



**CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CORTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS**



**Summary Newsletter of the Judgments issued by the Inter-American Court¹ during its
97th Regular Period of Sessions**

During the period covered by this Newsletter,² the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) issued five Judgments related to the following topics, among others: the scope of the right to life regarding the interpretation of the terms “conception,” “person,” and “in general” established in Article 4 of the American Convention; the prohibition of in vitro fertilization and how this infringes upon the right to privacy, personal liberty, personal integrity, autonomy, reproductive rights and the right to start a family; access to reproductive health services and to the technology necessary to exercise reproductive freedom; indirect discrimination caused by the disproportionate impact that the prohibition on in vitro fertilization had on the individuals due to their disability, gender and socio-economic conditions; the State’s obligation to guarantee the special protection of children within the framework of a non-international armed conflict; forced disappearances within the context of an internal armed conflict and how they infringe the personal integrity of the next of kin of the victims; complementarity of international human rights law and international humanitarian law; interpretation of the American Convention in light of the principles of precaution and distinction of International Humanitarian Law; principle of complementarity of domestic and international jurisdictions; protection of the right to property of the victims of internal armed conflicts; the right to a fair trial and to judicial protection, including the right to appeal a criminal conviction before a judge or superior court, the State’s obligation to provide effective judicial remedies to the victims in conformity with the rules of due process, and the right of access to justice of the victims and their next of kin, within a reasonable term, to learn the truth of the facts and punish those responsible.

A summary of each of these Judgments is provided below:

- 1. Case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala. Judgment of November 20, 2012. Articles 1(1), 3, 4(1), 5(1), 5(2), 7, 8(1), 11(2), 16(1), 17, 19, 22(1) and 25(1) of the American Convention on Human Rights; Articles I.a), I.b) and XI of the Inter-American Convention on Forced Disappearance of Persons; Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and Article 7(b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.**

¹ The preparation of this case law newsletter by the Secretariat of the Inter-American Court has been financed by Ministerio de Asuntos Exteriores y Cooperación de España and Agencia Española de Cooperación Internacional y Desarrollo.

² This Newsletter covers the judgments issued by the Inter-American Court in its 97th Regular Period of Sessions, held from November 19-30, 2012, in which the Court determined the international responsibility of the States. The text of the decisions indicated in this Newsletter can be downloaded from the website: www.corteidh.or.cr

This case is related to the forced disappearance of 26 persons listed in a Guatemalan military intelligence document known as “Diario Militar.” These disappearances occurred between 1983 and 1985 within the context of the internal armed conflict in Guatemala. In addition, the case deals with the lack of an effective investigation into said disappearances, as well as the death of Rudy Gustavo Figueroa Muñoz and the alleged detention and torturing of Wendy and Igor Santizo Méndez.

The Republic of Guatemala (hereinafter “the State” or “Guatemala”) recognized its international responsibility for: (i) the forced disappearance of 26 victims registered in the “Diario Militar,” whose whereabouts were unknown as of the time of submission of this case, and for the resulting violations of the American Convention, the Inter-American Convention on Forced Disappearance of Persons (hereinafter “Inter-American Convention on Forced Disappearance”) and the Inter-American Convention to Prevent and Punish Torture (hereinafter “Inter-American Convention against Torture”); (ii) the violation of the rights of the child to the detriment of Juan Pablo and María Quirina Armira López, who were minors when their forced disappearance began; (iii) violation of the right to freedom of association of the disappeared persons, given that the restriction of this right was the motive for said disappearances; (iv) violation of the right to a fair trial and the right to judicial protection, due to the deficiencies in the investigation of the facts; (v) violation of the right to personal integrity, rights of the family, freedom of association, and political rights of the next of kin of the victims of forced disappearance.

Similarly, the State expressed its “partial acknowledgment” of the alleged violations committed after March 9, 1987, the date on which the obligatory jurisdiction of the Court was recognized, to the detriment of Rudy Gustavo Figueroa Muñoz, Wendy Santizo Mendez and the next of kin of both. The State also partially acknowledged the violation of Article 13 of the Convention, in relation to Articles 1(1) and 2 thereof, due to the alleged violation of the right to information, to the detriment of the next of kin of the 26 disappeared victims and the next of kin of Rudy Gustavo Figueroa Muñoz.

On November 20, 2012, the Inter-American Court issued its judgment on merits, reparations and costs in the instant case, in which it accepted the State’s partial acknowledgment of responsibility for the forced disappearance of the 26 victims listed in the *Diario Militar*, and the resulting violations of the rights to personal liberty, personal integrity, right to life and to recognition as a person before the law, as well as freedom of association (as the motive for said disappearances), and the rights of the child of Juan Pablo Armira López and María Quirina Armira López. In addition, it unanimously declared that the State failed to comply with its duty to effectively investigate said facts, as well as the death of Rudy Gustavo Figueroa and the alleged detention and torture of Igor and Wendy Santizo Méndez. The Court also decided that the State is internationally responsible for the violation of the right to personal integrity of all of the next of kin of the victims, and for some, the right to freedom of movement and residence, rights of the family, rights of the child and freedom of association.

I. Merits

a. Summary of the facts of the case

Between 1962 and 1996 there was an internal armed conflict in Guatemala during which the forced disappearance of persons became a State practice, mainly committed by officers of its security forces. According to the Commission for Historical Clarification, (Comisión para el Esclarecimiento Histórico, hereinafter “CEH”) State forces and related paramilitary groups were responsible for 92% of the forced disappearances registered by said body.

In 1999 National Security Archive, a non-governmental organization from the United States, published a confidential intelligence document from the Guatemalan state, known as the *Diario Militar* (hereinafter “*Diario Militar*”). The *Diario Militar* included, *inter alia*, a list of 183 persons with their personal data, affiliation to organizations, activities, and in most cases a passport size photo of each person. Each registry also indicates the actions committed against each person, including secret detentions, kidnappings and murders. The facts recorded in the *Diario Militar*

occurred between August 1983 and March 1985. Furthermore, in 2005, the employees of the Office of the Human Rights Ombudsman accidentally discovered in an old facility of the National Police, videos, photos, and approximately 80 million pages, among other objects, recording the actions of the National Police from 1882 to 1997. This group of information is known as the Historical Archive of the National Police. The information contained in this Archive confirms and complements what was recorded in the *Diario Militar*.

Specifically, in relation to the victims of this case, the *Diario Militar* recorded the detention of the 26 disappeared victims and of Rudy Gustavo Figueroa. After said detentions, the referred 26 victims were forcibly disappeared between September 22, 1983 and March 2, 1985. According to the data recorded in the *Diario Militar*, some of the victims in the instant case were held in captivity between 15 and 106 days, one was allegedly executed the same date of capture and others were transferred to unknown places or prisons. According to the codes used in the *Diario Militar* (which have been interpreted by expert witnesses and state bodies), this document also records the execution of 17 of the 26 victims forcibly disappeared in the instant case. In addition, the *Diario Militar* includes evidence of the detention of Rudy Gustavo Figueroa Muñoz, who, according to the document, was abducted on October 12, 1984, and his lifeless body was found two months later on the street near his parents' house.

After the *Diario Militar* was published, GAM and FAMDEGUA, non-governmental organizations, and the Human Rights Ombudsman, denounced the facts recorded in said document before the Attorney General's Office. Initially, the claims were individually distributed among thirty-five Prosecutor Agencies. Subsequently, the Attorney General's Office joined the cases into a single file that it named Coordination of the *Diario Militar*, and in 2005 the file was forwarded to the "Unidad de Casos Especiales y Violaciones de Derechos Humanos del Ministerio Público" (Unit for Special Cases and Human Rights Violations of the Attorney General's Office, hereinafter "Unidad Fiscal Especial"). According to the file of the investigation, it had focused on two main groups of proceedings. The first, requests for information on the victims and, in some cases, their families, to different entities and state, civilian or private offices and the second, conducting summons and in some cases taking statements from the next of kin of the victims. In the file of the investigation, as well as a report prepared by the Attorney General's Office, there is evidence of limited investigative evidence not belonging to either of these two groups.

Moreover, in 2003 the Guatemalan Forensic Anthropology Foundation, acting as expert witness for the Attorney General's Office, began the exhumations of a mass grave found at an old military detachment. On November 22, 2011 the remains of two of the disappeared victims of this case were identified: Amancio Samuel Villatoro and Sergio Saúl Linares Morales, found at the aforementioned military detachment.

b. Conclusions and determinations of the Court regarding the forced disappearance of the 26 victims recorded in the *Diario Militar*

In the instant case there is no controversy among the parties regarding the international responsibility of the State for the forced disappearance of the 26 victims. The sole fact that 26 disappearances are recorded in the *Diario Militar* demonstrates the State's participation in said violations. The Court indicated that the detention of the 26 alleged victims entailed an infringement of their liberty, in the broadest sense of Article 7(1) of the Convention, given that 25 years later the whereabouts of 24 of the 26 victims is unknown. In addition, the Court highlighted that at the time when the disappearances began there was a pattern of use of clandestine prisons. In addition, the Court considered that subjecting detainees to official repression bodies, state or private agents acting with their acquiescence or tolerance, which committed torture and murder and it went unpunished, represents in and of itself a violation of the right to prevent violations to humane treatment and to life. Additionally, the Court indicated that the 26 disappeared victims were put in a situation of legal uncertainty which prevented them from holding or effectively exercising their rights, in general, which entails a violation of their right to recognition as a legal personality.

The Court observed that Juan Pablo and María Quirina Armira López were 13 and 16 years old, respectively, at the time of their disappearance. Based on the State's full recognition regarding

this violation, the Court considered that the State failed to comply with its duty to adopt special measures of protection in conformity with Article 19 of the Convention regarding these two victims.

The Court determined that these forced disappearances fell within the context of the internal armed conflict in Guatemala, in which the State applied what it called the "National Security Doctrine," based on which it used the notion of "internal enemy" to include "all those persons who identif[ied] with the communist ideology or belonged to an organization –union, social, religious, student- or those who for any reason opposed the established regime."

The Inter-American Court highlighted the gravity of the facts *sub judice* that occurred after 1983, which fell within the State's systematic practice of forced disappearances. The Court highlighted that the existence of official documents such as the *Diario Militar* provided evidence of the organization and planning with which forced disappearances were committed, as well as the existing coordination between top-level political and/or military authorities. Consequently, the Court determined that Guatemala violated Articles 7, 5(1), 5(2), 4(1) and 3 of the American Convention, in relation to Article 1(1) thereof, as well as Articles I.a) and XI of the Inter-American Convention on Forced Disappearance, to the detriment of the 26 disappeared victims and, in addition, in relation to Article 19 of the Convention, to the detriment of Juan Pablo and María Quirina Armira López. The Court deemed inadmissible to declare non-compliance with Article II of the Inter-American Convention on Forced Disappearance.

In addition, the Court indicated that it did not have jurisdiction to decide on the alleged violation of Article 13 of the Convention to the detriment of the 26 disappeared victims. Nevertheless, taking into account the State's acknowledgment, the Court concluded that the forced disappearance of victims in this case, as part of the State's counterinsurgency policy, were intended to break up the movements or organizations to which the victims allegedly belonged, which the State identified as inclined to "insurgency." In fact, the common factor of the 26 disappeared victims listed in the *Diario Militar* is their alleged membership or relation with a group considered as an opposition and/or insurgency group by the State's security forces. Therefore, the Court concluded that the forced disappearance of the 26 victims recorded in the *Diario Militar* had the purpose of restricting the exercise of their right to freedom of association, in violation to Article 16 of the Convention.

c. Conclusions and determinations of the Court regarding the obligation to investigate the forced disappearances, the alleged detention and torture and the alleged extrajudicial killing

The Court called to mind that, based on its *ratione temporis* jurisdiction, it can only rule on facts related to the investigations that occurred after March 9, 1987.

c.1. Investigation of the forced disappearance of the 26 victims and the death of Rudy Gustavo Figueroa Muñoz

The Court considered that in spite of having knowledge of the forced disappearance of at least 18 of the victims in the instant case through the formal filing of judicial remedies, complaints or official decisions, the State did not act in a manner that was consistent with its duty to initiate *ex officio* an investigation into said violations, prior to the appearance of the *Diario Militar*.

In relation to the investigation that began in 1999, after the *Diario Militar* was published, the Court concluded that the State did not carry out the investigation of the facts of the instant case with due diligence, given that: most of the steps were oriented toward obtaining information regarding the victims; there was an unjustified delay in the joinder of actions in the investigation; there was a lack of cooperation from the Ministry of Defense, which obstructed the progress of the investigations, and there were serious omissions regarding the use of the evidence on file. In addition, the Court considered that the State had not carried out the minimum steps necessary required by its obligation to investigate the death of Rudy Gustavo Figueroa Muñoz.

The Court confirmed that from the date of recognition of the Court's obligatory jurisdiction to date 25 years and 8 months have elapsed, as well as 13 years and 6 months since the appearance of the Diario Militar, in which the investigation of the facts in the instant case has not advanced from the initial phase of the investigation before the Attorney General's Office. In this regard, the Court considered that a prolonged delay such as that incurred in the instant case constitutes, in and of itself, a violation of the right to a fair trial.

The Court emphasized that the violations committed in this case fall within a systematic pattern of denial of justice and impunity. Based on the foregoing, the Court considered that the State failed to comply with its duty to guarantee the rights enshrined in Articles 7, 5(1), 5(2), 4(1) and 3 of the American Convention through an effective investigation into the forced disappearances and death of Rudy Gustavo Figueroa Muñoz, in relation to Articles 1(1) thereof and Articles 1, 6 and 8 of the Inter-American Convention against Torture, to the detriment Rudy Gustavo Figueroa Muñoz, along with Article I.b) of the Convention on Forced Disappearance of Persons, to the detriment of the 26 disappeared victims. In addition, the Court concluded that due to the lack of an effective investigation of the facts, prosecution and punishment of those responsible, the State violated the rights to a fair trial and to judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, as well as Articles 1, 6 and 8 of the Inter-American Convention against Torture, to the detriment of Rudy Gustavo Figueroa Muñoz, as well as in relation to Article I.b) of the Inter-American Convention on Forced Disappearance of Persons to the detriment of the next of kin of the disappeared victims.

c.2 Duty to investigate the alleged detention and torture of Wendy and Igor Santizo Méndez

The Court observed that Wendy Santizo Méndez gave her statement before the Attorney General's Office on June 11, 1999, within the framework of the investigation of her mother's forced disappearance, on the alleged detention, torture and rape of which she was allegedly a victim of at the time of her mother's detention. The Court highlighted that upon learning of the alleged violations against Wendy Santizo Méndez the State's obligation to begin an investigation *ex officio* into these facts was generated. Although this investigation is part of the Diario Militar investigation, there is no evidence of specific steps taken regarding the alleged torture, detention and rape of Wendy Santizo Méndez. The Court noted that there are specific facts in the file that have not been followed up on. Consequently, the Court deemed that the State failed to comply with its duty to investigate –and thus the duty to guarantee- the rights enshrined in Articles 5(1), 5(2), 7(1) and 11(2) of the American Convention, in relation to Article 1(1) thereof, as well as Article 7.b of the Convention of Belém do Pará and Articles 1, 6 and 8 of the Inter-American Convention against Torture, to the detriment of Wendy Santizo Méndez.

In addition, the Court noted that in her statement before the Attorney General's Office Wendy Santizo Méndez indicated that her brother, Igor Santizo Méndez, was detained and subjected, *inter alia*, to mock shooting drills. As described in the case of Wendy Santizo Méndez, the investigation of these facts is part of the general investigation of the Diario Militar, in which the State has not taken specific measures for clarification. Consequently, the Court considered that the State failed to comply with its duty to investigate –and to guarantee- the rights enshrined in Articles 5(1), 5(2) and 7(1) of the American Convention, in relation to Article 1(1) thereof, and Articles 1, 6 and 8 of the Inter-American Convention against Torture, to the detriment of Igor Santizo Méndez.

d. Conclusions and determinations of the Court regarding the violations to the detriment of the next of kin of Rudy Gustavo Figueroa Muñoz and the 26 disappeared victims

d.1. Regarding the right to personal integrity

In the present case, the Court noted that it had been established that the existing circumstances have led to feelings of sadness, frustration, impotence, insecurity and distress in the next of kin of the victims. Consequently, the Court considered that the State violated the right to personal integrity established in Articles 5(1) and 5(2) of the American Convention, in relation to Article

1(1) thereof, to the detriment of the next of kin of the disappeared victims and of Rudy Gustavo Figueroa Muñoz, identified in the Appendix to the Judgment.

In addition, in relation to the alleged threats suffered by the next of kin of the victims, the Court observed that from the evidence provided by the parties it can only be inferred that the next of kin of Alfonso Alvarado Palencia were threatened in 2004 so that they would cease their complaints and search for their loved one. The Court deemed that this constitutes an additional violation to the right to personal integrity of these persons.

d.2. Regarding the right to the truth

The Court deemed adequate to adjudge specifically on the right to the truth of the next of kin of the victims recorded in the Diario Militar. It highlighted that the Ministry of Defense denied to the CEH the existence of documents such as the Diario Militar, which appeared through non-official means three months after said commission published its final report. According to the CEH, this lack of information had a negative impact on the fulfillment of its mandate, as it was unable, inter alia, to precisely determine the chain of command regarding the forced disappearances committed during the conflict. Taking into account that the facts of this case occurred within a non-international conflict, the clarification of the truth of what occurred becomes particularly relevant. The Court noted that by preventing the families from the elucidation of the historical truth through the CEH, which was the extrajudicial means established by the State itself in the Peace Agreements and Law on National Reconciliation, in addition to the impunity in which this case remains, the State violated Articles 5(1) and 5(2) of the American Convention to the detriment of the family of Rudy Gustavo Figueroa Muñoz and of the disappeared victims.

d.3. Regarding the right to freedom of movement and residence

The Court analyzed the cases of displacements that occurred after the acceptance of the Court's obligatory jurisdiction on March 9, 1987 or that continued after that date, in which there was evidence of inability to return attribution on the State. In this regard, the Court observed that it could not be inferred from the file that there was a direct or immediate causal relationship between the displacement of the next of kin occurred after March 9, 1987 and the forced disappearances of their family members or a possible risk to their lives or personal integrity that was attributable to the State.

In relation to the alleged displacements that continued after March 9, 1987, the Court confirmed that only in the case of the family of José Miguel Gudiel Álvarez it was demonstrated that the family was unable to return after that date. Consequently, the Court concluded that Guatemala failed to comply with its obligation to provide the conditions necessary to facilitate the voluntary return, with dignity and in a safe manner, of Florentín Gudiel Ramos, María Agripina Álvarez and her children Makrina, José Francisco, Florentín and Ana Patricia Gudiel Álvarez to Guatemala after March 9, 1987.

d.4. Regarding the rights of the family and rights of the child

The Court considered that the claims of the representatives regarding these rights refer to infringements that were substantially assessed by the Court in the analysis of the right to personal integrity of the next of kin of the victims in the instant case, therefore it deemed unnecessary to issue an additional decision in this regard. Without detriment to the above, the Court verified that Marlyn Carolina, Juan Carlos and José Geovany Hernández Escobar remained separated from their mother, Reyna de Jesús Escobar Rodríguez, due to the terror that she experienced due to the fact that "she had to hide as a measure of protection" after her husband's disappearance in 1985. This separation was for a period of five years, which fell within the jurisdiction of the Court. Therefore, the Court concluded that the State was responsible for the violation of Article 17 of the Convention, in relation to Article 1(1) thereof, to the detriment of Reyna de Jesús Escobar Rodríguez, Marlyn Carolina, Juan Carlos and José Geovany Hernández Escobar, as well as in relation to Article 19 of the Convention to the detriment of the latter three, who were minors.

d.5. Regarding the freedom of association and freedom of thought and expression

Taking into account the State's acknowledgment of responsibility, the Court confirmed that the members of Grupo de Apoyo Mutuo were subjected to a situation of risk and persecution due to the actions to seek justice and defend human rights undertaken by said organization. This situation continued after the acceptance of the Court's jurisdiction, until at least 1993. Based on the foregoing, the Court determined that the State violated the right to freedom of association to the detriment of the next of kin of the disappeared victims who were members of Grupo de Apoyo Mutuo, or those for whom there is evidence that they decided to not participate in associations of this type due to the fear generated by the risk situation that it represented.

II. Reparations and Costs

Regarding reparations, the Court established that the Judgment itself constitutes *per se* a type of reparation. In addition, it ordered the State to: (i) initiate, continue and perform the investigations and proceedings necessary, within a reasonable term, to establish the truth of the facts and to determine and if applicable punish those responsible for the forced disappearance of the 26 victims, the death of Rudy Gustavo Figueroa Muñoz and the alleged detention and torture suffered by Wendy and Igor Santizo Méndez; (ii) perform as soon as possible a serious search making all efforts to determine the whereabouts of the 24 victims that still remain disappeared, within the shortest time possible; (iii) provide, immediately, psychological or psychiatric treatment to the victims who request it and, if applicable, pay the sum established for expenses relating to the psychological or psychiatric treatment of those victims who reside outside of Guatemala; (iv) publish this official summary of the Judgment, one time only, in the Official Gazette and in a newspaper of ample national circulation, and the full text of the judgment in an official website; (v) create an audiovisual documentary about the victims and the facts of the instant case, the context in which they occurred and the search for justice of their next of kin; (vi) build a park or square to honor the memory of the victims of the instant case, which would serve to the next of kin as a space to remember their loved ones, and (vii) pay the amounts established in the Judgment for pecuniary and non-pecuniary damages, and for the reimbursement of costs and expenses.

The full text of the Judgment can be accessed through the following link:

http://www.corteidh.or.cr/docs/casos/articulos/seriec_253_esp1.pdf

2. Case of Mohamed v. Argentina. Judgment of November 23, 2012. Articles 1(1), 2 and 8(2)(h) of the American Convention on Human Rights.

On November 23, 2012 the Inter-American Court issued the Judgment, in which it rejected the preliminary objection filed by the State and unanimously declared that the State is internationally responsible for the violation of the right to appeal the judgment enshrined in Article 8(2)(h) of the American Convention on Human Rights, in connection with Articles 1(1) and 2 thereof, to the detriment of Oscar Alberto Mohamed. The Court determined the State's international responsibility for failing to guarantee to Mr. Oscar Alberto Mohamed the right to appeal a criminal conviction. Mr. Mohamed was convicted for the crime of manslaughter by a judgment issued on February 22, 1995 by the Court of Appeals, which overturned the acquittal that had been issued by the Court of First Instance.

I. Preliminary Objections

The State filed a preliminary objection requesting the rejection of the claims of the alleged victim's representatives regarding the violation of the right enshrined in Article 8(4) of the American Convention, given that they were invoking it "for the first time in these international proceedings," thus Argentina had been denied the opportunity to address it and adequately respond to it in conformity with the subsidiary nature of international law.

The Court reiterated its case law, in which it has established that alleged victims and their representatives may invoke the violation of rights other than those included in the Report on

Merits, provided that they abide by the facts contained in that document. In the instant case the representatives claimed the violation of the principle of *ne bis in idem*, arguing that by permitting a party other than the accused to appeal the acquittal decision is to allow a double prosecution, which violates said principle. The Court verified that the alleged violation of Article 8(4) of the Convention is related to the same facts outlined by the Commission in the Report on Merits, comprised of the judgments issued in the criminal action against Mr. Mohamed but qualifying them as an alleged violation of the principle of *ne bis in idem*. Consequently, the Court rejected the preliminary objection filed by the State.

II. Merits

A) Summary of the facts of the case

On March 16, 1992, Mr. Oscar Alberto Mohamed, who worked in the city of Buenos Aires as a bus driver, was involved in a traffic accident. Mr. Mohamed ran over a woman, who suffered severe injuries and died.

That same day a criminal action was initiated against Mr. Mohamed for the crime of manslaughter. The rules of the criminal action against Mr. Mohammed were governed by the Criminal Procedural Code of 1888, as amended. The National Prosecutor of First Instance of Criminal and Correctional Matters No. 14 filed charges against Mr. Mohamed as the perpetrator of the crime of manslaughter under Article 84 of the Criminal Code.

Both the prosecutor and the plaintiff's counsel requested a sentence of one year in prison, a special disqualification from driving for six years and the payment of legal costs.

On August 30, 1994 the National Correctional Court No. 3 issued a ruling in which it decided, *inter alia*, to acquit Oscar Alberto Mohamed of the crime of manslaughter as contained in Article 84 of the Criminal Code.

The Public Prosecutor and the plaintiff's representative appealed the points of the judgment relating to the acquittal and the defense counsel's fees. The aforementioned court granted the lodged appeals and ordered the forwarding of the case to a higher court. The plaintiff's representative submitted the statement of grievances supporting the appeal filed. On February 22, 1995 the First Chamber of the Court of Appeals for Criminal and Correctional Matters issued a ruling in which it decided, *inter alia*, to convict Mr. Mohamed "as he was found to be criminally responsible for the crime of manslaughter, and sentenced him to three years in prison, the fulfillment of which is held in abeyance, and eight years of special disqualification from driving any type of motor vehicle (Articles 26 and 84 of the Criminal Code)," and assigned the costs of both instances to the convict.

The legal code applied in the action against Mr. Mohamed did not provide any recourse in which to appeal the conviction. The available remedy was the federal extraordinary appeal, as contemplated in Article 256 of the Civil and Commercial Procedural Code of the Nation.

On March 13, 1995 Mr. Mohamed's defense counsel filed an extraordinary appeal against the conviction decision with the same First Chamber of the Court of Appeals for Criminal and Correctional Matters that delivered such judgment, "in accordance with Articles 256 and 257 of the Civil and Commercial Procedural Code of the Nation" and "in accordance with Articles 14 and 15 of Law 48." The defense counsel requested the aforementioned Chamber to admit and forward the proceedings to a higher court, and for the higher court to "annul the final judgment ... and order the issuing of a new decision in conformity with the law." Mr. Mohamed's legal counsel indicated that said remedy had violated the constitutional guarantees that are enabled by the federal route and the following were the reasons for his grievances: i) the "flaw in the policy rationale" for having "sought as basis a regulation that was not applicable to the case" given that the decree quoted in the ruling was not in effect as of the date of the traffic accident; ii) self-contradiction in the judgment, iii) crucial evidence was disregarded; and iv) the ruling is based "on dogmatic statements that are inconsistent with the facts or the law."

On July 4, 1995 the referred First Chamber decided to “reject with costs the extraordinary appeal” based on, *inter alia*, the fact that the arguments presented by the defense counsel “refer to matters of fact, evidence and common law, that ha[d] already been assessed and discussed in the challenged decision.” The court also indicated that:

[a]lthough]the Court has incurred in a material error by having cited [said] decree, which was not in effect at the time of the event, the judgment of the accused is based on the violation of the objective duty of care in which he incurred, a fact that is duly confirmed herein and that, as previously mentioned, is not a matter to be discussed through these means.

On July 17, 1995, Mr. Mohamed was fired from his job as a bus driver, due to “the criminal disqualification to drive.”

On July 18, 1995 Mr. Mohamed’s legal counsel filed an appeal of complaint against refusal to accept the appeal before the Supreme Court of Justice of the Nation, “for denying him the extraordinary appeal filed against the definitive judgment of second instance” and requested the annulment of the appeal judgment and for a new judgment to be delivered. The defense counsel reiterated its position on the retroactive application of Decree 692/92 and indicated that the decision that rejected the extraordinary appeal violated Article 9 of the American Convention. On September 19, 1995 the Supreme Court of Justice “dismissed the appeal of complaint,” indicating that “the extraordinary appeal, the denial of which motivat[ed] [...] the complaint, [was] inadmissible (Art. 280 of the Civil and Commercial Procedural Code of the Nation).”

On September 27, 1995 Mr. Mohamed’s legal counsel filed a brief before the Supreme Court asking it to revoke the decision that dismissed the appeal of complaint. He explained, among other claims, that Mr. Mohamed “ha[d] not been heard with the adequate guarantees,” which constitutes a violation of Article 8 of the American Convention on Human Rights, as well as that “by having retroactively applied regulation” the annulment of the acquittal had violated, among others, Article 9 of the Convention. On October 19, 1995 the Supreme Court of Justice of the Nation dismissed the petition filed by Mr. Mohamed’s legal counsel based on that “the Court’s judgments are not subject to appeal for annulment or reversal.”

B. Right to a fair trial

Alleged violation of Articles 8(2)(c), 8(2)(d), 8(2)(e), 25(2)(a) and 25(2)(b) of the American Convention

The Court did not adjudge on the alleged violation of Articles 8(2)(d), 8(2)(e), 25(2)(a) or 25(2)(b) of the American Convention because the representatives did not present legal arguments on those alleged violations and did not even mention which facts they were related to. The Court also did not rule on the alleged violation of Mr. Mohamed’s right to defend himself during the criminal action against him, claimed only by the representatives, given that they based their arguments on a criminal procedural law that was not submitted into evidence.

Right to appeal the decision before a higher court or judge

First, the Court adjudged and declared within the scope of Article 8(2)(h) of the American Convention regarding conviction judgments issued when deciding on an appeal against an acquittal, given that the State claimed that it would be permissible to establish exceptions to the right to appeal criminal convictions. The Court established that the right to appeal a decision cannot be effective if it is not guaranteed to all persons who are convicted, and that it is contrary to the purpose of this specific right if it is not ensured to those convicted by means of a judgment that revokes an acquittal decision. Interpreting the contrary would entail leaving the convict without an appeal against conviction decisions. The Court concluded that, under the terms of the protection granted by Article 8(2)(h) of the American Convention, Mr. Mohamed was entitled to appeal the decision issued by the First Chamber of the Court of Appeals on February 22, 1995, given that in it he was convicted as perpetrator of the crime of manslaughter.

Next, the Court referred to the contents of the guarantee granted by Article 8(2)(h) of the Convention. The Court noted that the right to appeal the judgment before a higher court seeks to protect the right to defend oneself, and it reiterated that Article 8(2)(h) of the Convention refers to an ordinary remedy that is accessible and effective, which implies, *inter alia*, that: it must be guaranteed before the decision becomes *res judicata*; it must provide results or answers to the purpose for which it was created; and the formalities required for the appeal to be admitted should be minimal and should not constitute an obstacle so that the remedy achieves its purpose of examining and deciding on grievances endured by the appellant.

The Court also indicated that, regardless of the recursive system adopted by States Parties or the name given for the means of challenging a conviction, in order for it to be effective it should constitute an appropriate means to ensure the correction of an erroneous conviction. This means that it must be able to analyze the factual, legal and evidentiary matters on which the judgment being appealed is based. Consequently, the requirements for admissibility of the motion should allow extensive control of the contested aspects of the conviction. Furthermore, the Court considered that in the regulation that States develop in their respective recursive schemes, they must ensure that the remedy against the conviction respects the minimum procedural guarantees that, under Article 8 of the Convention, are relevant and necessary to resolve the grievances outlined by the appellant, which does not imply that new oral proceedings must take place.

Subsequently, the Court considered whether Mr. Mohamed was granted the right to appeal the conviction. The Court noted that it was not disputed that the legal code applied to Mr. Mohamed did not contemplate any ordinary criminal appeal for him to be able to appeal the conviction that was imposed. The conviction of second instance was a final judgment that could only be appealed through an extraordinary federal appeal and a subsequent appeal of complaint against the refusal to accept appeal.

The Court considered that that aforementioned extraordinary appeal does not constitute a means to challenge the criminal action but it is an extraordinary remedy governed by the Civil and Commercial Procedural Code of the Nation, which has its own purposes in the Argentinean body of law. In addition, it highlighted that the requirements for admissibility of said appeal are limited to the review of issues relating to the validity of a law, treaty, or constitutional law or the arbitrariness of a judgment, and it excludes factual and evidentiary issues, as well as those of a legal nature that are not constitutional.

Notwithstanding the above, and taking into account that the State claimed that the extraordinary federal appeal could have guaranteed the right to appeal the conviction, the Court made additional considerations to examine the treatment given by the judicial bodies in this specific case to the remedies filed by Mr. Mohamed. The Court noted that, even when analyzing whether these remedies would have materially protected Mr. Mohamed's right to appeal the conviction, the requirements for admissibility of the extraordinary remedy limited *per se* Mr. Mohamed's possibility to file grievances that involved a broad and effective review of the conviction. Consequently, such a limitation negatively impacts the effectiveness that such remedy could have in practice to challenge the conviction.

The Court found that in the instant case, the limited scope of the extraordinary federal appeal is evident from the judgment issued by the First Chamber of the National Court of Appeals, which dismissed *in limine* the appeal filed by Mr. Mohammed's legal counsel on the grounds that the arguments presented referred to "matters of facts, evidence and common law that ha[d] been assessed and discussed at the time of the appealed decision."

The Court concluded that the Argentinean criminal procedural system that was applied to Mr. Mohamed did not instrumentally guarantee an efficient and accessible ordinary remedy that would allow an assessment of the conviction against Mr. Mohamed, under the terms of Article 8(2)(h) of the American Convention, and also verified that the extraordinary federal appeal and the appeal of complaint against refusal to accept appeal did not constitute in this specific case efficient remedies to guarantee that right.

Additionally, the Court concluded that the absence of a judicial remedy to guarantee the review of Mr. Mohamed's conviction decision and the application of judicial remedies that did not guarantee either that right to appeal the conviction entailed a breach of the State's general duty to adopt its domestic body of law to ensure the right to fair trial enshrined by article 8(2)(h) of the Convention.

Based on the foregoing, the Court determined that Argentina violated the right to appeal a judgment enshrined in Article 8(2)(h) of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Mr. Oscar Alberto Mohamed.

Alleged violation of Articles 8(1), 8(2)(c) and 25(1) of the American Convention

The Court did not deem it necessary to issue an additional decision on the alleged violation of the right to defend himself, the right to be heard, the duty to provide grounds and the right to a simple, fast and effective remedy, allegedly derived from the judicial decisions issued by the First Chamber of the National Court of Appeals and the Supreme Court of Justice of the Nation by having dismissed the federal extraordinary appeal and the appeal of complaint against refusal to accept appeal, as it considered that the alleged violations that Mr. Mohamed suffered due to those court decisions fall within the violation of the right to appeal the judgment.

Alleged violation to the right enshrined in Article 8(4) of the American Convention

With regard to the representatives' claims that Argentina has developed a "standard [...] that is more protective of rights than that which would arise from a literal interpretation of the text of Article 8(4) of the Convention," the Court indicated that it was not proven that in Argentina the principle of *ne bis in idem* is legally protected, and it should be guaranteed more broadly than in the terms indicated in the Convention. Therefore, the Court did not analyze that requested by the representatives as to the guideline for the interpretation of Article 29(b) of the Convention.

The Court reiterated that the principle of *ne bis in idem*, enshrined in Article 8(4) of the Convention, is supported by the prohibition of a new trial on the same facts that were the subject of a judgment that has acquired the authority of a final judgment. The Court found that Mr. Mohamed was not subjected to two trials or different proceedings based on the same facts. The conviction of Mr. Mohamed did not take place in a new trial subsequent to a final judgment that had acquired the authority of *res judicata*; rather, it was issued in a stage of the same criminal proceedings. Therefore, the Court concluded that the State did not violate Article 8(4) of the Convention to the detriment of Mr. Oscar Alberto Mohamed.

C. Alleged violation of the principle *nullum crimen nulla poena sine lege praevia*

In the instant case Mr. Mohamed was convicted as perpetrator of the crime of manslaughter legally defined in Article 84 of the Criminal Code in effect at the time of the event (traffic accident). The Commission and the representatives claimed that there was a violation of freedom from *ex post facto* laws because the court established the referred criminal definition with the provisions of Decree No. 692/92 on motor vehicle traffic regulations, which entered into effect after the fact.

The Court noted that in a case of manslaughter in which the criminal definition is open and needs to be completed by the judge when analyzing the legal classification, what matters is that the judgment must identify the corresponding duty of care infringed with the active conduct (recklessness) or omission (negligence) of the accused, and that this must be a decisive factor for the resulting violation of the legally protected right. The Court verified that the grounds of the conviction to identify the "duty of care" required of the accused referred to, on one hand, "[t]he standards of care" applicable to the case as "standards of international practice" and, on the other hand, to "principles" of such practices contained in a traffic regulation (Decree Law No. 692/92) which was not yet in effect at the time of the event.

The Court considered that the issues raised dealt with criminal matters that must be reviewed by the higher court that should hear the appeal against Mr. Mohamed's conviction. Therefore, the Court did not consider relevant to determine whether the considerations regarding the legal basis of the conviction to fulfill the legal definition of manslaughter involve or not an infringement of Article 9 of the Convention.

III. Reparations

The Court established that the judgment itself constitutes *per se* a form of reparation. In addition, it ordered the State to perform the following reparations: (i) adopt the necessary measures to guarantee Mr. Oscar Alberto Mohamed the right to appeal the conviction, in accordance with the parameters set forth in Article 8(2)(h) of the American Convention; (ii) adopt all measures necessary so that the legal effects of the referred conviction, specifically its inclusion in his criminal records, remain in abeyance until a decision on merits is made guaranteeing Mr. Oscar Alberto Mohamed's right to appeal the conviction; (iii) publish, within six months from the date of notification of this Judgment: a) the official summary of the Judgment prepared by the Court, only once, in the official Gazette, b) the official summary of the Judgment prepared by the Court, only once, in a newspaper of wide national circulation, and c) the full text of this Judgment, which shall be available for a period of one year, on an official website; (iv) pay the amounts established in the Judgment for compensation of pecuniary and non-pecuniary damages, and the reimbursement of costs and expenses, as well as to reimburse the Victims' Legal Assistance Fund of the Inter-American Court the amount established in the Judgment.

The full text of the judgment is available at the following link:

http://www.corteidh.or.cr/docs/casos/articulos/seriec_255_esp.pdf

3. **Case of Artavia Murillo et al. (“*In Vitro Fertilization*”) v. Costa Rica. Judgment of November 28, 2012. Articles 1(1), 5(1), 7, 11(2) and 17(2) of the American Convention on Human Rights**

This case concerns the effects of the judgment delivered by the Constitutional Chamber of the Supreme Court of Justice on March 15, 2000, which declared unconstitutional Executive Decree No. 24029-S that regulated the In Vitro Fertilization (IVF) technique in the country. This judgment entailed the prohibition of IVF in Costa Rica and, specifically, it caused some of the victims in the instant case to interrupt the medical treatment that they had begun, while others were forced to go to other countries to be able to have access to IVF.

On November 28, 2012 the Inter-American Court issued the Judgment, in which it rejected the preliminary objections filed by Costa Rica (hereinafter “the State”). In addition, the Court declared Costa Rica to be internationally responsible for the violation of the right to private and family life, as well as the right to personal integrity in relation to personal autonomy, sexual health, the right to enjoy the benefits of scientific and technological progress and the principle of non-discrimination, enshrined in Articles 5(1), 7, 11(2) and 17(2) in relation to Article 1(1) of the American Convention to the detriment of Grettel Artavia Murillo, Miguel Mejías Carballo, Andrea Bianchi Bruna, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchoz Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Víktor Hugo Sanabria León, Karen Espinoza Vindas, Héctor Jiménez Acuña, María del Socorro Calderón P., Joaquinita Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solórzano, Julieta González Ledezma and Oriester Rojas Carranza.

I. Preliminary objections

The State filed three preliminary objections: i) failure to exhaust domestic remedies; ii) time-barred petition filed by Karen Espinoza and Héctor Jiménez, and iii) lack of competence of the Inter-American Court to hear new facts not included in the facts of the application.

After analyzing their admissibility the Court dismissed the three preliminary objections filed by Costa Rica: i) regarding the preliminary objection of failure to exhaust domestic remedies, the Court considered unreasonable to require the victims to continue exhausting domestic remedies if the highest judicial instance on constitutional matters had already ruled on the specific aspects challenged by the alleged victims, and that the function of said remedy in the domestic body of law was not appropriate to protect the legal situation infringed, therefore, it could not be considered a domestic remedy that had to be exhausted; ii) in relation to the exception of the time-barred petition filed by Karen Espinoza and Héctor Jiménez, the Court noted that the instant case required an interpretation of the six-month requirement established in Article 46.1.b, given that a couple may take months or years to decide whether to use a specific technique of assisted reproduction or other alternatives, thus it is not possible to place on the alleged victims the burden to make a decision to file a petition before the Inter-American System within a specific time frame, and iii) lastly, regarding the preliminary objection of lack of competence of the Inter-American Court to hear the supervening facts of the petition, the Court considered that it was not appropriate to rule in a preliminary manner on the factual framework of the case because this analysis corresponds to the merits of the case.

II. Merits

a. Summary of the main facts

Infertility can be defined as the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse. Assisted reproductive techniques or procedures are a group of different medical treatments used to help infertile individuals and couples achieve pregnancy; they include “the manipulation of both ovocytes and spermatozoids, or embryos [...] for the establishment of a pregnancy.” For its part, in vitro fertilization is “a procedure in which a woman’s eggs are removed from her ovaries, and are then fertilized with spermatozoids in a laboratory procedure; once this is completed, the fertilized egg (embryo) is re-implanted in the woman’s uterus.” This technique is used when infertility is caused by the absence or blockage of the woman’s Fallopian tubes; in other words, when an egg cannot pass through the Fallopian tubes to be fertilized and subsequently implanted in the uterus, or in cases of male infertility, and also in cases where the cause of infertility is unknown. The stages followed during IVF are: (i) ovulation induction; (ii) retrieval (aspiration) of eggs from the ovaries; (iii) insemination of eggs with spermatozoids; (iv) monitoring of the embryo fertilization and incubation process, and (v) embryo transfer to the mother’s uterus.

The first birth of a baby resulting from in vitro fertilization occurred in England in 1978. In Latin America, the first baby born through in vitro fertilization and embryo transfer was reported in Argentina in 1984. Since the birth of the first person as a result of Assisted Reproductive Techniques (hereinafter “ART”) was reported, “five million people in the world have been born thanks to the advances in this technology.” Furthermore, “each year, millions of ART procedures are performed. It is estimated that in 2008, 1.6 million treatments resulted in the birth of 400,000 individuals between 2008 and September 2009” globally. In Latin America “it is estimated that 150,000 individuals were born from 1990 to 2010,” according to the Latin American Register of Assisted Reproduction.

In Costa Rica, Executive Decree No. 24029-S of February 3, 1995, issued by the Ministry of Health, authorized the technique of in vitro fertilization for married couples and regulated its practice. Article 1 of the Executive Decree regulated the practice of assisted reproduction techniques between married couples, and established rules for their practice. IVF was practiced in Costa Rica from 1995 to 2000, and during that period 15 Costa Ricans were born.

On April 7, 1995, an action of unconstitutionality was filed against said Executive Decree, using different arguments relating to the violation of the right to life. On March 15, 2000 the Constitutional Chamber of the Supreme Court delivered a judgment, whereby it declared “the admissibility of the action [and] annulled Executive Decree No. 24029-S due to unconstitutionality.” The reasons given by the Constitutional Chamber to support its decision were, first, the “violation of the principle of legal reserve,” given that it concluded that the Executive Decree regulated the “right to life and dignity of the human being,” therefore “[t]he

regulation of these rights by the Executive Branch [was] incompatible with Constitutional law," insofar as "only through a formal law issued by the Legislature, according to the procedure established in the Constitution for the enactment of laws, is it possible to regulate and, if appropriate, restrict fundamental rights and freedoms." Secondly, the Constitutional Chamber determined that the practice of IVF "clearly jeopardizes the life and dignity of the human being," since: (i) "[h]uman beings have the right not to be deprived of their life or to suffer unlawful attacks by the State or by private individuals, but not only this: public authorities and civil society must help them defend themselves from the dangers to their life"; (ii) "once conceived, a person is a person, and we are dealing with a living being, with the right to be protected by the law," and (iii) "since the right [to life] is declared for everyone, with no exception, it must be protected for both the individual who has been born, and also for the unborn child."

Lastly, the Chamber concluded:

The human embryo is a person from the time of conception; hence it cannot be treated as an object for investigation purposes, be submitted to selection processes, kept frozen and, the most essential point for the Chamber, it is not constitutionally legitimate to expose it to a disproportionate risk of death.... The main objection of the Chamber is that the application of the technique entails a high loss of embryos, which cannot be justified by the fact that it is intended to create a human being, providing a child to a couple who would otherwise be unable to have one. The key aspect is that the embryos whose life is first sought and then violated are human beings, and constitutional law does not allow any distinction among them. The argument that in natural circumstances there are embryos that are not implanted, or that even if they are implanted they do not develop until birth, is not admissible either, simply because the application of [IVF] entails a conscious and voluntary manipulation of the female and male reproductive cells in order to produce a new human life, which leads to a situation where it is known in advance that the human life, in a considerable percentage of the cases, has no possibility to continue. As the Chamber has been able to verify, the application of the technique of *in vitro* fertilization and embryo transfer, as it is currently performed, jeopardizes human life. This Court knows that advances in science and biotechnology are so dramatic that the technique could be improved so that the reservations included herein disappear. However, the conditions in which it is currently applied lead to the conclusion that any elimination or destruction of embryos – whether voluntary or derived from the negligence of the person executing the technique or its inaccuracy – violates the right to life, hence the technique is not in keeping with constitutional law and, consequently, the regulation under consideration is unconstitutional as it violates article 21 of the Constitution and Article 4 of the American Convention on Human Rights. Since the technique violates the right to life, it shall be expressly placed on record that its application cannot be authorized even based on a norm with legal status, at least while its scientific development remains at the current state and entails conscious damage to human life. (Underlining not in the original text)

From the evidence on file, Costa Rica is the only State in the world to expressly prohibit IVF.

On the other hand, the Court described the specific situation of the nine couples who are victims in the instant case, in which they evidenced: i) the causes of infertility for each couple; ii) the treatments they sought to combat said condition; iii) the reasons why they sought IVF; iv) cases where IVF treatment was interrupted due to the judgment of the Fourth Chamber, and v) the cases where the couples had to travel abroad to perform the proceeding.

b. Conclusions and determinations of the Court

1. Scope of the rights to personal integrity, personal liberty and private and family life in the instant case

Article 11 of the American Convention requires the state to protect individuals from arbitrary actions by state institutions that affect private and family life. It prohibits any arbitrary or abusive interference with the private life of persons, indicating different spheres of their private life and that of their families. In addition, the Court has broadly interpreted Article 7 of the American Convention when indicating that it includes a concept of liberty in a broad sense as the ability to do and not do all that is lawfully permitted. In other words, every person has the right to organize, in keeping with the law, his or her individual and social life according to his or her own choices and beliefs. Liberty, thus defined, is a basic human right, inherent in the attributes

of the person, that is evident throughout the American Convention. The Court has also underscored the concept of liberty and the possibility of all human beings to self-determination and to choose freely the options and circumstances that give meaning to their life, according to their own choices and beliefs. Private life includes the way in which individual views themselves and how he or she decides to project this view towards others, which is an essential condition for the free development of the personality. Furthermore, the Court has indicated that motherhood is an essential part of the free development of a woman's personality. Based on the foregoing, the Court considers that the decision of whether or not to become a parent is part of the right to private life and includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense.

In addition, the Court indicated that Article 17 of the American Convention recognizes the central role of the family and family life in a person's existence and in society in general. The Court has already indicated that the right to protection of the family entails, among other obligations, facilitating, in the broadest possible terms, the development and fortification of the family unit. On the other hand, the Human Rights Committee has indicated that the possibility of procreating is part of the right to start a family.

The Court also indicated that the right to a private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right. Consequently, the rights to private life and to personal integrity are also directly and immediately related to healthcare. The lack of legal safeguards that take into account reproductive health can result in a serious impairment of the right to reproductive autonomy and freedom. Reproductive rights are based on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.

Finally, the right to a private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right. The right to have access to the highest and most effective scientific progress for the exercise of reproductive autonomy and the possibility to form a family creates the right to access the best health services in reproductive assistance techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, *de iure* or *de facto*, to exercise the reproductive decisions that correspond to each individual.

The Court deemed that the instant case dealt with a particular combination of different aspects of private life related to the right to start a family, the right to physical and mental integrity, and specifically the reproductive rights of persons.

2. Effects of the absolute prohibition of IVF

The Court noted that the Constitutional Chamber considered that if the IVF technique could be applied respecting the concept of absolute protection of the life of the embryo it could be practiced in the country. However, the Court considered that, although the Constitutional Chamber's judgment accepted the practice of IVF in the country under certain conditions, the fact remains that 12 years after the judgment was delivered, this technique had not been practiced in Costa Rica. Consequently, the Court deemed that the "suspended status" established in the judgment has not produced any real practical effects to date. Consequently, without proceeding to define it as an "absolute" or "relative" prohibition, it concluded that the Constitutional Chamber's decision resulted in the undisputed fact that IVF is not practiced in Costa Rican territory and that, therefore, couples wishing to use this technique cannot do so in this country. In addition, since the Constitutional Chamber conditioned the possibility of applying the technique to ensuring that there was no embryonic loss whatsoever, in practice, this entails a prohibition of IVF, because the evidence in the case file indicates that, to date, there is no option for practicing IVF without some possibility of embryonic loss.

Additionally, said judgment generated the interruption of the medical treatment that some of the presumed victims in this case had begun, while others were forced to travel to other countries to

be able to have access to IVF. These facts constitute an interference with the private and family life of the presumed victims, who had to modify or change their possibilities of having access to IVF, which involved a personal decision regarding the methods or practices that they wished to try in order to have biological children. The Court clarified that in this case the interference is not related to the fact that the families could or could not have children, because even if they could have had access to the IVF technique, it is not possible to determine whether that objective could have been achieved; thus, the interference is limited to the possibility of making an autonomous decision on the type of treatments they wished to try to exercise their sexual and reproductive rights.

3. Interpretation of Article 4(1) of the American Convention as relevant to this case

The decision of the Constitutional Chamber held that the American Convention required prohibiting IVF as it was regulated in the Executive Decree; therefore, the Chamber interpreted Article 4(1) of the Convention based on the understanding that the Convention requires the absolute protection of the embryo. However, the Court is the authorized interpreter of the Convention. Therefore, it deemed relevant to analyze whether the interpretation of the Convention by the Constitutional Court was admissible in light of said treaty and taking into account the different sources of pertinent international law.

Specifically, the Court examined the scope of Articles 1(2) and 4(1) of the American Convention with regard to the words "person," "human being," "conception" and "in general." For this purpose it performed an interpretation: (i) in accordance with the ordinary meaning of the terms; (ii) systematic and historic; (iii) evolutive, and (iv) of the object and purpose of the treaty.

3.1. Interpretation in accordance with the ordinary meaning of the terms

In this case the Court observed that the concept of "person" is a legal term that is analyzed in many of the domestic legal systems of the States Parties. However, for the purposes of the interpretation of Article 4(1), the definition of person stems from the mention of such terms made in the treaty with regard to "conception" and to "human being." Therefore, the scope of such terms should be assessed based on scientific literature.

The Court noted that the evidence on file demonstrated how IVF transformed the discussion on how the phenomenon of "conception" was understood. In fact, IVF revealed that time may elapse between the time of the union of the egg and the sperm and implantation. Therefore, the definition of "conception" accepted by the authors of the American Convention has changed.

The Court observes that in the current scientific context there are two different interpretations of the term "conception." One school of thought understands "conception" as the moment of union, or fertilization of the egg by the sperm. Fertilization results in the creation of a new cell: the zygote. Certain scientific evidence considers the zygote as a human organism that contains the necessary instructions for the development of the embryo. Another school of thought understands "conception" as the moment when the fertilized egg is implanted in the uterus. The implantation of the fertilized egg in the mother's uterus allows the new cell, the zygote, to connect with the mother's circulatory system, providing it with access to all the hormones and other necessary elements for the embryo's development.

Regarding the dispute as to when human life begins, the Court considers that this is a question that has been assessed in different ways from a biological, medical, ethical, moral, philosophical and religious perspective, and it concurs with domestic and international courts that there is not one agreed definition on when life begins. Nevertheless, it is clear to the Court that some opinions view a fertilized egg as a complete human life. Some of these opinions may be associated with concepts that confer certain metaphysical attributes on embryos. Such concepts cannot justify preference being given to a certain type of scientific literature when interpreting

the scope of the right to life established in the American Convention, because this would imply imposing specific types of beliefs on others who do not share them.

Notwithstanding the foregoing, the Court considers that it is appropriate to define how to interpret the term “conception” in relation to the American Convention. In this regard, the Court highlighted that the scientific evidence agrees on differentiating between two complementary and essential moments of embryonic development: fertilization and implantation. The Court observes that it is only after completion of the latter that the cycle is concluded and that conception can be understood to have occurred. Taking into account the scientific evidence presented by the parties in this case, the Court found that even though once the egg has been fertilized this gives rise to a different cell with sufficient genetic information for the potential development of a “human being,” the fact is that if this embryo is not implanted in a woman’s body, development of the embryo cannot occur. If an embryo is never implanted in the uterus, it can not develop, because it would not receive the necessary nutrients, nor would it be in a suitable environment for its development.

Thus, the Court considers that the term “conception” cannot be understood as a moment or process exclusive of a woman’s body, given that an embryo has no chance of survival if implantation does not occur. Evidence of this notion stems from the fact that it is only possible to establish whether or not pregnancy has occurred once the fertilized egg has been implanted in the uterus, when the hormone known as “chorionic gonadotropin” is produced, which can only be detected in a woman who has an embryo implanted in her. Prior to this, it is impossible to determine whether the union between the egg and a sperm occurred within the body or whether this union was lost prior to implantation.

Considering the foregoing, the Court understands the word “conception” as the moment when implantation occurs; therefore it considers that before this event Article 4 of the American Convention cannot be applied. In addition, the term “in general” infers exceptions to a rule, but the interpretation in keeping with the ordinary meaning does not allow the scope of those exceptions to be specified.

3.2. Systematic and historical interpretation

The Constitutional Chamber and the State based their arguments on an interpretation of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the 1959 Declaration on the Rights of the Child. Specifically, the State indicated that treaties other than the American Convention require the absolute protection of prenatal life. The Court examined this argument based on a general assessment of the provisions established by the protection systems in relation to the protection of the right to life, namely: (i) the inter-American system; (ii) the universal system; (iii) the European system, and (iv) the African system. In addition, the Court studied the commentary made in preparation of said treaties.

3.2.1. Inter-American Human Rights System

Based on the background information leading up to the American Declaration, the Court considered that the commentaries did not provide a clear answer for the matter under consideration. Regarding the American Convention, the Court observed that during the preparatory work, the terms “person” and “human being” were used without the intention of differentiating the two. Article 1(2) of the Convention specified that the two terms should be understood as synonyms. Therefore, the Court concluded that the commentaries of the Convention indicate that the proposal to eliminate the phrase “and, in general, from the moment of conception,” was rejected, as was the proposal to merely eliminate the words “in general.”

Moreover, the Court indicated that the expression “every person” is used in numerous articles of the American Convention and the American Declaration. When analyzing these articles, it is not feasible to maintain that an embryo is the holder of and exercises the rights established in each of these article. Also, taking into account, as indicated previously, that conception can only take place within a woman’s body, it can be concluded with regard to Article 4(1) of the Convention,

that the direct subject of protection is fundamentally the pregnant woman, because the protection of the unborn child is implemented essentially through the protection of the woman. Consequently, the Court concludes that the historic and systematic interpretation of precedents that exist in the inter-American system confirms that it is not admissible to grant the status of person to the embryo.

3.2.2. Universal Human Rights System

The Court indicated that the expression “human being” used in the Universal Declaration of Human Rights, according to the commentaries, was not intended to include the unborn child. In addition, it explained that the commentaries of Article 6(1) of the ICCPR revealed that the States did not seek to treat the unborn child as a person and grant it the same level of protection as those who are born. Similarly, it indicated that the decisions of the Human Rights Committee allow confirming that an absolute protection of pre-natal life or the life of the embryo cannot be inferred from the ICCPR.

Regarding the Convention on the Elimination of All Forms of Discrimination against Women, the Court indicated that the reports of the Committee on the Elimination of Discrimination against Women (hereinafter “CEDAW”) clarify that the fundamental principles of equality and non-discrimination require that precedence be given to protecting the rights of pregnant women over the interest of protecting the life in formation.

Finally, it indicated that Articles 1 and 6(1) of the Convention on the Rights of the Child do not refer explicitly to protection of the unborn child. The Preamble refers to the need to provide “special safeguards and care [...] before [...] birth.” However, the commentaries show that this phrase was not intended to extend the provisions of the Convention to the unborn child, particularly the right to life.

3.2.3. European Human Rights System

The former European Commission on Human Rights and the European Court of Human Rights (hereinafter “the ECHR”) have ruled that the reach of the protection of prenatal life in the context of cases of abortion and medical treatments related to in vitro fertilization is not absolute. Thus, for example in the 1980 *Case of Paton v. United Kingdom*, the European Commission on Human Rights held that the wording of the ECHR Convention “tends to support the view that [Article 2] does not include the unborn child.” It added that recognizing an absolute right to prenatal life would be “contrary to the object and purpose of the Convention.”

Moreover, in the *Case of Vo. v. France*, the European Court indicated that “it may be regarded as common ground between States that the embryo/fetus belongs to the human race, but [t]he potentiality of that being and its capacity to become a person ... requires protection in the name of human dignity, without making it a “person” with the “right to life.” Regarding cases relating to the practice of IVF, the ECHR ruled in the case *Evans v. United Kingdom* that “embryos created by the petitioner [and partner] do not have the right to life within the meaning of Article 2 of the Convention, thus there has been no violation to said provision.” On the other hand, in the *cases of S.H. v. Austria* and *Costa and Pavan v. Italy*, which related respectively, to the regulation of IVF with respect to egg and sperm donation by third parties, and pre-implantation genetic diagnosis, the ECHR did not refer to an alleged violation of a specific right of the embryos.

3.2.4. African Human Rights System

The Court indicated that the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Protocol of Maputo), does not refer to the beginning of life, and establishes that the States must take all appropriate measures to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.”

3.2.5. Conclusion concerning the systematic interpretation

The Court concluded that the Constitutional Chamber based its decision on Article 4 of the American Convention, Article 3 of the Universal Declaration, Article 6 of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the 1959 Declaration on the Rights of the Child. However, it is not possible to use any of these articles or treaties to substantiate that the embryo can be considered a person in the terms of Article 4 of the Convention. Similarly, it is not possible to reach this conclusion from the commentaries or from the systematic interpretation of the rights recognized in the American Convention or in the American Declaration.

3.3. Evolutive interpretation

In the instant case, the evolutive interpretation is particularly relevant, bearing in mind that IVF is a procedure that did not exist when the authors of the Convention adopted the content of Article 4(1) of the Convention. Therefore, the Court analyzed two issues in the context of the evolutive interpretation: (i) the pertinent developments in international and comparative law concerning the specific legal status of the embryo, and (ii) the regulations and practice of comparative law in relation to IVF.

3.3.1. The legal status of the embryo

The Court referred to the Oviedo Convention, several cases of the European Court of Human Rights and a judgment of the Court of Justice of the European Union to conclude that the regulatory trends in international law do not lead to the conclusion that the embryo should be treated in the same way as a person, or that it has a right to life. Thus, for example, in the case of *Costa and Pavan v. Italy*, the ECHR in its prior considerations on European law relevant to the analysis of the case, emphasized that in “the case of *Roche v. Roche and others* [...] the Supreme Court of Ireland established that the concept of the unborn child is not applicable to embryos obtained within the framework of in vitro fertilization, and the latter do not benefit from the protection provided by article 40.3.3 of the Irish Constitution that recognizes the right to life of the unborn child.”

3.3.2. IVF regulations and practice in comparative law

The Court considered that, even though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. This means that, in the context of the practice of most States Parties to the Convention, it has been interpreted that the Convention allows IVF to be performed. The Court deemed that this practice by the States is related to the way in which they interpret the scope of Article 4 of the Convention, because none of the said States have considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental –rather than absolute– protection of prenatal life and with the conclusion that the embryo cannot be understood as a person.

3.4. The principle of most favorable interpretation, and the object and purpose of the treaty

The precedents examined so far allow the inference that the purpose of Article 4(1) of the Convention is to safeguard the right to life, without this entailing the denial of other rights protected by the Convention. In this sense, the object and purpose of the expression “in general” is to permit, should a conflict between rights arise, the possibility of invoking exceptions to the protection of the right to life from the moment of conception. In other words, the object and purpose of Article 4(1) of the Convention is that the right to life should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights.

Consequently, the argument of the State that its constitutional norms grant a greater protection to the right to life and, therefore, proceed to give this right absolute prevalence is inadmissible.

On the contrary, this approach denies the existence of rights that may be the object of disproportionate restrictions under the defense of the absolute protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty.

Therefore, the Court concluded that the object and purpose of the expression “in general” in Article 4(1) of the Convention is to allow, as appropriate, an adequate balance between competing rights and interests. In the case that the Court is examining, it is sufficient to indicate that the said object and purpose implies that the absolute protection of the embryo cannot be alleged, annulling other rights.

3.5. Conclusion on the interpretation of Article 4(1)

The Court used different methods of interpretation that led to similar results according to which the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention. In addition, after analyzing the available scientific data, the Court has concluded that “conception” in the sense of Article 4(1) occurs at the moment when the embryo becomes implanted in the uterus, which explains why, before this event, Article 4 of the Convention would not be applicable. Moreover, it can be concluded from the words “in general” that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible.

4. Proportionality of the prohibition

The Court has established in its case law that the States may restrict a right, provided that the interference is not abusive or arbitrary. Thus, they must be substantively and formally established by law, pursue a legitimate aim, and comply with the requirements of suitability, necessity and proportionality. In the instant case, the Court highlighted that the “absolute right to life of the embryo” as grounds for the restriction of the rights involved is not supported by the American Convention; thus, it was not necessary to make a detailed analysis of each of these requirements, or to assess the disputes regarding the declaration of unconstitutionality in the formal sense based on the presumed violation of the principle of legal reservation.

Notwithstanding the above, the Court deemed it appropriate to explain how the forfeiting of rights involved in this case was excessive in comparison to the benefits referred to with the protection of the embryo. To this end, the restriction would have to protect prenatal life significantly, without annulling the rights to privacy and to start a family. In order to weigh these factors the Court analyzed: (i) the severity of the interference into the rights to private and family life. In addition, this severity is analyzed based on the disproportionate impact in relation to: (ii) disability, (iii) gender, and (iv) socio-economic situation. Lastly, the Court analyzed (v) the alleged goals achieved in pursuing the purpose of the interference.

4.1. Severity of the limitation of the rights involved in the instant case

The Court considered that one of the direct interferences in private life related to the fact that the Constitutional Chamber’s decision prevented the couples from deciding whether or not they wished to submit to this treatment to have children in Costa Rica. The interference was even more evident considering that IVF, in most cases, is the technique that individuals or couples resort to after having tried other treatments to overcome infertility (for example, Mr. Vega and Mrs. Arroyo underwent 21 artificial inseminations) or, in other circumstances, it is the only option the person has in order to be able to have biological children, as in the case of Mr. Mejías Carballo and Mrs. Calderón Porrás.

The Court established that said interference entailed a severe limitation. Therefore, first, the prohibition of IVF had an impact on the intimacy of the individuals because, in some cases, due to the fact that the procedure was not available in Costa Rica, the procedures undergone in order to obtain medical treatment abroad required revealing aspects that were part of private life.

Secondly, regarding the infringement of personal autonomy and the life project of the couples, the Court observes that IVF is usually used as a last resort to overcome serious reproductive difficulties. Its ban had a greater impact on the life plans of the couples whose only option to procreate was IVF. Thirdly, the psychological integrity of the individual was affected by denying that person the ability to obtain access to a procedure that makes it possible to exercise the desired reproductive freedom. Based on the foregoing, the couples suffered a severe interference in relation to their decision-making concerning the methods or practices they wished to utilize in order to procreate a biological child.

4.2. Severity of the interference as a result of indirect discrimination owing to the disproportionate impact in relation to disability, gender and financial situation

The Court has indicated that the principle of the preemptory right to equal and effective protection of the law and non-discrimination establishes that States must abstain from creating discriminatory laws or those with discriminatory effects on the different groups of the population when exercising their rights. The concept of indirect discrimination means that a law or practice that appears to be neutral has particularly negative repercussions on a person or group with specific characteristics. It is possible that whoever established this law or practice was unaware of the practical consequences and, if so, the intention to discriminate is not essential, and causes a reversal of the burden of proof. The Court considered that the concept of disproportionate impact is related to that of indirect discrimination, therefore it analyzed whether there was a disproportionate impact in relation to disability, gender and financial status.

4.2.1. Indirect discrimination in relation to the condition of disability

The Court took note that the World Health Organization (hereinafter "WHO") has defined infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse." In this regard, the Convention on the Rights of Persons with Disabilities (CRPD) establishes that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." The disability results from the interaction between an individual's functional limitations and the barriers that exist in the environment that prevents the full exercise of his rights and freedoms.

Based on these considerations and taking into account the definition developed by the WHO according to which infertility is a disease of the reproductive system, the Court considers that infertility is a functional limitation recognized as a disease, and that people with infertility in Costa Rica, faced with the barriers created by the Constitutional Chamber's decision, should be considered protected by the rights of persons with disabilities, including the right to access the necessary techniques to resolve reproductive health problems. This condition requires special attention in order to have reproductive autonomy.

4.2.2. Indirect discrimination in relation to gender

The Court considered that the ban on IVF can affect both men and women and may have differentiated disproportionate impacts due to the existence of stereotypes and prejudices in society. In this regard, although infertility can affect men and women, the use of assisted reproduction technologies is especially related to a woman's body. Even though the ban on IVF is not expressly addressed at women, and thus appears neutral, it has a disproportionately negative impact on women.

In this regard, the Court highlighted that the initial IVF procedure (ovulation induction) was interrupted for some of the couples, which had a disproportionate impact on women because the interventions destined to achieve the results associated with IVF were being performed on their bodies. Because in an IVF procedure women receive hormonal stimulation for ovary induction it generated a strong impact in cases where treatment was interrupted due to the prohibition and

in those cases where procedures were performed outside the country, they required additional costs. Moreover, it referred to stereotypes that affected cases of male infertility. The Court highlighted that gender stereotypes are incompatible with international law on human rights and measures must be taken to eradicate them. The Court did not validate said stereotypes and only recognized and defined them to describe the disproportionate impact of the interference generated by the judgment of the Constitutional Chamber.

4.2.3. Indirect discrimination in relation to financial situation

Finally, the Court highlighted that the ban on IVF had a disproportionate impact on the infertile couples that did not have the financial resources to undergo IVF abroad.

4.3. Dispute regarding the alleged embryonic loss

The Court observed that the Decree that was declared unconstitutional by the Chamber included measures of protection for the embryo, because it established the number of eggs that could be fertilized. In addition, it prohibited “discarding or eliminating embryos, or preserving them for transfer in subsequent cycles of the same patient or other patients.” In this regard, these measures were to ensure that a “disproportionate risk” for the life expectation of the embryos was not created. In addition, according to the said decree, the only possibility of loss of viable embryos was if they failed to become implanted in the woman’s uterus once the embryonic transfer had taken place.

The Court deemed it necessary to examine this aspect further based on the evidence provided during the proceedings before the Court in relation to the similarities and differences concerning the loss of embryos in both natural pregnancies and in IVF. For the Court, it was sufficient to verify that the evidence in the case file is consistent in indicating that there is embryonic loss in both a natural pregnancy and in the context of IVF. In addition, both expert witness Zegers-Hochschild and expert witness Caruso indicated that it is difficult to measure embryonic loss in natural pregnancies compared to the measurement of losses in IVF, and this places limitations on the implications aimed towards some of the statistics submitted to the Court.

Bearing in mind that embryonic loss occurs in both natural pregnancies and when IVF is applied, the argument of the existence of conscious and voluntary manipulation of cells in the context of IVF can only be understood in relation to the argument developed by the Constitutional Chamber concerning the absolute protection of the right to life of the embryo, which has been invalidated in preceding sections of this Judgment. The Court found it disproportionate to claim absolute protection of the embryo in relation to a risk that is common and even inherent in processes where the IVF technique has not been used.

The Court reiterated that precisely one of the goals of IVF is to contribute to the creation of life, which is evidenced by thousands of people that were born due to this procedure. In sum, embryonic loss exists in both natural pregnancy and in techniques such as artificial insemination. The Court observed that scientific debate exists about the differences between the type of embryonic losses that occur in these processes and reasons for them. But the analysis above allowed the Court to conclude that, taking into account the embryonic losses that occur in a natural pregnancy and in other reproduction techniques permitted in Costa Rica, the protection of the embryo sought by banning IVF has a very limited and moderate scope.

4.4. Conclusion regarding the assessment of the severity of the interference in relation to the impact on the intended purpose

By weighing of the severity of the limitation of the rights involved in this case and the importance of the protection of the embryo, the Court was able to determine that the effects on the rights to personal integrity, personal liberty, a private life, intimacy, reproductive autonomy, access to reproductive health services and to start a family were severe, and presumed the violation of said rights given that in practice they are annulled for those persons whose only

possible treatment for infertility was IVF. In addition, the interference had a differentiated impact on the victims for their disability status, gender stereotypes, and for some of the victims, their financial situation. In contrast, the impact on the protection of the embryo is very slight, because the risk of embryonic loss is present both in IVF and in natural pregnancy. The Court highlighted that the embryo, prior to implantation, is not covered by the terms of Article 4 of the Convention, and called to mind the principle of the gradual and incremental protection of prenatal life.

Therefore, the Court concluded that the Constitutional Chamber based itself on an absolute protection of the embryo, which, by failing to weigh or consider other competing rights, involved an arbitrary and excessive interference in private and family life that makes this interference disproportionate. Moreover, the interference had discriminatory effects.

III. Reparations

The Court established that its Judgment itself constitutes *per se* a form of reparation. In addition, it ordered the State to: i) adopt, as soon as possible, appropriate measures to annul the prohibition to perform in vitro fertilization, so that those persons who wish to use this assisted reproduction technique can do so without any impediment in this regard; ii) the State must regulate, as soon as possible, the aspects that it considers necessary for the implementation of IVF, and must establish systems of inspection and quality control of the institutions and qualified professionals that perform this type of assisted reproduction technique and iii) the Caja Costarricense de Seguro Social must gradually include the availability of IVF within the infertility treatments and programs offered by its health care services, in keeping with the obligation of guarantee in relation to the principle of non-discrimination.

In addition, as reparation the State must: i) provide the victims with psychological treatment, free of charge, for those who request it; ii) publish the official summary prepared by the Court in the Gazette, a newspaper of wide national circulation and have it available on the website of the judicial Branch; iii) implement permanent education and training programs and courses on human rights, reproductive rights and non-discrimination for judicial officials, and iv) pay compensation to the victims for pecuniary and non-pecuniary damages.

The full text of the Judgment is available at the following link:
http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf

4. Case of García and family v. Guatemala. Judgment of November 29, 2012. Articles 1(1), 3, 4(1), 5(1), 5(2), 7, 8(1), 16(1) and 25(1) of the American Convention on Human Rights and Articles I.a) and I.b) of the Inter-American Convention on Forced Disappearance of Persons

The facts of this case refer to, among other aspects, the forced disappearance of Mr. Edgar Fernando García, as well as the lack of investigation into his disappearance. Mr. García was a student and union leader. His capture, which occurred in 1984, was recorded in a confidential document of the military intelligence of Guatemala known as the "Diario Militar," which was published in 1999, as well as the Historical Archive of the National Police, discovered in 2005.

In this case, the State of Guatemala partially recognized its international responsibility. The Court expressed appreciation for this recognition by the State. In addition, the parties signed an agreement on reparations, which was approved in its entirety by the Court.

Taking into account this partial recognition and in light of the evidence provided, the Inter-American Court declared, among other, the international responsibility of the State for the forced disappearance of Edgar Fernando García.

The Court established that the forced disappearance of Mr. García fell within a systematic State practice that was part of a policy to attack persons identified as "internal enemies" by the national security doctrine, in which forced disappearances were intended to break up social

movements or organizations that the State identified as conducive to “insurgency.” The Court concluded that the forced disappearance of Mr. García was motivated by his participation in union and student associations classified as “opposition and/or insurgent” within the context of the armed conflict in Guatemala.

In the instant case, the information found in the Historical Archive of the National Police allowed the conviction of two perpetrators in 2010, as well as the prosecution of two alleged masterminds and the identification of two other alleged perpetrators, which was positively valued by the Court. Notwithstanding to the foregoing, the Court concluded, among other things, that the State breached its obligation to begin an investigation *ex officio*, within a reasonable term and with due diligence on the facts of the present case, to the extent that, *inter alia*, the investigations did not advance until the accidental discovery of the Historical Archive of the National Police, over twenty-five years after the facts.

In addition, the Court indicated that the next of kin of Mr. García have endured great uncertainty, profound suffering and anguish due to his forced disappearance; therefore, the State violated their personal integrity. Finally, the Court considered that the situation of risk that Nineth Varenca Montenegro and María Emilia García were exposed to, as members and founders of Grupo de Apoyo Mutuo, represented a *de facto* restriction and a violation of their right to freedom of association.

As a consequence of the aforementioned violations, and taking into account the agreement on reparations approved in its entirety by the Court, the following reparation measures were ordered, among others: i) continue performing the investigations and proceedings necessary to establish the truth of the facts, as well as to identify and if applicable punish those responsible for the forced disappearance of Edgar Fernando García; ii) determine the whereabouts of Edgar Fernando García; iii) make the publications indicated in the Judgment; iv) hold a public act of acknowledgment of the international responsibility of the State for the facts of the instant case; v) promote the initiative named “Memorial para la Concordia”; vi) include the name of Edgar Fernando García in the plaque to be placed on the park or plaza to be built in compliance with that ordered in the case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala; vii) promote changing the name of the public school “Julia Ydigoras Fuentes” to “Edgar Fernando García”; viii) provide ten scholarships to sons or grandchildren of forcibly disappeared persons, and the beneficiaries will be designated by the next of kin of Edgar Fernando García; ix) promote the approval of the bill for the creation of the National Commission to Search for Victims of Forced Disappearance, and x) pay the amounts established in the reparations agreement for the concepts of pecuniary and non-pecuniary damages, medical and psychological treatment and reimbursement of costs and expenses.

The full text of the Judgment is available at the following link:
http://www.corteidh.or.cr/docs/casos/articulos/seriec_258_esp.pdf

5. Case of the Santo Domingo Massacre v. Colombia. Judgment of November 30, 2012. Articles 1(1), 4(1), 5(1), 19, 21 and 22 of the American Convention on Human Rights

On November 30, 2012 the Inter-American Court issued a Judgment in which it declared the international responsibility of the Republic of Colombia for the human rights violations committed by the launching of an explosive device by the Colombian Air Force on December 13, 1998 in the village of Santo Domingo, Arauca department, Colombia.

I. Facts

On December 12, 1998, while a fair was being held in the village of Santo Domingo that included several sporting events, the Colombian Armed Forces and the guerrillas had a confrontation after a Cessna aircraft landed on the highway that goes from Santo Domingo village to Panamá de Arauca or Pueblo Nuevo, containing money or guns for drug trafficking activities. Within the framework of these facts, the Armed Forces planned an aerial military operation that lasted

several days, in which the XVIII Brigade of the National Army and the 36th Counter-Guerrilla Battalion also participated. In this context, on December 13, 1998 several aircraft overflew the Santo Domingo area in the morning, and at 10:02 am, the crew of helicopter UH1H 4407 of the Colombian Armed Forces launched a cluster bomb, type AN-M1A2, comprised of six grenades or fragmentation bombs AN-M41A, on the main street of Santo Domingo, causing the death of 17 persons, of which six were children, and wounding 27 persons, including 10 children.

The Court also found that, as a result of the facts, that same day, December 13, 1998, the population of Santo Domingo had to leave their homes and move to Betoyes district in Tame municipality, to the cities of Tame and Saravena, a situation that intensified after 10 am when groups of persons were leaving Santo Domingo. The Court also found that after the launching of the cluster bomb, the Colombian Air Force fired machine guns from the planes toward the people on the highway who were leaving on foot or by car. Several inhabitants returned after January 1999. Three crewmembers of the airplane that launched the explosive device over Santo Domingo village were convicted based on these facts. The Superior Court of Bogotá confirmed this decision in June 2011 with respect to two of the crewmembers. The administrative court also established the responsibility of the State of Colombia for the acts of Santo Domingo.

II. Preliminary objections

During the processing of the case before the Inter-American Court, the State of Colombia filed two preliminary objections: alleged lack of jurisdiction *ratione materiae* and lack of exhaustion of domestic remedies. The Court rejected the first objection as it considered that although the American Convention only provides it with jurisdiction to determine the compatibility of the actions and omissions or laws of the States with the Convention and not with the provisions of other treaties or customary law, when performing said examination it can, as it has done in other cases, interpret the rights contained in the Convention in light of other treaties, specifically International Humanitarian Law. The Court also rejected the second preliminary objection, calling to mind that although administrative proceedings can be relevant in the classification and definition of certain aspects or the scope of the State's responsibility, as well as to satisfy certain claims within the framework of comprehensive reparation in proceedings before the Inter-American System, in cases such as the one at hand it is not a remedy that necessarily has to always be exhausted, therefore it does not limit the Court's jurisdiction from hearing this case.

III. Alleged "acknowledgment" of responsibility by the State

Moreover, in the processing before the Court the State indicated its "acknowledgment" of responsibility for the violation of the victims' right to the truth and "access to the justice system," claiming that there was "great confusion" and contradictory positions regarding the facts as a result of "deceitful evidence in the domestic criminal proceedings." Specifically, the State referred to a judgment of January 2011 in which a guerrilla member was convicted for offense involving, among others, the facts of Santo Domingo, which contradicts other judgments issued domestically. However, it was noted that this process was not included in the factual background of the case before the Court. In addition, the act that the State called "acknowledgment" contradicts what was indicated during the proceedings before the Inter-American Commission on Human Rights. The Court considered that, in the terms expressed by the State itself, the referred act "does not entail recognizing or accepting the facts presented by the Commission and the victims," therefore it would not be considered an acknowledgment of responsibility nor have legal effect.

IV. Merits

Regarding the alleged violation of the right to a fair trial and judicial protection as recognized in Articles 8 and 25 of the Convention, the Court found that it was not demonstrated that the State failed to carry out a serious, diligent and thorough investigation, within a reasonable term. On the contrary, it considered that the other domestic mechanisms and procedures had helped to clarify the truth and to determine the scope of the State's responsibility. Consequently, the Court deemed that the State did not violate Articles 8 and 25 of the American Convention, and

that, pursuant to the principle of complementarity; it was not necessary to rule on the facts that generated the established violations of rights, for which reparation was provided domestically. However, the Court noted that during the proceedings before the Court, the State intended to disregard and even questioned what its judicial and administrative bodies had done to determine the truth of what had occurred, the subsequent responsibilities and to provide reparations to the victims, maintaining the controversy regarding the facts. Consequently, the Court proceeded to analyze the alleged violations of the Convention.

The Court confirmed that, due to the lethal capacity and limited accuracy of the device used, launching it in the urban area of Santo Domingo village or the surrounding area was contrary to the principle of precaution recognized by International Humanitarian Law. This allowed the Court to declare the State's responsibility for the violation of the right to life, to the detriment of the persons killed in Santo Domingo village, as well as the violation of the right to personal integrity of the persons wounded.

Furthermore, the Court confirmed that the firing of machine guns against the civilian population by the members of the Armed Forces entailed non-compliance with the obligation to guarantee the rights to life and to personal integrity, under the terms of the American Convention, to the detriment of the inhabitants of Santo Domingo. The Court also concluded that the State failed to comply with its duty of special protection of the children affected by the events of Santo Domingo, insofar as it did not fulfill its obligation to provide special protection within the framework of a non-international armed conflict, and it considered that the violations of the right to life and to personal integrity previously declared must be understood in relation to the violation of the right to special measures of protection of the children who died and those who were wounded. In addition, the Court considered that the State was responsible for the violation of the right to personal integrity to the detriment of the next of kin of the victims of the facts.

Consequently, the Court declared the State to be responsible for the violation of the right to life enshrined in Article 4(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of those killed in the facts of December 13, 1998 in Santo Domingo, and in relation to Article 19 to the detriment of the children killed. In addition, the Court declared that the State violated the right to personal integrity recognized by Article 5(1) of the American Convention to the detriment of the persons who were injured during the events of December 13, 1998 in Santo Domingo, and in relation to Article 19 thereof in relation to the children who were victims. The Court also determined that Colombia is responsible for the violation of the right to personal integrity recognized in Article 5(1) of the American Convention, in relation to Article 1(1) thereof, to the prejudice of the next of kin of the victims of the facts occurred in Santo Domingo on December 13, 1998.

The Court also concluded that the situation of forced internal displacement endured by the wounded victims and their next of kin due to the explosion of the cluster bomb in Santo Domingo, coupled with the fear and psychological effects caused by the fighting nearby and the aforementioned firing of machine guns, and therefore the State was responsible for the violation of the right to freedom of movement and residence, in relation to the right to personal integrity, regarding the people injured in Santo Domingo. The facts of the instant case also allowed the Court to conclude that the damage caused by the launching of a cluster bomb on Santo Domingo are attributable to the Colombian Armed Forces; therefore, the State is responsible for the violation of the right to property, to the detriment of the owners of stores and homes affected. Thus, the Court declared the State responsible for the violation of the right to property enshrined in Article 21 of the American Convention, in relation to Article 1(1) thereof, to the detriment of four of the victims. Similarly, the Court found the State responsible for the violation of the right to freedom of movement and residence recognized in Article 22 of the American Convention, in relation to Articles 1(1) and 5(1) thereof, to the detriment of those displaced by the facts of the case.

Finally, the Court concluded that in the instant case the alleged violation of the right enshrined in Article 11 of the American Convention was not demonstrated, nor the alleged violation of the rights contained in Articles 8 and 25 of said treaty. Notwithstanding the foregoing, the Court declared that in light of the general obligation contained in Article 1(1) of the Convention, the

State must continue the investigations and administrative and judicial proceedings currently underway, as well as those necessary to fully determine the facts of the instant case and the corresponding responsibilities. Therefore, the Court deemed that it is inadmissible to analyze the facts of the case in light of Article 2 of the Convention.

V. Reparations

Regarding reparations, the Court indicated that in conformity with the compensations set forth by the administrative courts in favor of the majority of the victims of this case, based on what they requested and even agreed on, and pursuant to the principle of complementarity, it was not appropriate to order additional pecuniary or non-pecuniary reparations in favor of the next of kin of the deceased or wounded victims of the facts, as they have received reparations domestically, but without prejudice to the reparations corresponding to other victims who did not resort to those means, as indicated in the Judgment.

Lastly, the Inter-American Court of Human Rights expressed that the Judgment itself constitutes *per se* a form of reparation and, in addition, it ordered the State to: i) perform a public act of acknowledgment of international responsibility for the facts of the instant case; ii) publish and disseminate the Judgment of the Inter-American Court; iii) provide comprehensive health treatment to the victims, and iv) grant and execute, within one year and through an expeditious internal mechanism, if applicable, the corresponding compensations for pecuniary and non-pecuniary damages in favor of the wounded victims and next of kin of the victims who did not resort to the administrative jurisdiction domestically.

The full text of the Judgment is available at the following link:
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