

**REPORT No. 178/10**  
PETITION 469-05  
ADMISSIBILITY  
VICTORIA JIMENEZ MORGAN and SERGIO JIMENEZ  
COSTA RICA  
November 24th, 2010

**I. SUMMARY**

1. On April 28, 2005, the Inter-American Commission on Human Rights (hereinafter "Commission," "Inter-American Commission," or "IACHR") received a petition presented by Victoria Jiménez Morgan and Sergio Jiménez Morgan (hereinafter "the petitioners" and/or "the alleged victims"), against the State of Costa Rica (hereinafter "State," "Costa Rica," or "Costa Rican state"), in which they allege the international responsibility of the State because, in spite of having accredited in trial through scientific evidence the identity of the biological father of Sergio Jiménez Morgan, said paternity has not been judicially recognized.

2. The petitioners allege that the State violated the rights established in Articles 17.5 (rights of the family—equal rights for children born out of wedlock), 18 (right to a name), and 24 (right to equal protection) of the American Convention on Human Rights (hereinafter "Convention" or "American Convention"), in relation to Article 2 (obligation to adopt domestic legal measures) of that international instrument. Regarding the requirement of prior exhaustion of domestic remedies, they argued that they exhausted the suitable and available remedies under domestic law.

3. For its part, the State requested that the petition be declared inadmissible because the petitioners had not complied with the requirement of prior exhaustion of domestic remedies.

4. Without prejudging the merits of the case, after analyzing the positions of the parties and in compliance with the requirements set forth in Articles 46 and 47 of the American Convention, the Commission decides to declare the present petition admissible in relation to Articles 17.5, 18, and 24 of the American Convention in relation to Article 2 of that international instrument. Additionally, through application of the principle of *iura novit curiae*, the Commission will analyze the possible violation of Articles 1.1, 19, and 25 of the Convention during the merits phase. The Commission further decides to notify the parties of this decision, to publish it, and to include it in its Annual Report to the OAS General Assembly.

**II. PROCESSING BY THE INTER-AMERICAN COMMISSION**

5. On April 28, 2005, the Commission received a complaint presented by Victoria Jiménez Morgan and Sergio Jiménez Morgan and assigned it the number 469-05. On October 12, 2005, it transmitted the pertinent parts of the complaint to the State, requesting that it present its response within a period of two months, in accordance with the provisions of Article 30.3 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter the "Rules of Procedure"). The State's response was received on December 23, 2005.

6. Additionally, the IACHR received information from the petitioner on the following dates: December 1, 2005; February 27, 2006; March 9, 2006; May 9, 2006; June 2, 2006; July 7, 2006; August 7, 2006; October 11, 2006; May 24, 2007; February 6, 2008; and June 9, 2008. These communications were duly transmitted to the State. On the other hand, the IACHR received observations from the State on the following dates: June 13, 2006; July 27, 2006; November 3, 2006; and February 6, 2008. These communications were duly transmitted to the petitioner.

**III. POSITIONS OF THE PARTIES**

**A. The petitioners**

7. The alleged victims, Victoria Jiménez Morgan and her son, Sergio Jiménez Morgan, argue that the legal order of Costa Rica applies the principle of *res judicata* above the right that every person has to know who are his/her biological parents. They assert this because the Law on Responsible Paternity of 2001 does not grant this right to persons who “before the incorporation of scientific evidence with DNA technology, presented petitions for recognition of paternity and were rejected.”

8. They allege that the foregoing has caused economic and emotional damages and has made it impossible for Sergio Jiménez Morgan to carry the last name of his biological father, to receive support, and, eventually, to be his heir. They consider, therefore, that the Costa Rican government has violated their rights under Articles 17.5, 18, and 24 of the American Convention, in relation to Article 2 of that international instrument. They express that in addition this situation generated and continues to generate gender inequality, since Ms Victoria Jiménez Morgan had to assume the financial obligation of raising and educating her son, Sergio. They allege that she had to make sacrifices throughout the years of litigation and that both of them suffered the particular strain caused by proceedings of this nature. They state that the biological father, on the other hand, whose condition cannot be declared judicially, would have used in benefit of his estate the money that he should have used to fulfill his financial obligations towards his son.

9. In relation to the facts of the petition, they state that in 1989, a complaint filed against the presumed father of Sergio, Jorge Desanti Arce,<sup>1</sup> in paternity proceedings was denied in the second instance for insufficient evidence. They allege that they did not have access to scientific DNA testing to prove paternity because at that time it was not regulated in the country.

10. They state that upon the entry into force of the Law on Responsible Paternity in Costa Rica in April of 2001,<sup>2</sup> regulating scientific evidence in paternity cases, they filed a new paternity suit in 2002, succeeding in 2004, with DNA testing, in proving before the courts that Sergio Jiménez Morgan was the biological son of Jorge Desanti Arce. They allege that, despite the accreditation of paternity at trial, the court applied Article 98 *bis* part m) of the Family Code,<sup>3</sup> which establishes the principle of *res judicata* in paternity suits, due to the fact that a complaint with the same objective had been denied in 1989.

11. With respect to the requirement of prior exhaustion of domestic remedies, they allege that they exhausted domestic remedies in the paternity suit initiated in 2002 because they appealed to the three instances allowed under the domestic law. They report that the process concluded on March 8, 2006, with the resolution of the Second Chamber of the Supreme Court, which, considering an appeal for reversal (*recurso de casación*) filed by the defendant, applied the exception of *res judicata* and rejected the claim of Sergio Jiménez Morgan. They state that no remedies exist to challenge this resolution of the Second Chamber of the Supreme Court.

12. Moreover, they state that they filed an action for unconstitutionality (*recurso de inconstitucionalidad*) to challenge Article 98 part m) of the Family Code, because it affected their rights by impeding them from challenging the judgment in the first paternity suit. They state that the action was flatly rejected by the Constitutional Chamber of the Supreme Court even though the Office of the Attorney General of Costa Rica recommended that an interpretation of the norm should be made according to the Constitution.

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<sup>1</sup> The petitioners allege that in the first paternity suit they did not file an appeal for reversal (*casación*) because the attorneys representing them did not consider this possibility. They explain that, for this reason, they filed a complaint against their lawyers, which was settled out of court. They add that at that time they could not request the reconsideration of the case because the possibility of using DNA evidence did not exist.

<sup>2</sup> The Law on Responsible Paternity entered into force in Costa Rica on April 27, 2001.

<sup>3</sup> The petitioners indicate that the pertinent part of Article 98, paragraph m) establishes that:... “that which is firmly resolved in filiation proceedings produces the effect of *res judicata*.” The referenced article was added to the Family Code by the Law on Responsible Paternity.

13. Regarding the State's allegation that they did not file an action for protection (*recurso de amparo*) or an action for unconstitutionality (*recurso de inconstitucionalidad*) to challenge the Law on Responsible Paternity, they state 1) that the Law on Constitutional Jurisdiction (Law No. 7135), establishes in its Article 30 that the action for protection is not appropriate to challenge a jurisdictional resolution or proceeding of the Judicial Branch; 2) that Article 76 of the cited law establishes that one who files an action for unconstitutionality cannot file another action related to the same trial or proceeding, even if it is based on different grounds. Additionally, they explain that according to Article 74 of that law, this action is not appropriate against jurisdictional acts of the Judicial Branch. They further state that it is not possible to file a motion to reargue (*recurso de revisión*), given that the Law on Responsible Paternity did not consider the creation of a cause of action to examine a case like the one at hand.

14. As a result, they state that with their complaint, they seek to reestablish the equilibrium of the principle of justice without challenging the principle of *res judicata*, as regulated. Such that those persons who before the implementation of scientific DNA testing filed lawsuits for the recognition of paternity and were rejected, can present a motion to reargue before the courts. Otherwise, they allege that there would be juridical consolidation of a discriminatory act that allows one part of the population to utilize DNA evidence and the other part not to utilize it, ignoring the biological reality, which implies the violation of the human rights of the alleged victims.

## **B. The State**

15. The State summarizes the judicial proceedings and the applicable domestic law and substantially agrees with the version presented by the petitioners. Nevertheless, it raises the exception of the failure to exhaust domestic remedies and argues that it has not committed violation of the precepts of the American Convention.

16. With respect to the judicial paternity proceedings, it indicates that Victoria Jiménez Morgan opened a lawsuit to investigate paternity on behalf of her son Sergio Jiménez Morgan in 1987. It states that the lawsuit was resolved by a judgment on appeal of June 5, 1989, issued by the Second Superior Civil Court of San Jose, in which it rejected the petition seeking the declaration of paternity in favor of Sergio Jiménez Morgan, a child at the time. It explains that at that point in time, it was not possible to use DNA testing to establish the filial relationship and that, therefore, customary methods of determination through analysis of blood types were used.

17. It reports that through Law 7689 of August 6, 1997, Article 98 of the Family Code was reformed, which established that in any proceeding of investigation or refutation of paternity or maternity, scientific evidence with the objective of verifying the existence or nonexistence of a parental relationship is admissible. It indicates that with the promulgation of Law 8101 on Responsible Paternity, on April 27, 2001, through the incorporation of Article 98 *bis* to the Family Code, a special judicial process for filiation was established in which scientific evidence is valued as "exclusive proof to define the biological truth of paternity."

18. It indicates that due to the normative changes, the youth Sergio Jiménez Morgan, having reached adulthood, filed a special paternity lawsuit in 2002, in which scientific DNA testing was used. The test showed that it there was a 99.99% probability that the youth was the son of Mr. Jorge Desanti Arce. Nevertheless, the judgment in the first instance, issued on June 15, 2004 by the First Family Court of San Jose, established that because Ms Jiménez Morgan did not present an appeal for reversal against the decision of the Civil Court in the lawsuit initiated in 1987, the pronouncement of June 5, 1989 remained firm and acquired the effect of *res judicata*.

19. It adds that on July 28, 2004, the petitioners presented an action for unconstitutionality before the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, to have part m) of Article 98 *bis* of the Family Code declared unconstitutional. It indicates that through a resolution of the Constitutional Chamber on April 5, 2005, the action was flatly rejected because it was considered that it did not constitute a "reasonable means of repairing the right that was considered injured, since the

declaration of unconstitutionality would not give the plaintiff any benefit in the lawsuit upon which the action is based, since the condition of *res judicata* of the judgment issue would subsist.” It specifies that as the High Court explained, the exception of *res judicata* raised by the defendant had been accepted, since this exception “has support in the special paternity lawsuit brought against him by Victoria Jiménez Morgan, based on Articles 91 and subsequent of the Family Code. In this proceeding, the Second Superior Civil Court, Second Section, issued judgment No. 275 of June 5, 1989, which rejected the plaintiff’s claims. This judgment was issued before Article 98 *bis* of the Family Code came into effect (April 27, 2001). Its character as *res judicata* derives therefore, not from Article 98 *bis* of the Family Code, but rather in the relation between Articles 162 and 420(2) of the Code of Civil Procedure.”

20. Additionally, it refutes the allegations of the petitioners that the Constitutional Chamber rejected the action for unconstitutionality, although the Office of the Attorney General of the Republic recommended the modification of this legal situation. It states in this regard that the Attorney General’s Office is an advisory body to the Constitutional Tribunal and its opinions are not legally binding.

21. With respect to the requirement under the convention of prior exhaustion of domestic remedies, in its first response it alleged that there was a pending paternity suit before the Family Court. Additionally, the State alleges that the petitioners did not file an action for protection (*recurso de amparo*), which was the appropriate remedy to protect their rights, and an action for unconstitutionality, to challenge specifically the Law on Responsible Paternity, which could be discriminatory according to the petitioners. Concretely, it alleges that the merits of the issue were never raised before the Constitutional Chamber of the Supreme Court of Justice in the domestic venue. It maintains that the alleged damages to the rights to the protection of the family, a name, and equality under the law could be considered by the Constitutional Chamber of the Supreme Court of Justice, through an action for protection and through an action for unconstitutionality.<sup>4</sup>

22. It specifies that the alleged violations of the right to a name and the right to protection of the family were used to lay the foundation for the action for unconstitutionality but they were not rights that were concretely alleged to have been violated. It indicates that the alleged violation of the right to equality under the law, because the petitioners consider that there is a normative omission with respect to cases like that of Mr. Jiménez Morgan, has not been argued or discussed within a domestic forum either.

23. It indicates that the petitioners availed themselves of the action for unconstitutionality within a paternity suit in order to impugn Article 98 *bis* of the Family Code which, according to them, applied in their concrete case. It argues that the norm that was applied to them is not the cited Article 98, but the exception of *res judicata* derived from the relationship between Articles 162 and 420(2) of the Code of Civil Procedure.

24. It alleges that the authority of *res judicata* is central in the present case. It states that it is of such importance for the functioning of the democratic system that the Political Constitution establishes in Article 42, paragraph 2: “It is prohibited to reopen closed criminal cases and judgments issued with the authority of *res judicata*, except when a motion to reargue (*recurso de revisión*) is available.” It asserts that the protection of *res judicata*, as an instrument of legal security constitutes a mechanism by which human rights are maintained and the existence of a democratic society and the rule of law are made possible.

25. Regarding the right to the family, it states that it has strengthened the right to the protection of the family because it has established mechanisms within the legal system so that children and adolescents will have equal rights, whether they are born within or outside of wedlock. With respect to the alleged violation of the right to a name, it claims that the state action is in conformity with the requirements of the norm under the Convention, given that it has adapted the national regulations to the

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<sup>4</sup> The State notes that the Law on Constitutional Jurisdiction of Costa Rica establishes in Article 73, paragraph a) that an action to declare unconstitutionality is possible “against laws and other general dispositions, including those that originate in the acts of private individuals, that infringe, by action or omission, upon a constitutional norm or principle.”

technological and scientific advances and mechanisms have been created so that the rights to a name and to an identity are respected and guaranteed for all persons. With respect to the alleged violation of the right to equality under the law, it argues that the norms of the Law on Responsible Paternity seek to benefit in the most effective manner children born out of wedlock because it guarantees the right to a name so they can have the last names of both parents to better protect their rights. It specifies that the elements of the Law on Responsible Paternity were created in response to cases in which the earlier law did not provide an opportune resolution. As a result, it requests that the petition be declared inadmissible because it does not satisfy the requirements in Articles 30, 37, and related provisions of the Rules of Procedure of the IACHR.

#### **IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY**

##### **A. Competence of the Inter-American Commission *ratione personae, ratione loci, ratione temporis, and ratione materiae***

26. The petitioners have standing under Article 44 of the American Convention to present petitions before the IACHR. The petition names as alleged victims individual persons, with respect to whom the State has committed itself to respect and guarantee the rights consecrated in the American Convention and other international instruments. For the foregoing reasons, the IACHR has competence *ratione personae* to consider the present petition.

27. The IACHR has competence *ratione loci* to consider the petition because it sets forth allegations of violations of rights protected in the American Convention that allegedly took place within the territory of a State Party to that treaty.

28. The IACHR has competence *ratione temporis*, because the alleged facts took place when the obligation to respect and guarantee the rights established in the Convention was already in force in Costa Rica, a state that ratified the American Convention on April 8, 1970. Finally, the IACHR has competence *ratione materiae* because the petition contains denunciations of violations of the human rights protected in the American Convention.

## B. Exhaustion of domestic remedies

29. Article 46.1.a of the American Convention provides that, for a petition to be admissible before the Inter-American Commission in accordance with Article 44 of the Convention, it is necessary that domestic remedies must have been exhausted in according to generally-recognized principles of international law.<sup>5</sup> This requirement has the objective of allowing national authorities to be aware of the alleged violation of a protected right and, when appropriate, to resolve the issue before it is brought before an international tribunal.

30. With respect to the requirement under analysis, the petitioners allege that they have exhausted the domestic remedies, given that after the passage of the Law on Responsible Paternity, they filed a new paternity lawsuit and an action for unconstitutionality. They add that it was not possible to file an action for protection (*recurso de amparo*) because it is not available to challenge resolutions of the Judicial Branch and it was not possible to file more than one action for unconstitutionality regarding the same issue. For its part, the State alleges: 1) failure to exhaust domestic remedies because when the petition was presented before the IACHR, a paternity lawsuit was pending; and 2) that the petitioners did not submit the merits of their claim through an action for protection or an action for unconstitutionality.

31. Regarding the State's first argument, it is necessary to state that the IACHR decides on this requirement under the Convention at the time it carries out its analysis and not at the time the petition was filed.<sup>6</sup> With respect to the State's second allegation, the Commission considers it pertinent to indicate that in order to determine whether compliance with the Convention's requirement of exhaustion of domestic remedies has been verified, it is necessary to state precisely the object of the complaint and analyze whether the actions lodged in the domestic forum were appropriate to remedy the denounced situation. In this line of reasoning, in the first place, the Commission notes that the object of the complaint in the present case refers to the alleged impossibility to access to a judicial declaration of the biological reality of paternity, as one of the aspects that define the personal identity.

32. From the information in the file, it appears that in 1989, a complaint filed by Ms Jiménez Morgan in a paternity suit against Jorge Desanti Arce was rejected in second instance. The Tribunal denied the complaint based on insufficient evidence of the alleged paternity.

33. In 2001, the Law on Responsible Paternity was approved and entered into force and this added Article 98 *bis* to the Family Code, establishing the procedural rules for paternity suits and regulating the use of scientific proof of paternity, stating that in the processing of the complaint, the citation of genetic markers will be required.

34. On March 14, 2002, Victoria Jiménez Morgan, on behalf of her minor son, Sergio Jiménez Morgan, presented a new lawsuit for the investigation of paternity with respect to Jorge Desanti Arce. During this proceeding, Sergio Jiménez Morgan attained majority, appeared before the court, and

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<sup>5</sup> See, among others: I/A Court H.R., *Case of Chaparro-Álvarez and Lapo-Íñiguez. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C No. 170, para 16; I/A Court H.R., *Case of Nogueira de Carvalho et al. v. Brazil. Preliminary Objections and Merits*. Judgment of November 28, 2006. Series C No. 161, para. 50; I/A Court H.R., *Case of Acevedo-Jaramillo et al. v. Peru*. Judgment of February 7, 2006. Series C No. 144, para. 122; I/A Court H.R., *Case of Ximenes-Lopes v. Brazil. Preliminary Objection*. Judgment of November 30, 2005. Series C No. 139, para. 4.

<sup>6</sup> IACHR, Report No. 25/04, Case 12.361 (Ana Victoria Sánchez Villalobos et al.), March 11, 2004, Costa Rica, para. 45; Report No. 50/04 (Admissibility—Petition 12.056, Gabriel Oscar Jenkins v. Argentina), October 13, 2004, para. 50; Report No. 20/05, Petition 714/00 (Rafael Correa Díaz), February 25, 2005, Peru, para. 32.

joined the lawsuit as plaintiff.<sup>7</sup> During the proceeding, DNA testing was carried out and said test indicated a 99.9%<sup>8</sup> probability of paternity of Mr. Desanti Arce.

35. In the first instance, on June 15, 2004, the First Family Court of San Jose allowed the exception of *res judicata* lodged by the defendant and declared the complaint unfounded, establishing in its pertinent section that:

[T]he promulgation of new legislation related to the issue of paternity, concretely, the law on "responsible paternity," number eight thousand one hundred one published in *La Gaceta* on the twenty-seventh of April of the year two thousand one, and the scientific advances do not permit the reconsideration of previously-decided cases; in fact, Article 98 *bis* of the Family Code, added by this law, incorporates this idea by establishing that what has been decided in a final judgment in paternity proceeding has the effect of *res judicata*.<sup>9</sup>

36. Sergio Jiménez Morgan filed an appeal against the decision in the first instance before the Family Court of San Jose. On August 3, 2005, the court rejected the exception for *res judicata* lodged by the defendant<sup>10</sup> and established the paternity of Jorge Desanti Arce.

37. The defendant filed an appeal for reversal against the judgment of the Family Court of San Jose. On March 8, 2006, the Second Chamber of the Supreme Court of Justice confirmed the first-instance judgment of June 15, 2004 by the First Family Court, which accepted the exception of *res judicata*,<sup>11</sup> establishing:

[I]n the case under discussion, the defendant raised the exception of *res judicata* due to the fact that in a prior judicial proceeding to establish paternity, it had been declared unfounded (pages 27 to 29). In proceedings regarding filiation, by disposition of Article 98 *bis* of the Family Code, part m), which was added by Law 8101 of April 16, 2001, that was similar before the addition to Article 98, based on the cited disposition of Article 162 of the Code of Civil Procedure, because by dealing with an ordinary proceeding, the judgments that are issued in this matter have the authority of *res judicata*. [...] In the case under consideration, both the parties and the claims are the same, since in both a declaration of the defendant's paternity with respect to the youth Sergio Jiménez Morgan is sought; for this reason, the judgment issued in that proceeding [...] produced *res judicata* with respect to the issue being analyzed here[.]

38. Moreover, it appears that on July 28, 2004, Jiménez Morgan filed an action for unconstitutionality against Article 98 *bis* m) of the Family Code,<sup>12</sup> which was used as the basis for the first-instance judgment of June 15, 2004. In the remedy, it was alleged that this norm determines that those persons who initiated proceedings for investigation of paternity before the Law on Responsible

<sup>7</sup> *Poder Judicial de Costa Rica* (Judiciary of Costa Rica), *Juzgado Primero de Familia de San José* (First Family Court of San Jose), *Proceso Especial de Filiación* (Special Filiation Proceeding), File No. 2002-400393-186-FA. Judgment No 886-2004, June 15, 2004.

<sup>8</sup> *Organismo de Investigación Judicial* (Judicial Investigation Body), *Departamento de Investigación Judicial* (Department of Judicial Investigation), *Departamento de Ciencias Forenses, Sección de Bioquímica* (Department of Forensic Science, Biochemistry Section), expert findings on paternity, February 19, 2004.

<sup>9</sup> *Poder Judicial de Costa Rica* (Judiciary of Costa Rica), *Juzgado Primero de Familia de San José* (First Family Court of San Jose), *Proceso Especial de Filiación* (Special Filiation Proceeding), File No. 2002-400393-186-FA. Judgment No 886-2004, June 15, 2004.

<sup>10</sup> *Poder Judicial de Costa Rica* (Judiciary of Costa Rica), *Tribunal de familia de San José* (Family Court of San Jose), Declaration of Paternity, Opinion No. 1146-05, Judgment of August 3, 2005.

<sup>11</sup> *Corte Suprema de Justicia, Sala Segunda* (Supreme Court of Justice, Second Chamber), Resolution 2006-00142, Judgment of March 8, 2006. The petitioners were notified of the decision on April 18, 2006.

<sup>12</sup> Article 98 *bis*. Special process for filiation proceedings. In proceedings in which filiation is at issue, the following procedural rules will be observed: m) Remedies: The judgment will be appealable within the third day and, in this case, the remedy of appeal for reversal available in family matters shall be admissible against the second instance judgment. That which is the resolved in a final judgment in proceedings discussing filiation has the effect of *res judicata*.

Paternity of 2001 and were denied cannot obtain judicial recognition of paternity in a new lawsuit,<sup>13</sup> due to the application of *res judicata*, despite having proven paternity at trial with DNA evidence. Additionally, it was alleged in the action for unconstitutionality that the cited norm violates a series of constitutional and conventional norms, among others, the violation of the right of children to know who are their parents and the violation of the right to equality, protected in the American Convention.

39. On April 5, 2005 the Constitutional Chamber of the Supreme Court of Justice flatly rejected the action for unconstitutionality, establishing in its pertinent part:

This judgment [judgment of June 5, 1989 issued in the first paternity suit] was issued before Article 98 *bis* of the Family Code entered into force (April 27, 2001). Its character of *res judicata* derives, therefore, not from Article 98 *bis* of the Family Code but rather from the relationship between Articles 162 and 420, clause 2) of the Code of Civil Procedure. These are the norms, therefore, that serve as the basis for the exception of *res judicata* raised by the defendant and adopted by judgment No. 886-2004 [judgment in the first instance in the second paternity suit]. This is why, even assuming this action were admitted on the merits, the judgment [...] would retain the condition of *res judicata* because Articles 162 and 420, clause 2) of the Code of Civil Procedure were not challenged. This confirms that the action does not constitute a reasonable means of protecting the right that was considered damaged, since the declaration of unconstitutionality would not give the plaintiff any benefit in the proceeding on which the action is based, as the condition of *res judicata* of the judgment issue would subsist.<sup>14</sup>

40. The Commission observes that 1) with respect to the lawsuit for the investigation of paternity initiated by the alleged victims in 2002, the final resolution was issued on March 8, 2006 by the Second Chamber of the Supreme Court of Justice; 2) with respect to the action for unconstitutionality Article 98 *bis* m) of the Family Code initiated in 2004 by the alleged victims, the definitive resolution was issued on April 5, 2005 by the Constitutional Chamber of the Supreme Court of Justice. Additionally, the Commission observes that the petitioners stated before the local tribunals their intention that, through the initiation of a new paternity suit using DNA technology, the paternity of the alleged father be declared. Later, in the face of the application of the exception of *res judicata*, they questioned the constitutionality of the norm applied in that respect, additionally alleging violations of the right to a name, a family, and equality. Therefore, the Commission considers that the object of the petition, in regard to the pretention to obtain the judicial recognition of the biological paternity, was presented to domestic tribunals through remedies that could have been suitable and effective to resolve this type of situations.

41. With respect to the State's allegation of the failure to file another action for unconstitutionality, it should be noted that in accordance with the domestic legislation in Costa Rica, in order to file an action for unconstitutionality it is necessary that there be a matter pending before the tribunals in which unconstitutionality is invoked as a reasonable means of protecting the right or interest considered injured.<sup>15</sup> It establishes as an exception that this will not be necessary when due to the nature of the issue there is no direct and individual injury, or it deals with the defense of diffuse interests, or ones that concern the community as a whole.<sup>16</sup> In addition, the legislation establishes that one who has filed an action for unconstitutionality cannot file others in relation to the same trial or proceeding, although they

<sup>13</sup>Appeal filed in the action for unconstitutionality presented by Sergio Jiménez Morgan, received by the Judiciary on June 28, 2004.

<sup>14</sup>*Corte Suprema de Justicia, Sala Constitucional* (Supreme Court of Justice, Constitutional Chamber), Resolution 2005-03626, Judgment of April 5, 2005.

<sup>15</sup> *Ley de La Jurisdicción Constitucional de Costa Rica* (Law on Constitutional Jurisdiction in Costa Rica), Law No. 7135 of October 11, 1989, Article 75. The Constitutional Court, in resolving the action brought by the alleged victim, Sergio Jiménez Morgan, established with respect to this norm: "[T]he jurisdictional function, which constitutes a substantial and fundamental part of constitutional control, is exercised through the resolution of real controversies that have remedy in a definitive judgment. As has been stated in other platforms, the exercise of jurisdiction is legitimate as a final remedy, when it is necessary for the determination of a real, sincere, and vital controversy between individuals, without prejudice of the personal concept of interest, especially in its diffuse and collective forms[.]" *Corte Suprema de Justicia, Sala Constitucional* (Supreme Court of Justice, Constitutional Chamber), Resolution 2005-03626, Judgment of April 5, 2005, Consideration II.

<sup>16</sup> *Ibid.*



may be based on different grounds; one that is filed under these conditions will be flatly rejected.<sup>17</sup> Therefore, the Commission considers that the filing of an action for unconstitutionality in addition to the one filed by the alleged victims cannot be considered suitable, since the domestic legislation itself determines its inadmissibility in the case under analysis.

42. The Inter-American Court established that the mere existence of domestic remedies does not imply the obligation to exhaust them; they must be adequate and effective. In order to be adequate, it is necessary that their function, within the domestic law, be suitable to protect the infringed legal situation. An effective remedy, in turn, is one that makes it possible to produce the result for which it was established.<sup>18</sup> As a result, the Commission considers that the State did not prove the effectiveness of the filing of an additional action for unconstitutionality.

43. With regard to the alleged failure to file an action for protection (*recurso de amparo*), the Commission observes that the legislation of Costa Rica establishes that *amparo* is not appropriate against jurisdictional resolutions and actions of the Judiciary, among them, the judgments issued in the paternity suit initiated by the alleged victims.<sup>19</sup> Regarding the filing of a *recurso de amparo* with respect to the alleged constitutional and conventional violations, it should be reiterated that the requirement of exhaustion of domestic remedies does not mean that the alleged victims have the obligation to exhaust all the remedies available to them.<sup>20</sup>

44. For the reasons expressed, the Commission considered that in the present case the petitioners have exhausted the available and suitable remedies to request the judicial recognition of the paternity and therefore the identity of Sergio Jimenez Morgan, and also to challenge the regulations that had been impeding that. Consequently, the conventional requirement is fulfilled.

### C. Deadline for the presentation of the petition

45. Article 46.1.b of the Convention establishes that for a petition to be declared admissible, it must be presented with a period of six months counting from the date on which the interested party was notified of the final decision at the domestic jurisdictional level.

46. In the present case, the Commission observes that the judgment of the Second Chamber of the Supreme Court of Justice that decided the action for reversal in the paternity suit filed by Ms Jiménez Morgan is dated March 8, 2006 and that the judgment of the Constitutional Court that decided the action for unconstitutionality filed by Sergio Jiménez Morgan is dated April 5, 2005 and that the petition against the State of Costa Rica was presented to the Commission on April 28, 2005. As a result, the Commission concludes that this requirement under the Convention is satisfied.

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<sup>17</sup> *Ibid.*, Article 76.

<sup>18</sup> IACHR, Report No. 25/04, Petition 12.361, Admissibility, Ana Victoria Sánchez Villalobos et al., Costa Rica, March 11, 2004, para. 62.

<sup>19</sup> *Ley de La Jurisdicción Constitucional de Costa Rica* (Law on Constitutional Jurisdiction in Costa Rica) establishes in its pertinent section that: "Article 30.-*Amparo* (action for the protection of fundamental rights) is not available: b) against jurisdictional resolutions and actions of the Judiciary. "

<sup>20</sup> Both the Court and the Commission have stated on many occasions that: "(...) the rule that requires the prior exhaustion of domestic remedies is conceived in the interest of the State, since it seeks to absolve it of the need to respond to an international organ for acts imputed to it before having had an opportunity to remedy them using its own means." Consequently, if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled. IACHR, Report No. 70/04 (Admissibility—Petition 667/01, Jesús Manuel Naranjo Cárdenas et al. – Pensioners of the Venezuelan Aviation Company VIASA v. Venezuela), October 13, 2004, para. 52.

#### **D. Duplication of proceedings and international *res judicata***

47. There is no information in the file suggesting that the subject of the petition is pending in any other proceeding for international settlement, nor does it reproduce a petition previously examined by this or any other international organization. Therefore, the requirements established in Articles 46.1.c and 47.d of the Convention have been met.

#### **E. Characterization of the alleged facts**

48. As the Commission has previously stated in other cases, it is not necessary at this stage of the proceeding to establish whether or not there has been a violation of the American Convention. For purposes of admissibility, the IACHR must simply decide whether the allegations set forth facts that could characterize a violation of the American Convention, according to the requirements of its Article 47.b, and if the petition is “manifestly groundless” or “obviously out of order,” according to paragraph (c) of the same article. The standard of evaluation of these extremes is different than that required to decide upon the merits of the complaint. In the present step, the IACHR must carry out a *prima facie* evaluation that does not constitute a prior judgment or the advancement of an opinion on the merits. Its own Rules of Procedure reflect this distinction between the evaluation that must be carried out in order to declare a petition admissible and that required to determine whether the state’s responsibility has been effectively verified by establishing clearly differentiated stages for the consideration of admissibility and merits.

49. The knowledge of biological reality, including the identity of one’s parents, constitutes an important aspect of personal identity<sup>21</sup> and the core of rights that define it. Taking the parties’ allegations into account, the IACHR will analyze in the merits stage whether the conditions applied to Sergio Jimenez Morgan in the resources interposed to obtain the judicial determination of paternity and identity, are compatible with the American Convention. The Commission considers that the petitioners have formulated allegations that are not “manifestly unfounded” or “obviously out of order” and that, if proven to be true, could constitute violations of Articles 17.5, 18, and 24 of the American Convention, in relation to Article 2 of that international instrument. Additionally, by application of the principle of *iura novit curiae*, the Commission will analyze the possible violation of Articles 1.1, 19, and 25 of the Convention during the merits stage.

50. Since the lack of foundation or inappropriateness of the complaint with respect to the rights referred to is not evident, the Commission considers that the requirements established in Articles 47.b and c of the American Convention are satisfied with respect to this aspect of the complaint.

#### **V. CONCLUSIONS**

51. The Commission concludes that it is competent to examine the complaints presented by the petitioner regarding the alleged violation of Articles 17.5, 18, and 24 of the American Convention, in relation to Article 2 of the same international instrument. Additionally, by application of the principle of *iura novit curiae*, the Commission will analyze the possible violation of Articles 1.1, 19, and 25 of the Convention during the merits stage.

52. Based on the arguments of fact and law set forth above and without prejudging the merits of the case,

#### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

#### **DECIDES:**

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<sup>21</sup> See, generally, European Court of Human Rights, Case *Odievère v. France*, Complaint No 42326/98. Sentence on the merits. Strasbourg, February 13, 2003, Parr. 29.

1. To declare the present complaint admissible with respect to Articles 17.5, 18, and 24 of the American Convention, in relation to Article 2 of the same international instrument. Additionally, by application of the principle of *iura novit curiae*, to analyze the possible violation of Articles 1.1, 19, and 25 of the Convention during the merits phase.

2. To notify the State of Costa Rica and the petitioners of this decision.

3. To continue with the analysis of the merits of the case.

4. To publish this decision and include in its Annual Report to the OAS General Assembly.

Approved by the Interamerican Commission on Human Rights, on the 24<sup>th</sup> of November 2010. (Signed): In favor Felipe González, President; Paulo Sérgio Pinheiro, First Vice-President; Luz Patricia Mejía Guerrero, María Silvia Guillén, José de Jesús Orozco Henríquez y Rodrigo Escobar Gil. Dissenting Dinah Shelton, Second Vicepresident.