgments, decrees, and provisions of the constitutional court cannot be appealed.

52. The State, for its part, maintains that the petitioner did not exhaust domestic remedies, citing in support of this argument the fact that Ms. Ileana Henchoz Bolaños, victim in case 12,361 before the IACHR, instituted a proceeding for decision against the Costa Rican Health Fund before the Superior Tribunal of Contentious Civil Treasury Matters, which was resolved in favor of the claimant in the first instance. Consequently, the State alleges that at the time the petitions were presented to the IACHR there existed domestic remedies that had not been exhausted.

53. In order to ascertain compliance with the requirement that domestic remedies be exhausted, the IACHR must identify the appropriate remedy according to each specific case, i.e., the remedy that could correct the violation of law.

54. The matter in dispute in this case is the judgment issued by the Constitutional Chamber on March 15, 2000, which declared unconstitutional Presidential Decree 24029-S of February 3, 1995, which regulated in vitro fertilization in Costa Rica--that is, a final, binding decision of the highest judicial body of Costa Rica.

55. The Commission observes that Article 11 of the Constitutional Jurisdiction Act expressly states that "there shall be no appeal of judgments, decrees, or provisions issued under constitutional jurisdiction." Consequently, under that article, any remedy attempted in respect of a judgment issued by that jurisdictional body would have been rejected. In addition, the IACHR observes that, according to the petition, the alleged victims did not know in 2000 that in vitro fertilization would be their only option for biological procreation. Consequently, they had no need to sue for their interests in response to the Constitutional Chamber's ruling. Because the matter in dispute was decided definitively in 2000, at the time that the alleged victims were affected by the consequences of that judgment they no longer had appropriate remedies available for pursuing their individual interests.

56. Moreover, the IACHR notes that Ileana Henchoz Bolaños (alleged victim in case 12.361) attempted a constitutional challenge and a proceeding for decision. As for the constitutional challenge to the jurisprudence of the Constitutional Chamber, that chamber, in a ruling of June 11, 2008, rejected that remedy outright.

57. As for the proceeding for decision attempted, cited both by the petitioner and by the State, the Commission finds that such proceeding was not an appropriate remedy for the alleged victims. The proceeding for decision was attempted by Ileana Henchoz against the Costa Rican Health Fund, seeking to compel the Fund to provide her with a medical procedure that, because of the decision issued by the Constitutional Chamber of Costa Rica, had been prohibited in Costa Rica since 2000. Although the remedy was resolved in favor of the claimant in the first instance, on appeal the magistrates of the First Chamber of the Supreme Court of Justice reversed that ruling and declared the case groundless. In addition, the State has not shown how this proceeding for decision, which is not of a constitutional nature, would have been effective in resolving the claim. In that regard, both parties affirm that the matter in

dispute has been addressed as a constitutional question and, therefore, only the legal question raised at the constitutional level need be addressed. As already explained, Costa Rican law expressly provides that there shall be no appeal of judgments by the constitutional court.

58. Accordingly, the Inter-American Commission finds that the alleged victims in this case were prevented from exhausting other appropriate and available remedies. Consequently, it finds in this case that the exception to the exhaustion of domestic remedies rule provided in Article 46.2.a does apply.

2. Deadline for presentation of the petition

59. Article 46.1.b of the Convention establishes that, in order for the petition to be declared admissible, it must have been presented within a period of six months from the date on which the interested party was notified of the final decision that exhausted domestic jurisdiction. This rule does not apply when the Commission finds that any of the exceptions to the exhaustion of domestic remedies rule set forth in Article 46.2 of the Convention applies. In such cases, the Commission must determine whether the petition was presented in a reasonable period of time under Article 32 of its Rules of Procedure. According to that article, in its analysis the Commission “shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.”

60. According to the petitioner, the existence of a jurisprudential provision in force under domestic law that is final and binding for all judicial, administrative, and legislative bodies in Costa Rica and for every person in itself creates a legal situation that affects the rights protected by the American Convention on Human Rights. In this specific case, he maintains that a continuing violation of the Convention has occurred. Consequently, he alleges that paragraph (b) of Article 46, which requires that the complaint be lodged within a period of six months, does not apply.

61. The State, for its part, maintains that the petitions were presented after the deadline, that is, beyond the period of six months, having been presented to the IACHR in 2004, 2005, 2006, and 2007, i.e., several years after the final ruling on the matter was known¹³ on March 15, 2000. According to the State, it is not reasonable to conclude that an alleged violation continues years after the interested parties have been notified of a final decision, since in that line of thinking the alleged continuing violation would have been accepted tacitly by the alleged victims since the reasonable period of time for reporting the supposed rights violation to international bodies would have expired much earlier. The rule concerning a reasonable period of time for lodging petitions with the inter-American human rights system must be analyzed in each case, taking into account the legal action taken by the relatives of the alleged victims, the State’s actions, and the situation and context in which the violation is alleged to have taken place¹⁴.

62. In this regard the Commission observes that the complaints lodged refer to a health condition, infertility, which is diagnosed medically, a situation of which the alleged victims had no reason to be aware at the time of the judgment by the Constitutional Chamber of Costa Rica. The alleged victims were affected by the judgment once they needed in vitro fertilization to procreate biologically.

63. Considering the nature of the complaints presented, which refer to the effects of a judgment issued by the highest judicial authority and still in effect, together with the health situation of which they were unaware at the time the Constitutional Chamber of Costa Rica issued its ruling on March 15, 2000, and which affected them when they learned that in vitro fertilization was their only option for biological procreation, and that, according to the analysis under the exhaustion of domestic remedies, they realized that no effective remedies were available to them, the IACHR finds that the six-month rule does not constitute an impediment to the admissibility of this case under the circumstances here established¹⁵.

¹³ Communication from the State, dated May 14, 2007.

¹⁴ IACHR, Report No. 7/07, Petition 208-05 Admissibility, Florencio Chitay Nech et al. (Guatemala), February 27, 2007.

¹⁵ See IACHR, Report No. 28/98, Case 11.625, María Eugenia Morales de Sierra (Guatemala), March 6, 1998, paragraph

64. In this particular situation, the IACHR finds, for purposes of the admissibility requirements, that the petitions were presented within a reasonable period of time.

3. Duplication of procedures and international *res judicata*

65. The petitioners have stated, and the case file shows no evidence to the contrary, that the subject of the petition is not pending in another international proceeding for settlement (Article 46.1.c of the American Convention), nor does it duplicate one previously heard by the Commission or by another international organization (Article 47.d of the Convention). The Commission finds, therefore, that the requirements set forth in both articles of the Convention have been met.

4. Characterization of the facts alleged

66. For purposes of admissibility, the Commission must decide whether the petition describes events that could constitute a violation of rights as stipulated in Article 47.b of the American Convention or, conversely, is "manifestly groundless" or "groundless" according to section (c) of that article. The standard for assessing those factors is different from the one used to rule on the merits of a complaint. The Commission must make a *prima facie* assessment as to whether the petition provides evidence of the possible or potential violation of a right guaranteed by the Convention; it need not establish that rights were indeed violated.¹⁶ This phase calls for a summary examination that does not constitute a prejudgment or opinion on the merits. The Rules of Procedure of the Inter-American Commission themselves, in establishing an admissibility phase and a merits phase, reflect this distinction between the evaluation to be performed by the Inter-American Commission in order to find a petition admissible and that required to establish whether a violation attributable to the State has been committed¹⁷.

67. The Commission finds that the allegations, if proven, could constitute possible violations of the rights of the alleged victims to a private and family life, to raise a family, and to personal integrity, enshrined in Articles 11.2, 17.2, and 5.1 of the American Convention, in respect of Articles 1.1 and 2 of the Convention. It also finds that the effect of the prohibition of a procedure that could have helped the alleged victims in this case to have biological children, as they wished, stemming from the judgment issued by the Constitutional Chamber of Costa Rica on March 15, 2000, could constitute a violation of Article 24 of the American Convention in relation to Articles 1.1 and 2 of that international instrument.

68. The IACHR finds that the information presented does not constitute sufficient evidence of a violation of the rights protected by Articles 4 and 26 of the American Convention.

II. CONCLUSIONS

69. The Inter-American Commission concludes that it is competent to examine the merits of this case and that the petition is admissible under Articles 46 and 47 of the American Convention. It has decided to proceed with the examination of the merits concerning the alleged violation of Articles 5.1, 11.2, 17.2, and 24 of the American Convention, in keeping with the overall obligations to respect and safeguard rights set forth in Articles 1.1 and 2 of the Convention. In addition, although it does not have competence to determine violations of Articles 1, 2, 3, 10, 14.1.b, and 18 of the Protocol of San Salvador,

¹⁶ See IACHR, Report No. 128/01, Case 12.367, Mauricio Herrera Ulloa and Fernán Vargas Rohrmoser of the newspaper *La Nación* (Costa Rica), December 3, 2001, paragraph 50; Report No. 4/04, Petition 12.324, Rubén Luis Godoy (Argentina), February 24, 2004, paragraph 43; Report No. 32/07, Petition 429-05, Juan Patricio Marileo Saravia et al. (Chile), April 23, 2007, paragraph 54.

¹⁷ See IACHR, Report No. 31/03, Case 12.195, Mario Alberto Jara Oñate et al. (Chile), March 7, 2003, paragraph 41; Report No. 4/04, Petition 12.324, Rubén Luis Godoy (Argentina), February 24, 2004, paragraph 43; Petition 429-05, Juan Patricio Marileo Saravia et al. (Chile), April 23, 2007, paragraph 54; Petition 581-05, Víctor Manuel Ancalaf LLaupe (Chile), May 2, 2007, paragraph 46.

the IACHR will consider the provisions concerning those rights in its examination of the merits in this case, as established in Article 29 of the American Convention.

70. The Commission also concludes that this petition is inadmissible insofar as the alleged violation of rights recognized in Articles 4 and 26 of the American Convention is concerned.

71. On the basis of the considerations of fact and of law set forth herein,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

HAS DECIDED:

1. To declare this petition admissible in relation to the alleged violations of the rights recognized in Articles 5.1, 11.2, 17.2, and 24 of the American Convention, in keeping with Articles 1.1 and 2 of that convention.

2. To declare this petition inadmissible in relation to the alleged violations of the rights recognized in Articles 4 and 26 of the American Convention.

3. To apprise the parties of this decision.

4. To publish this decision and to include it in the Commission's Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 1st. day of the month of November 2010.
(Signed): Felipe González, President; Paulo Sérgio Pinheiro, First Vice-President; Dinah Shelton, Second Vice-President; Luz Patricia Mejía Guerrero, María Silvia Guillén, and José de Jesús Orozco Henríquez, members of the the Commission.