

**ORDER OF THE PRESIDENT OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS**

OF AUGUST 6, 2012

CASE OF ARTAVIA MURILLO *ET AL.* (“*IN VITRO FERTILIZATION*”) *v.* COSTA RICA

HAVING SEEN:

1. The brief of July 29, 2011, in which the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) a case against the Republic of Costa Rica (hereinafter “Costa Rica” or “the State”). On that occasion, the Commission offered four expert opinions, indicated the names of three expert witnesses, and described the purpose of the four proposed expert opinions.
2. The brief of August 3, 2011, in which the Inter-American Commission provided the name of one of the expert witnesses offered in its brief submitting the case, and the brief of August 5, 2011, forwarding the curricula vitae of the four proposed expert witnesses.
3. The note of the Secretariat of October 18, 2011, advising that, in view of the failure of the presumed victims to agree on the appointment of a common intervener, the President of the Court had designated Boris Molina Acevedo (hereinafter “representative Molina Acevedo”) and Gerardo Trejos Salas (hereinafter “representative Trejos Salas”) as common interveners with autonomous participation.
4. The brief with pleadings, motions and evidence (hereinafter “the pleadings and motions brief”) presented on December 19, 2011, by representative Molina Acevedo, on behalf of twelve presumed victims,¹ in which he offered two statements and one expert opinion.
5. The pleadings and motions brief presented on December 19, 2011, by representative Trejos Salas, on behalf of six presumed victims,² in which he offered four statements and four expert opinions.

¹ Boris Molina Acevedo was designated as the representative of Enrique Acuña Cartín, Ileana Hénchoz Bolaños, Miguel Antonio Yamuni Zeledón, Viktor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María Del Socorro Calderón Porras, Joaquina Arroyo Fonseca, Giovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza

² Gerardo Trejos Salas was designated as the representative of Grettel Artavia Murillo, Miguel Mejía Carballo, Claudia María Carro Maklouf, Andrea Regina Bianchi Bruna, German Alberto Moreno Valencia and Ana Cristina Castillo León.

6. The briefs of January 25 and 27, 2012, and their attachments, whereby representative Trejos Salas forwarded the curricula vitae of two proposed expert witnesses and a summary of the curriculum of another proposed expert witness.

7. The brief with preliminary objections, answering the submission of the case of the Inter-American Commission on Human Rights and with observations on the pleadings and motions brief (hereinafter "the answer to the application") presented by Costa Rica on April 30, 2012, in which it offered four expert opinions.

8. The brief of May 8, 2012, and its attachments, in which Hubert May Cantillano (hereinafter "representative May Cantillano") advised that "owing to the decease of [...] Gerardo Trejos Salas, the presumed victims that [the latter had] represented [...] had decided to appoint [him] as their new representative."

9. The communication of May 14, 2012, and its attachments, in which the State forwarded clarifications in response to the Secretariat's observations concerning the documentary evidence attached to its answer to the application.

10. The notes of the Secretariat of May 21, 2012, in which, on the instructions of the President of the Court and in accordance with Article 46(1) of the Rules of Procedure of the Court applicable to this case³ (hereinafter "the Court's Rules of Procedure" or "the Rules of Procedure"), the State, the representatives and the Inter-American Commission were asked to forward their respective final list of deponents, in order to schedule the public hearing on the preliminary objections and eventual merits, reparations and costs in this case. In addition, based on the principle of procedural economy, they were asked to indicate which deponents could provide their testimony by affidavit and who they considered should be called to testify at the public hearing.

11. The brief of June 6, 2012, in which the State presented its final list of deponents. The State confirmed the offer of the four expert witnesses it had proposed (*supra* having seen paragraph 7) and asked that all of them be called to testify at the public hearing.

12. The brief of June 6, 2012, in which the Inter-American Commission presented its final list of deponents. In this brief, the Commission confirmed the offer of the four proposed expert witnesses (*supra* having seen paragraphs 1 and 2). It asked that two of them be called to declare at the public hearing; advised that one expert witness could provide her expert opinion by affidavit and that the expert opinion of the fourth expert witness could only be received by affidavit owing to his impossibility of attending the scheduled hearing.

13. The brief of June 6, 2012, in which representative May Cantillano forwarded his final list of deponents, indicating who he considered should be called to testify at the public hearing, and who could testify by affidavit. In this brief, he requested the substitution of one presumed victim proposed as a deponent in the pleadings and motions brief by another presumed victim.

14. The brief of June 6, 2012, in which representative Molina Acevedo forwarded his final list of deponents, indicating who he considered should be called to testify at the public hearing, and who could testify by affidavit.

³ Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009.

15. The notes of the Secretariat of June 8, 2012, forwarding the final lists of deponents to the parties and advising them that they had 15 days to present any observations they deemed pertinent.

16. The brief of June 14, 2012, in which the Inter-American Commission indicated that it had no observations to make on the final lists of deponents of the State and of the two representatives. In addition, the Commission asked permission to pose questions to the four expert witnesses proposed by the State.

17. The briefs of June 21, 2012, in which representatives May Cantillano and Molina Acevedo presented their observations on the preliminary objections filed by the State in its answer to the application.

18. The brief of June 22, 2012, in which the Inter-American Commission presented its observations on the preliminary objections filed the State in its answer to the application.

19. The brief of June 22, 2012, in which the State presented its observations on the final lists of deponents of the representatives. In the brief, the State indicated that it "ha[d] no objection to any of the deponents offered by the victims' representatives or by the Commission," but "it [was] worth noting that [Gerardo Escalante López and Delia Ribas Valdés, expert witnesses proposed by representative May Cantillano]" are "the petitioners who initiated this case and have a direct interest in its result, because in the private exercise of their profession, they performed the technique of *in vitro* fertilization."

20. The note of the Secretariat of June 29, 2012, in which, on the instructions of the President, it forward to Dr. Escalante López and to Dr. Ribas Valdés the State's brief of June 22, 2012, granting them until July 9, 2012, at the latest, to submit their observations on the State's arguments.

21. The note of the Secretariat of June 29, 2012, placing on record that the Commission had no observations to make on the final list of deponents of the State and of the representatives, and that the representatives had not presented observations on the final lists of deponents presented by the Commission and the State.

22. The brief of July 9, 2012, in which Dr. Escalante López and Dr. Ribas Valdés presented clarifications in relation to the observations of the State.

CONSIDERING THAT:

1. The offer and admission of evidence, as well as the summoning of the presumed victims and expert witnesses, are regulated in Articles 35(1)(f), 40(2)(c), 41(1)(c), 42(2), 46(1), 50, 57 and 58 of the Court's Rules of Procedure.

2. The Commission proposed that the Court receive four expert opinions. Representative May Cantillano offered as evidence the testimony of four presumed victims and four expert witnesses. Representative Molina Acevedo offered as evidence the testimony of two presumed victims and one expert witness. The State offered as evidence the testimony of four expert witnesses. The evidence offered by the Commission, the representatives and the State was indicated at the appropriate procedural opportunity.

3. The parties have been granted the right of defense with regard to the evidence offered by each of them in their briefs submitting the case, with pleadings and motions, and in answer to the application, as well as in their final lists of deponents (*supra* having seen paragraphs 10 and 15).

4. The Commission indicated that it had no observations to make on the testimony and expert opinions offered by the representatives and by the State (*supra* having seen paragraph 21). For their part, the representatives did not present observations on the final lists of deponents presented by the Commission and the State (*supra* having seen paragraph 21). The State presented observations on expert witnesses proposed by representative May Cantillano.

a) Testimony of the presumed victims and expert witnesses offered by the representatives and the State that have not been contested

5. Regarding the testimony and expert opinions offered by the representatives and the State that have not been contested, the President considers it appropriate to admit this evidence, so that the Court can assess its usefulness at the correct procedural opportunity, in the context of the existing body of evidence and according to the rules of sound judicial discretion.

6. In his brief of June 6, 2012, representative May Cantillano asked that Miguel Mejía Carballo be allowed to replace his wife, Grettel Artavia Murillo, as a deponent. He indicated that “[t]he reason for the substitution [...] is the consideration that he is the person who was most victimized by the *in vitro* ban. His specific health problem (he is a paraplegic) prevents him absolutely from procreating by any other means than assisted fertilization. The purpose of the testimony is the same as already indicated.”

7. Taking into account the reasons why representative May Cantillano has requested this substitution and that the other parties have not raised any objection, as well as the fact that the purpose of the testimony is substantially the same, the President finds that it is appropriate to receive the testimony of Miguel Mejía Carballo as indicated in the operative paragraphs of this Order (*infra* fifth operative paragraph), because this testimony can assist the Court in determining the facts of the instant case.

8. Consequently, the President orders the admission of the statements of six presumed victims: Andrea Regina Bianchi Bruna, Miguel Mejía Carballo, Ana Cristina Castillo León, Claudia María Carro Maklouf, Víctor Hugo Sanabria León and Ileana Hénchoz Bolaños; and the expert opinions of seven expert witnesses: Andrea Mesén Fainardi, Antonio Marlasca López, Alicia Neuburger, Maureen Condic, Anthony Caruso, Marco Gerardo Monroy Cabra and Martha Garza. The purpose of these statements and the way in which they will be received are specified in the operative paragraphs of this Order (*infra* first and fifth operative paragraphs).

b) Expert evidence presented by representative May Cantillano

9. Representative May Cantillano proposed Dr. Gerardo Escalante López and Dr. Delia Ribas Valdés as expert witnesses. The purpose of the testimony of Dr. Escalante López would be “the necessity that individuals who require and want this are able to have recourse to *in vitro* fertilization techniques so that this treatment may contribute to its purpose; also that the percentage of success of this technique is high in the world and on the American continent, and regarding the treatment provided to several couples in order to perform successful *in vitro* fertilizations in Costa Rica.” The purpose of the testimony of Dr. Ribas

Valdés would be “the necessity that individuals who require and want this are able to have recourse to *in vitro* fertilization techniques so that this treatment may contribute to its purpose; also that the percentage of success of this technique is high in the world and on the American continent, and regarding the treatment provided to several couples in order to perform successful *in vitro* fertilizations in Costa Rica and, especially, about the cases of Grettel Artavia Murillo and Andrea Bianchi Bruna.”

10. The State indicated that it “d[id] not contest the intervention of any of the deponents offered by the representatives of the victims [...], based on the obligation of good faith imposed on the State in compliance with its procedural obligations before the inter-American human rights system.” Nevertheless, it noted “that Dr. Gerardo Escalante López and Dr. Delia Ribas Valdés, expert witnesses offered in the brief signed by Hubert May Cantillano, are the petitioners who initiated this case and have a direct interest in its result, because in the private exercise of their profession they practiced the technique of *in vitro* fertilization.”

11. In their brief of July 9, 2012, Drs. Escalante López and Ribas Valdés indicated that “the State [...] has not filed, either *stricto sensu* or formally, an objection to or a disqualification of the undersigned, [but rather] a concern about whether any of the causes for disqualification established in Article 48(b), (c) and (f) of the Court’s Rules of Procedure exists or has been constituted.” They considered that they “have never been either formal or *de facto* representatives of any of the [presumed] victims.” They observed that they “have never had any type of relationship of subordination or dependency with regard to any of the [presumed] victims,” or a “close relationship [with the presumed victims], given that medical deontology requires a distance between doctor and patient.” They denied that they had “any personal or private interest because the only interest [...] is to explain, from a scientific point of view, [...] the technique of *in vitro* fertilization, the implications of modern treatments in this field, [and] the problem of infertility, as a public health problem.”

12. Article 48(1) of the Rules of Procedure indicates the following:

1. An expert witness may be disqualified based on the following grounds:

[...]

b. he or she is or has been a representative of one of the alleged victims in proceedings regarding the facts of the case before the Court, either at the domestic level or before the inter-American system for the promotion and protection of human rights;

c. he or she currently has, or has had, close ties with the proposing party, or is, or has been, a subordinate of the proposing party, and the Court considers that his or her impartiality may be affected; [...]

f. he or she has previously intervened, in any capacity and before any organ, whether national or international, in relation to the same case.

13. The President finds that, even though the State did not indicate a formal and explicit disqualification with regard to the two expert witnesses proposed by representative May Cantillano, a disqualification can be indicated implicitly when the parties or the Commission submit concerns as regards the impartiality of the expert witnesses. Consequently, in this case, the Court must analyze the causes for disqualification contained in Article 48(1) of the Rules of Procedure.

14. The President observes that on January 10, 2001, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica decided that “having seen the request presented by Gerardo Escalante López and Delia Ribas Valdés, [...] it considered withdrawn the appeal for

clarification and further information which they had filed” against the judgment of the Supreme Court of Justice of March 15, 2000, concerning the prohibition of *in vitro* fertilization.⁴

15. Subsequently, Dr. Escalante López, as legal representative of the *Instituto Costarricense de Fertilidad* [the Costa Rican Fertility Institute], granted a power of attorney to representative Trejos Salas, for the latter to lodge a petition before the Commission on behalf of the Costa Rican Fertility Institute, in order “to obtain fair compensation for the damage caused, because the [said] enterprise has made the necessary investments in the preparation of professionals abroad by means of training internships in international *in vitro* fertilization centers. On their return to our country, these professionals were unable to work in this field and, owing to their forced inactivity during the time required to reinstate this practice, they will suffer an evident deterioration in their skills and upgrading, a factor that will make it necessary to make another investment in their preparation.”⁵

16. In its admissibility report, the Commission indicated that, on January 19, 2001, representative Trejos Salas, acting as petitioner, had lodged a petition against the State based on the presumed violation of the American Convention to the detriment of, *inter alia*, the Costa Rican Fertility Institute.⁶

17. Furthermore, on December 24, 2002, Dr. Escalante López and Dr. Ribas Valdés, together with the other presumed victims in this case, submitted a brief to the Inter-American Commission in which they qualified themselves as “direct victims” of “the arbitrary decision of the Constitutional Chamber [...] that prohibited the practice of *in vitro* fertilization” and requested the Commission “to merge the admissibility and the merits stages and to deliver a ruling in the case as soon as possible.” In addition, they stated that they “waived [...] the friendly settlement procedure established in the Rules of Procedure.”⁷

18. Based on these facts, the President observes, first, that Drs. Escalante López and Ribas Valdés have not acted as legal representatives of the presumed victims in this case at either the national or the international level⁸; rather, as doctors, they have attended several of the presumed victims in relation to the medical treatment of infertility. Their intervention in the treatment as doctors is not related to any juridical action of legal representation under the law.⁹ Hence, the cause of disqualification of expert witnesses stipulated in Article 48(1)(b) of the Rules of Procedure is not applicable in this case.

19. Second, with regard to the grounds established in Article 48(1)(c) of the Rules of Procedure, it is necessary: (i) that the proposed expert witness has or has had close ties with the proposing party, or is or has been his or her subordinate, and (ii) that the Court considers that the impartiality of the expert witness may be affected. Even though it may be considered that the relationship between doctor and patient constitutes a close tie in the

⁴ File of attachments to the merits report of the Commission (tome I, folio 119).

⁵ File of attachments to the merits report of the Commission (tome I, folio 118).

⁶ IACHR, Admissibility Report No. 25/04, Petition 12,361, Ana Victoria Sánchez Villalobos *et al.*, Costa Rica, March 11, 2004, paras. 1 and 2.

⁷ File of attachments to the merits report of the Commission (tome III, folios 1121 to 1125).

⁸ Regarding the requirement of “is or has been a representative” under Article 48(1)(b) of the Rules of Procedure, *cf. Case of Mohamed v. Argentina*. Order of the Inter-American Court of Human Rights of June 18, 2012, considering paragraph 12.

⁹ Likewise, *cf. Case of Cabrera García and Montiel Flores v. Mexico*. Order of the Inter-American Court of Human Rights of August 23, 2010, considering paragraph 13.

case of a prolonged medical treatment and based on confidentiality, specific evidence must be provided from which the presumed lack of impartiality of the expert witness can be inferred in relation to the purpose of the proposed expert opinion.

20. Furthermore, alleging the existence of a direct interest of the expert witness that could affect his or her impartiality requires proving that the person opposed will benefit personally from the determination of facts of the case or their legal consequences.¹⁰ On previous occasions, it has been indicated that, even when the statement of an expert witness contained elements that support the arguments of one of the parties this, *per se*, does not disqualify the expert witness.¹¹ A direct interest in the result of these proceedings may exist when the determination of the facts and their legal consequences will grant some benefit to the proposed expert witness.¹²

21. The President considers that the instant case is related to the compatibility with the American Convention of a judicial ruling issued by the Constitutional Chamber of the Supreme Court of Justice concerning abstract control of constitutionality. Thus, a direct and individualized personal benefit to the proposed expert witnesses is not observed, given that the effects of the Court's decision on the compatibility of the judicial ruling with the American Convention will have general effects. In addition, the purpose of the expert opinion is limited to a scientific aspect relating to the techniques, implications and procedures of *in vitro* fertilization. Therefore, the President finds that there is no risk that impartiality will be impaired in the terms of Article 48(1)(c) of the Rules of Procedure.

22. Third, regarding the grounds for disqualification under Article 48(1)(f) of the Rules of Procedure, the President of the Court considers that the filing of an appeal for clarification and further information and the subsequent withdrawal of this appeal in relation to the ruling on the prohibition of *in vitro* fertilization constitutes a previous intervention before a national organ in relation to the same case as established in Article 48(1)(f) of the Rules of Procedure. Regarding the proceedings before the inter-American system, the two proposed expert witnesses were not named as presumed victims in the Commission's admissibility report.¹³ Therefore, the expert witnesses have not acquired the status of presumed victims in the case before the inter-American system. However, in view of the expression "in any capacity" of Article 48(1)(f) of the Rules of Procedure, it must be noted that Dr. Escalante López intervened before the Commission as legal representative of a juridical person that

¹⁰ Cf. *Case of Boyce et al. v. Barbados*. Order of the President of the Inter-American Court of Human Rights of May 29, 2007, considering paragraph 22; *Case of Tristán Donoso v. Panama*. Order of the President of the Inter-American Court of Human Rights of June 9, 2008, considering paragraph 19, and *Case of Reverón Trujillo v. Venezuela*. Order of the President of the Inter-American Court of Human Rights of September 24, 2008, considering paragraph 34.

¹¹ Cf. *Case of Boyce et al.*, *supra* note 10, considering paragraph 22; *Case of Tristán Donoso*, *supra* note 10, considering paragraph 19; *Case of Reverón Trujillo*, *supra* note 10, considering paragraph 34, and *Case of Radilla Pacheco v. Mexico*. Order of the President of the Inter-American Court of Human Rights of May 29, 2009, considering paragraph 46.

¹² Cf. *Case of Boyce et al.*, *supra* note 10, considering paragraph 22; *Case of García Prieto et al. v. El Salvador*. Order of the President of the Court of December 14, 2006, considering paragraph 11.

¹³ IACHR, Admissibility Report No. 25/04, Petition 12,361, Ana Victoria Sánchez Villalobos *et al.*, Costa Rica, March 11, 2004, para. 49. Although the petition lodged before the Commission included as presumed victims the companies *Costa Rica Ultrasonografía S.A* and *Instituto Costarricense de Fertilidad*, for which Dr. Escalante López was the legal representative, the Commission decided that "[r]egarding the companies *Costa Rica Ultrasonografía S.A.* and *Instituto Costarricense de Fertilidad*, the Commission ratifies its established practice and legal doctrine [...], declaring that it does not have competence *ratione personae* to examine a petition lodged before the Commission by a juridical person, since such entities are excluded from the persons to which the Convention grants protection."

acted as petitioner. In addition, in a brief, Dr. Escalante López, Dr. Ribas Valdés and the presumed victims confirmed that they were “direct victims” and asked the Commission to issue a report as soon as possible. On this basis, the President finds that the grounds for disqualification of Article 48(1)(f) of the Rules of Procedure are applicable with regard to Dr. Escalante López and Dr. Ribas Valdés.

23. Nevertheless, the President finds it pertinent to receive their statements for information purposes only, because they know how *in vitro* fertilization was performed in Costa Rica before it was banned and because they have treated several of the presumed victims for infertility. In addition, the President notes that the State did not contest their participation in these proceedings. The purpose of their testimony as deponents for information purposes only will be defined in the operative paragraphs of this Order (*infra* first operative paragraph), so that the Court may assess their usefulness at the appropriate opportunity, within the context of the existing body of evidence and according to the rules of sound judicial discretion.

c) Expert evidence offered by the Inter-American Commission

24. Under Article 35(1)(f) of the Rules of Procedure, the “possible appointment of expert witnesses” may be made by the Inter-American Commission “when the Inter-American public order of human rights is affected in a significant manner,” and the grounds for and purpose of their intervention must be justified satisfactorily. This provision means that the appointment of expert witnesses by the Commission must be exceptional and subject to this requirement, which is not complied with merely because the intended expert opinion is related to an alleged violation of human rights. The Inter-American public order of human rights must be “affected in a significant manner,” and the Commission must substantiate this situation.¹⁴

25. In this case, the Commission offered four expert witnesses indicating that “the [case] includes matters of inter-American public order.” It considered that “the general prohibition to practice *in vitro* fertilization in Costa Rica transcends the victims in this specific case and gives rise to a discussion on the content and scope of the rights embodied in Articles 11 and 17 of the American Convention,” because it allows the Court to analyze “the protection of the right to form a family in the sense of including the decision to become a biological father or mother, as well as the choice of and access to the pertinent means of achieving this, [...] the international standards applicable to the examination of permissible restrictions to the exercise of the rights to private and family life and to form a family, on an issue related to reproductive health, [...] and] the international standards concerning the right to equality and non-discrimination from two perspectives[:] [...] the] State’s responsibility for preventing a group of people from having access to a treatment that would have allowed them to overcome their situation of disadvantage regarding the possibility of having biological children, and [...] the disproportionate impact [...] on women.”

26. In its brief with the final list of deponents, the Commission added that “the substantial analysis of the compatibility or incompatibility of the absolute prohibition [of *in vitro* fertilization] with the American Convention, calls for the Court to have at its disposal

¹⁴ Cf. *Case of Vera Vera et al. v. Ecuador*. Order of the President of the Court of December 23, 2010, considering paragraph 9; *Case of Torres et al. v. Argentina*. Order of the President of the Court of April 29, 2011, considering paragraph 8, and *Case of the Barrios Family v. Venezuela*. Order of the President of the Court of June 1, 2011, considering paragraph 7.

the necessary normative and empirical elements on *in vitro* fertilization and its possible regulation, including a comparative perspective.”

27. First, the Commission offered the expert opinion of Fernando Zegers-Hochschild, to testify “on the assisted reproduction technique of *in vitro* fertilization, what the technique consists in and how it is carried out, including a comparative perspective.” With regard to the inter-American public order, it indicated that “the expert opinion of Fernando Zegers-Hochschild will provide the Court with information on the assisted reproduction technique of *in vitro* fertilization, and the procedures that it includes. In addition, given the experience of the expert witness, the Court will have relevant information on the technique from a comparative perspective. The Commission considered that a clear conceptualization of the technique and its procedures, as well as a comparative perspective, constituted an important starting point for deciding the case.”

28. Second, the Commission offered the expert opinion of Paola Bergallo to testify about “the international standards on reproductive rights, particularly on arbitrary interferences in private and family life and the principles of equality and non-discrimination.” Thus, the expert witness “will also discuss the implications of a State ban on the practice of *in vitro* fertilization in light of those standards.” The Commission indicated that this expert opinion is related to inter-American public order because “it will provide the Court with the required conceptual elements to allow the Court to include questions relating to reproductive rights within the normative framework of the right to private and family life, the right to form a family, and the principle of equality and non-discrimination. In addition to examining the normative framework of these rights, the expert witness will contribute to the legal analysis of whether or not the ban on *in vitro* fertilization is compatible with the American Convention. All these aspects will be dealt with based on the applicable international standards.”

29. Third, the Commission offered the expert opinion of Florencia Luna on “the different regulations governing the assisted reproductive technique of *in vitro* fertilization from a comparative point of view.” Regarding inter-American public order, it indicated that the expert opinion “will allow the Court to know how the other States in the region have regulated *in vitro* fertilization in order to accommodate the different interests at stake in a different way from an approach that prohibits access to the technique absolutely. This comparative analysis is relevant for determining whether or not the ban on *in vitro* fertilization constitutes a restriction that is permissible under the American Convention.”

30. Fourth, the Commission offered the expert opinion of Paul Hunt about “the concept of ‘disproportionate impact’ as a form of violation of the principle of equality and non-discrimination, and how the application of this concept particularly affects women by unduly restricting their exercise of their reproductive rights.” Regarding the inter-American public order, the Commission indicated that “the concept of disproportionate impact has not been dealt with directly in the case law of the Inter-American Court in relation to the principle of equality and non-discrimination. This expert opinion will allow the Court to incorporate the international standards concerning this concept into the analysis of the instant case, specifically the examination of the effects that a prohibition such as this one has on women.”

31. Based on the purpose of each of the proposed expert opinions and inter-American public order, the President considers that the four expert opinions transcend the interest and purpose of the instant case to include scientific and legal aspects related to artificial reproduction techniques that involve fundamental issues related to respect for and guarantee of the right to private and family life, and the right to equality and non-

discrimination. The four expert opinions that deal with scientific, empirical and normative aspects from the perspective of international and comparative law in relation to the technique of *in vitro* fertilization in light of the rights of the individual will be useful for the analysis of the prohibition adopted by the State in this case in relation to the American Convention. Based on the foregoing, the President finds it appropriate to admit the expert opinions of the four proposed expert witnesses, in keeping with the purpose and method determined in the operative paragraphs of this Order (*infra* first and fifth operative paragraphs).

d) Method for receiving the testimony and expert opinions

32. It is necessary to ensure that the truth can be known and also the most extensive presentation of the facts and arguments by the parties on everything that is pertinent for deciding disputed matters, guaranteeing both the latter's right to defend their respective positions and also the Court's ability to give adequate attention to the cases submitted to its consideration, taking into account that their number has increased significantly and is growing constantly. It must also be ensured that the proceedings are completed within a reasonable time, as required by effective access to justice. Consequently, it is necessary to receive the greatest possible number of statements by affidavit and to hear the presumed victims and expert witnesses whose direct testimony is truly essential at the public hearing, taking into account the circumstances of the case and the purpose of the testimony and opinions.

d.1) Testimony and expert opinions to be provided by affidavit

33. Taking into account the provisions of Article 50(1) of the Rules of Procedure, the information provided by the parties with their final lists of deponents, the purpose of the statements offered and their relationship to the facts of the case, as well as the principle of procedural economy, the President finds it desirable to receive by affidavit the following statements and expert opinions: the statements for information purposes only of Gerardo Escalante López and Delia Ribas Valdés, proposed by representative May Cantillano; the statements of the presumed victims Andrea Regina Bianchi Bruna, Ana Cristina Castillo León and Claudia María Carro Maklouf, proposed by representative May Cantillano; the statement of the presumed victim Víctor Hugo Sanabria León, proposed by representative Molina Acevedo; the expert opinions of Andrea Mesén Fainardi and Antonio Marlasca López, proposed by representative May Cantillano, the expert opinion of Alicia Neuburger, proposed by representative Molina Acevedo, the expert opinions of Maureen Condic and Martha Garza, proposed by the State, and the expert opinions of Florencia Luna and Paul Hunt, proposed by the Commission.

34. The President notes that Article 50(5) of the Court's Rules of Procedure applicable to this case establishes the possibility that the presumed victims or their representatives and the respondent State may provide a list of questions to pose to those persons called on to testify by affidavit. In application of the provisions of the said article, the President proceeds to grant an opportunity for the parties to submit, if they so wish, any questions they deem pertinent to the deponents and expert witnesses referred to in the preceding paragraph. The Commission may pose questions to the expert witnesses Maureen Condic and Martha Garza (*infra* considering paragraph 39). When preparing their affidavit, the deponents must answer the said questions, unless the President decides to the contrary. The corresponding time frames will be determined below in the first operative paragraph of this Order. The pertinent parts of the said statements and expert opinions will be forwarded to the Commission and to the parties. The Commission and the parties may present any observations they deem pertinent within the time frame indicated in the operative

paragraphs of this Order (*infra* fourth operative paragraph). The Court will determine the probative value of the said statements at the appropriate moment, taking into account any views expressed by the parties, if applicable.

d.2) The Commission's request to question the expert witnesses offered by the State

35. The Commission requested "the possibility of questioning, orally or in writing, as reasonable and relevant, the four expert witnesses offered by the State of Costa Rica whose opinions related both to inter-American public order and to the matters dealt with by the expert opinions offered by the Commission." It indicated that "the expert opinions of Anthony Caruso and Martha Garza [...] are directly related to the expert opinion to be provided by Fernando Zegers-Hochschild." Regarding the expert opinion of Maureen Condic, the Commission considered that "even though its content is not identical to the expert opinion to be provided by Fernando Zegers-Hochschild, since it touches on so-called scientific [*sic*] matters that could have an impact on the Court's understanding [...] of the technique of *in vitro* fertilization, the relationship between the two expert opinions is verified." Regarding the expert opinion of Marco Gerardo Monroy Cabra, the Commission observed that "it is related to part of the expert opinion to be provided by Paola Bergallo."

36. Regarding the Commission's request, the President recalls the limitations established in the Rules of Procedure currently in force concerning the reception of testimony proposed by the Commission, as well as in relation to the latter's authority to question the deponents offered by the other parties.¹⁵

37. In particular, the provisions of Article 50(5) of the Rules of Procedure should be recalled establishing that "[t]he alleged victims or their representatives, the respondent State, and, if applicable, the petitioning State may formulate questions in writing for the declarants offered by the opposing party and, if applicable, by the Commission who have been convened by the Court to render their statements through affidavits," which should be read in conjunction with Article 52(3) of the Rules of Procedure, which establishes the possibility that the Commission may question the expert witnesses proposed by the other parties, "if authorized by the Court upon receiving a well-grounded request therefor, when the inter-American public order of human rights is affected in a significant manner and the statement in question regards a topic included in the statement of an expert witness offered by the Commission." Thus, in each case, the Commission must justify the relationship both to inter-American public order and to the matter included in an expert opinion that it offers, so that the Court or its President may assess the request and, if appropriate, authorize the Commission to pose its questions.¹⁶

38. The President observes that the purpose of the expert opinion of Maureen Condic, proposed by the State, and by which the State seeks "to obtain a scientific criterion on the moment at which human life begins," the purpose of the expert opinion of Anthony Caruso on the techniques, implications and risks of *in vitro* fertilization, and the purpose of the expert opinion of Martha Garza about *in vitro* fertilization techniques and their implications, are related to the expert opinion of Fernando Zegers-Hochschild regarding scientific techniques and procedures for *in vitro* fertilization. They involve inter-American public order because they deal with aspects such as the initiation of life from the scientific perspective and the treatment of embryos in the context of the scientific techniques used to facilitate

¹⁵ Cf. *Case of González Medina and Family Members v. Dominican Republic*. Order of the President of the Inter-American Court of Human Rights of June 3, 2011, considering paragraph 44.

¹⁶ Cf. *Case of Torres v. Argentina*, *supra* note 13, considering paragraph 19.

artificial reproduction. Meanwhile, the expert opinion of Marco Gerardo Monroy Cabra about “the moment at which the protection of the right to life begins” is related to the analysis of the expert Paola Bergallo on the State’s ban on the practice of *in vitro* fertilization in light of the international standards. A comparison of the purposes of the two expert opinions leads to the conclusions that they both examine relevant aspects of the compatibility with the American Convention of the ban on the practice of *in vitro* fertilization. The purpose of this expertise, which includes an analysis of the scope of the protection of the right to life, as well as its relationship to the reproductive rights of the individual, constitutes an important matter for the inter-American system.

39. Therefore, based on Articles 50(5) and 52(3) of the Court’s Rules of Procedure, the Commission may question the four expert witnesses proposed by the State, whose opinions will be received at the public hearing and by affidavit, because these questions could have an impact on inter-American public order.

d.3) Testimony and expert opinions to be received during the hearing

40. The case is ready for the oral proceedings on the preliminary objections and eventual merits, reparations and costs. Hence, the President finds it pertinent to convene a public hearing to receive the following seven statements: statement of the presumed victim, Miguel Mejía Carballo, proposed by representative May Cantillano; statement of the presumed victim, Ileana Hénchoz Bolaños, proposed by representative Molina Acevedo; expert opinion of Anthony Caruso and Marco Gerardo Monroy Cabra, proposed by the State, and expert opinion of Fernando Zegers-Hochschild and Paola Bergallo, proposed by the Commission. It will also receive the final oral arguments of the representatives and of the State, as well as the final oral observations of the Commission.

e) Final oral and written arguments and observations

41. When the statements have concluded, the representatives and the State may submit to the Court their respective final oral arguments on the preliminary objections and eventual merits, reparations and costs in this case. As established in the Rules of Procedure, once the arguments have concluded, the Inter-American Commission will present its final oral observations.

42. Under Article 56 of the Rules of Procedure, the representatives, the State and the Commission may present their final written arguments and final written observations, respectively, on the preliminary objections and eventual merits, reparations and costs, within the time frame established in the twelfth operative paragraph of this Order.

THEREFORE:

THE PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in accordance with Articles 24(1) and 25(2) of the Statute of the Court, Article 34 of the previous Rules of Procedure, and Articles 4, 15(1), 26(1), 31(2), 35(1), 40(2), 41(1), 45, 46, 48, 50 to 56, 58 and 60 of the Rules of Procedure of the Court

DECIDES:

1. To require the following persons to provide their testimony by affidavit for the reasons set out in this Order (*supra* considering paragraphs 32 to 34), in keeping with the principle of procedural economy, and in exercise of the authority granted by Article 50(1) of the Court's Rules of Procedure:

A) Statement for information purposes only

Proposed by representative May Cantillano:

- 1) Gerardo Escalante López, who will testify about: "the regulation of *in vitro* fertilization in Costa Rica, the techniques and practices that he used as a doctor and their effectiveness and their implications for the medical treatment of infertility from a scientific perspective," as relevant to this case, and
- 2) Delia Ribas Valdés, who will testify about: "the regulation of *in vitro* fertilization in Costa Rica, the techniques and practices that she used as a doctor and their effectiveness and their implications for the medical treatment of infertility from a scientific perspective, especially in the cases of Grettel Artavia Murillo and Andrea Regina Bianchi Bruna."

B) Presumed victims

Proposed by representative May Cantillano:

- 3) Andrea Regina Bianchi Bruna, who will testify about: "the [presumed] harm suffered owing to the ban on the practice of *in vitro* fertilization in Costa Rica";
- 4) Ana Cristina Castillo León, who will testify about: "the [presumed] harm suffered owing to the ban on the practice of *in vitro* fertilization in Costa Rica," and
- 5) Claudia María Carro Maklouf, who will testify about "the [presumed] harm suffered owing to the ban on the practice of *in vitro* fertilization in Costa Rica."

Proposed by representative Molina Acevedo:

- 6) Víctor Hugo Sanabria León, who will testify about: "the [presumed] effects of the ban on *in vitro* fertilization on [his] life project and the State's [alleged] acts and omissions in his specific case."

C) Expert witnesses

Proposed by representative May Cantillano:

- 7) Andrea Mesén Fainardi, who will testify about: "the [presumed] non-pecuniary damage that may be caused to a person by the impossibility of having a child owing to sterility and about the ban on the practice of *in vitro* fertilization in Costa Rica," and
- 8) Antonio Marlasca López, who will testify about: "the distinction between the concepts of 'human life and human person'" as "fundamental concepts to judge this case."

Proposed by representative Molina Acevedo:

- 9) Alicia Neuburger, who will testify about: "the [presumed] effects and [alleged] consequences on the life projects of the victims owing to the State's [supposed] acts and omissions," because of the ban on *in vitro* fertilization.

Proposed by the State

- 10) Maureen Condic, who will testify about: "the moment at which life begins from a scientific point of view,"
- 11) Martha Garza, who will testify about: "*in vitro* fertilization techniques and their implications."

Proposed by the Commission

- 12) Florencia Luna, who will testify about: "the different regulations on the assisted reproduction technique of *in vitro* fertilization from a comparative perspective", and
- 13) Paul Hunt, who will testify about: "the concept of 'disproportionate impact' as a violation of the principle of equality and non-discrimination, and how the application of this concept particularly affects women by unduly restricting their exercise of their reproductive rights."

2. To require the parties and the Commission to forward, if they deem pertinent and as it relates to them and within the non-extendible time frame that expires on August 10, 2012, any questions they consider it relevant to pose through the Inter-American Court to the deponents providing information only, the presumed victims, and the expert witnesses mentioned in the first operative paragraph of this Order. The statements and expert opinions required in the first operative paragraph must be submitted by August 24, 2012, at the latest.

3. To require the representatives, the State, the Commission and the Secretariat of the Court to coordinate and take the necessary measures to ensure that, once the respective questions of the State, the representatives, and the Commission have been received, the proposed deponents and expert witnesses include the respective answers in their affidavits, in keeping with considering paragraphs 33 and 34 of this Order.

4. To establish that, when the statements and expert opinions required in the first operative paragraph have been received, the Secretariat of the Inter-American Court shall transmit them to the other parties so that they may submit their observations on the said statements and expert opinions by September 4, 2012, at the latest.

5. To convene the representatives, the State, and the Inter-American Commission to a public hearing, to be held during the ninety-sixth regular session of the Court, which will take place at the seat of the Court on September 5, 2012, starting at 9 a.m. and on September 6, 2012, starting at 9 a.m. to receive their final oral arguments and final oral observations, respectively, on the preliminary objections and eventual merits, reparations and costs, as well as the statements of the following persons:

A) Presumed victim proposed by representative May Cantillano

- 1) Miguel Mejía Carballo, who will testify about: "the [presumed] harm suffered by himself and by Grettel Artavia owing to the ban on the practice of *in vitro* fertilization."

B) Presumed victim proposed by representative Molina Acevedo

- 2) Ileana Hénchoz Bolaños, who will testify about: "the [presumed] effects of the ban on *in vitro* fertilization on [her] life project and the State's [alleged] acts and omissions in her specific case."

C) Expert witness proposed by the Commission

- 3) Fernando Zegers-Hochschild, who will refer to: "the assisted reproduction technique of *in vitro* fertilization, what the technique consists of and how it is carried out, including a comparative perspective," as relevant to this case.

D) Expert witness proposed by the State

- 4) Anthony Caruso, who will refer to: "*in vitro* fertilization techniques, their practice from a comparative perspective, and the risks for the mother and the embryo," as relevant to this case.

E) Expert witness proposed by the Commission

- 5) Paola Bergallo, who will refer to: (i) "the international standards applicable to reproductive rights, in particular, in relation to arbitrary interference in private family life and to the principles of equality and non-discrimination," and (ii) "the ban on the practice of *in vitro* fertilization by the State in light of the said standards," as relevant to this case.

F) Expert witness proposed by the State

- 6) Marco Gerardo Monroy Cabra, who will refer "to the recognition of life from the moment of conception established in the American Convention on Human Rights and its compatibility with Costa Rica's domestic law," as relevant to this case.

6. To call upon the State to facilitate the entry into and exit from its territory of the deponents, if they reside or are present in it [*sic*], who have been summoned in this Order to testify at the public hearing on the preliminary objections and eventual merits, reparations and costs in this case, as established in Article 26(1) of the Court's Rules of Procedure.

7. To call upon the representatives, the State, and the Inter-American Commission to notify this Order to the persons they have proposed, in accordance with the provisions of Article 50(2) and 50(4) of the Rules of Procedure.

8. To inform the representatives, the State, and the Inter-American Commission that they must cover any expenses arising from providing or giving the evidence they have proposed, as established in Article 60 of the Rules of Procedure.

9. To call upon the representatives, the State, and the Inter-American Commission to advise the deponents convened by the Court to testify that, according to the provisions of Article 54 of the Rules of Procedure, the Court will inform the State of any case in which the persons summoned to appear or to testify fail to appear or refuse to testify without legitimate cause, or in which, in the Court's opinion, they have violated their oath or solemn declaration, for the effects established in the relevant domestic legislation.

10. To inform the representatives, the State, and the Inter-American Commission that when all the testimony has been given at the public hearing, they may present the Court with their final oral arguments and final oral observations, respectively, on the preliminary objections and eventual merits, reparations and costs in this case.

11. To require the Secretariat of the Court, as established in Article 55(3) of the Rules of Procedure, to advise the Inter-American Commission, the representatives, and the State of the link where the recording of the public hearing on the preliminary objections and eventual merits, reparations and costs is available, as soon as possible.

12. To advise the representatives, the State, and the Inter-American Commission that they have until October 6, 2012, to present their final written arguments and final written observations, respectively, on the preliminary objections and eventual merits, reparations and costs in this case. This time frame cannot be extended and is unrelated to the transmittal of the copy of the recording of the public hearing.

13. To require the Secretariat of the Inter-American Court to notify this order to the representatives of the presumed victims, the State of Costa Rica, and the Inter-American Commission on Human Rights.

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary