The Inter-American Court on Human Rights’ Judgment in Artavia Murillo v. Costa Rica and Its Implications for the Creation of Abortion Rights in the Inter-American System of Human Rights

INTRODUCTION

The American Convention on Human Rights has consistently been identified by state parties, nonparties, commissioners, former judges, commission members, former judges, and amici curiae.

* The author intervened in Artavia Murillo v. Costa Rica as amicus curiae along with former Inter-American Court Judge Rafael Nieto Navia, and law professors Jane Adolphe and Richard Stith. The author wishes to thank Richard Stith for his wise suggestions on earlier drafts of this Article.

foreign courts, and observers of the Inter-American system on human rights, among others, as a pro-life treaty granting comprehensive protection to the unborn’s right to life. Previous Inter-American Court judges and commissioners have confirmed this understanding. The Convention’s Article 4(1) reads as follows: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

Nevertheless, in Artavia Murillo et al. v. Costa Rica, the Inter-American Court interpreted the right to life from conception in the most restrictive possible manner, holding that, before implantation, the human embryo is not a person entitled to human rights protection under the American Convention, while redefining the term “conception” as implantation, not fertilization. The court also defined Article 4(1)’s terms “in general, from the moment of conception” to mean that only gradual or incremental protection should be given to prenatal life, depending on the unborn child’s physical stage of development. In addition, it held that “personal decisions” to produce

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2 See, e.g., Julio Barberis, El derecho a la vida en el pacto de San Jose de Costa Rica (The right to life in the San Jose, Costa Rica Pact), in OS RUMOS DO DIREITO INTERNACIONAL DOS DIREITOS HUMANOS; ENSAIOS EM HOMENAGEM AO PROFESSOR ANTÔNIO AUGUSTO CANÇADO TRINDADE: LIBER AMICORUM CANÇADO TRINDADE 20 (Renato Zerbini Ribeiro Leão et al. eds., 2005).
5 Id. at ¶ 223.
6 Id. at ¶ 189.
biological children by in vitro fertilization (IVF) were protected under the American Convention on Human Rights, thus opening the way to a future proclamation of a broad right to personal decisions to choose state-funded abortion.

This paper explores the decision’s potential impact in the creation of abortion rights in Costa Rica and other states parties to the American Convention, and its effects on a wider weakening of the right to life in the Inter-American system of human rights.

I THE UNBORN CHILD’S RIGHT TO LIFE IN ARTICLE 4(1) OF THE AMERICAN CONVENTION ACCORDING TO ARTAVIA V. COSTA RICA

A. Abortion in Artavia

Although the Artavia complaint dealt exclusively with the issue of in vitro fertilization, the judgment also dealt with legalization of abortion, an issue that was immaterial to the complaint. The court inappropriately read Article 4(1)’s terms “in general, from the moment of conception” to mean that “gradual” or “incremental” protection should be given to prenatal life, depending on the unborn child’s physical stage of development, thus allowing abortion under at least some circumstances. Judge Vio Grossi suggested that the rationale used by the majority was obviously intended to legitimize elective abortion.

Although the court failed to create a right to abortion under the Convention, or to enunciate any state duties to create exceptions to abortion bans, its interpretation of Article 4(1) is erroneous for several

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7 Id. at ¶ 136–162.
8 States parties to the American Convention on Human Rights (a total of twenty-three nations as of December 2013) are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Nonparties include: Antigua and Barbuda, Bahamas, Belize, Cuba, Venezuela, Guyana, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. Canada and the United States, although members of the Organization of American States (O.A.S.), have not ratified the American Convention either. Inter-American Commission on Human Rights, B-32: American Convention on Human Rights, CIDH.OAS.ORG, http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm (last visited Oct. 25, 2013).
9 Artavia, supra note 4, at ¶ 256.
10 Id. at ¶ 257–264.
11 Id. at 19 (Vio Grossi, J., dissenting).
reasons. First, the text of Article 4(1) recognizes a right to life “from the moment of conception” (emphasis added), clearly indicating that the states intended to grant full protection to the unborn child from a distinctive moment onwards, not gradually or incrementally, as the court alleged. The judge’s personal opinion may be that the human embryo is an individual under construction that only becomes a person in stages. The Convention, however, grants full human rights protection to the human embryo from the moment of conception, recognizing its continual existence regardless of its stage of human development.

While the court rejected the personhood of the human embryo before implantation in the womb, it does implicitly grant that, after implantation, the embryo may be entitled to such recognition in a “gradual and incremental” manner. The Court seems to espouse the premise that the same embryo somehow gets transformed from non-person to person at implantation in the maternal womb or gradually thereafter, even though, from a scientific perspective, the human embryo continues to be the same embryo at implantation and does not undergo any substantial changes upon it. In regard to this outdated perception of embryonic life, Professor Robert P. George has written that implantation does not act on the embryo “in such a way as to produce a new character or new direction of growth,” implantation does not transform the developing organism from one kind of entity into another. The same organism or distinct biological unit does not essentially change or morph into a different entity, i.e., a person, upon implantation for the purposes of the Convention. Similarly, no maternal action changes the human embryo from a non-person into a

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12 Artavia, supra note 4, at ¶ 163, 183. See also Richard Stith, Construction vs. Development: A Source of Deep Misunderstanding Concerning the Beginning of Life, KENNEDY INST. ETHICS J. (forthcoming) (on “construction” versus “development” models of perceiving the human embryo’s status).

13 San José Articles, Article 2 (last visited Jan. 10, 2014), http://www.sanjosearticles.com/?page_id=2#shash.4ytN3Zh.dpuf.

14 Id. See also Artavia, supra note 4, at ¶ 256.


16 Id.

17 Guanajuato Declaration About ‘In Vitro’ Fertilization, ¶ II (Apr. 20, 2013), [hereinafter Guanajuato Declaration] (The Guanajuato Declaration reacts to the A Court holding in Artavia by pointing out that the human embryo’s life is, from its inception, human, its nature is not modified or perfected by reason of its development.), available at http://declaraciondeguanajuato.org/english.php.
person. That is because it was always a person, from the moment of fertilization.\textsuperscript{18}

Second, the court’s restrictive and creative interpretation of “in general” in the context of IVF is significantly inconsistent with its own jurisprudence on the right to life and the non-restrictive interpretation thereof, as indicated by Judge Vio Grossi.\textsuperscript{19} Before \textit{Artavia}, the Inter-American Court had noted that the right to life has been narrowly interpreted too often.\textsuperscript{20} In both \textit{Villagráin Morales and Others v. Guatemala} and \textit{Gomez Paquiyauri}, the court held that the right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible.\textsuperscript{21}

Costa Rica pointed out that a minimally restrictive interpretation of the term “in general,” regarding the unborn, could excuse or permit abortion where a mother’s right to life is at stake, or when the death of the unborn is unintended, but arguing that protection “in general” is compatible with elective and intentional abortions would stretch interpretation much too far.\textsuperscript{22} Judge Vio Grossi, in his dissenting opinion, lamented that, through such an interpretation, the court would deprive the American Convention’s express provision protecting the unborn of its \textit{effet utile}, which was to give ample protection to the unborn child, not “exceptional” as stated in \textit{Artavia}.\textsuperscript{23} Scholars have agreed that \textit{Artavia} trivialized the human embryo’s life and subordinated it to other interests (parental wishes,
privacy), potentially justifying, in theory, abortion or other embryo destructive acts.\textsuperscript{24}

Judge Vio Grossi did not even believe that the term “in general” was meant to create exceptions to the unborn’s right to life. He understood the term as a synonym of “common,” and stated that it was simply meant to extend right to life protection to the unborn, perhaps in a different manner than that given after birth, but to include rather than to exclude the unborn in any case.\textsuperscript{25} Former Judge Julio Barberis also suggested the term “in general” could be read this way. He said Mexico’s reservation to the treaty, which states that the term “in general” would not entail the obligation to legislate in favor of the right to life from conception at the federal level, is evidence that the majority of states parties read the terms to contain an obligation or permission to protect the unborn, rather than an obligation to allow their destruction.\textsuperscript{26} Judge Augusto Cançado Trindade also understood the expression in a minimally restrictive way. He suggested that domestic laws allowing abortion and defining conception as the beginning of life may be one of the reasons why some states, like the United States or Canada, have not ratified the Convention.\textsuperscript{27} Other commentators have pointed out that states parties to the American Convention did not or do not understand “in general” as permitting abortion. Author Ricardo Bach de Cazal has indicated that the acceptance of the terms “and, in general, from the moment of conception” by states parties was simply meant to emphasize that the right to life extended to the unborn, from conception, in equality of conditions, in every instance.\textsuperscript{28}


\textsuperscript{25} Artavia, \textit{supra} note 4, at 7-8 (Vio Grossi, J., dissenting).


\textsuperscript{28} Ricardo Bach de Chazal, \textit{El aborto en el derecho positivo argentino} [Abortion in positive Argentinian Law], EL DERECHO, 199 (2009) (Arg.).
In any case, even if states were allowed to create narrow exceptions to the unborn’s “general” right to life from conception, there is certainly no state duty to create them. The words in general are preceded by the terms “protected by law,” which indicates that exceptions to the enforcement of the right to life from conception would be permissible, not to the legal recognition of the right to life itself. Even where exceptions to the enforcement or legal protection of the right to life of unborn children may be permissible, they are never required under the Convention. Such a reading would be incompatible with the object and purpose of the Convention, which is to protect the right to life, not mandate violations thereof. The court has held that “the fundamental criterion which creates the very nature of human rights requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted.” The Commission has also stated that, in order to prevent human rights restrictions from becoming the rule rather than the exception, the broadest rule and the most extensive interpretations have to be applied when recognizing human rights. However, the majority opinion’s claim in Artavia, that the object and purpose of the treaty was to permit exceptions to the right to life from conception, rather than protect it, illustrates the very effect described by the Commission.

If acquiesced in by future domestic and international courts, the court’s restrictive interpretation of the right to life in Artavia may contribute to the erosion of the fundamental character of the right to life “as the supreme right of the human being, and the conditio sine qua non to the enjoyment of all other rights.” Scholars have pointed out that the Inter-American Court’s limitations on the right to life as imposed in Artavia are unprecedented: for the first time, the court declared the right to life to apply to some human beings, and not...
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others, as requested by the petitioners. The Manifiesto de San José characterized the judgment as a “dangerous precedent” for that reason. The “relativization” of right to life versus the absolute character given to autonomy may eventually undermine the court’s understanding of the right to life in general.

B. One-Sided, Evolving Interpretation of Article 4(1)

Rather than focusing on Latin American state practice on abortion, as Article 31 of the Vienna Convention requires, the court relied again on judicial decisions favoring abortion in non-parties to the American Convention, including the United States and European states like Germany and Spain. The court also relied on the European court on Human Rights and the Council of Europe to conclude that the American Convention could not have granted an unqualified right to life to the human embryo. The reliance on these judgments was strongly criticized by Judge Vio Grossi.

Putting aside the issue of whether United States domestic courts or European courts have any authority as sources of interpretation of the American Convention, the court cited only those decisions that


36 Jorge Nicolás Lafferriere, Invisibilizar al embrón ante los intereses biotecnológicos [Invisibilizing the embryo before biotechnological interests], 245 REVISTA JURIDICA LA LEY [L.L.] 1, 3 (2012).

37 Artavia, supra note 4, at ¶ 258–259, 262. For more comment on this aspect, see Luis Alejandro Silva Irazávala, La protección de la vida humana entre paréntesis. Comentario crítico a la sentencia Artavia Murillo y otros (“fecundación in vitro”) vs. Costa Rica, de la Corte Interamericana de Derechos Humanos [The parenthetical protection of human life. Critical commentary to the Inter-American Court on Human Rights’ judgment in Artavia Murillo and others v. Costa Rica], ANUARIO DE DERECHO PÚBLICO, UNIVERSIDAD DIEGO PORTALES 383, 387 (2013) (Chile).

38 Artavia, supra note 4, at ¶ 245–253.

39 Id. at 17–18 (Vio Grossi, J., dissenting).
favored abortion rights in those jurisdictions, while ignoring the jurisdictions that were not in favor. The German Constitutional Court, for instance, repeatedly affirmed the constitutional right to life of the unborn, even in the embryonic stage. This Court interpreted the term “everyone” in its Constitution (Article 2(2) of the Grundgesetz: “everyone possesses the right to life”) to include the unborn human being. A 1975 decision spoke of the legal irrelevance of distinctions among the various stages of “self-developing life” (sich entwickelnden Lebens). In 1993, the court reaffirmed most of that earlier judgment, holding that discussion of the unborn concerns “an individual life, one that in the process of growing and unfolding itself does not develop into a human being but rather develops as a human being,” with its “own” (“eigenen”) constitutional right to life. The Inter-American Court also ignored that German law protects non-implanted embryos against lethal experimentation.

Similarly, the judgment imitated the United States Supreme Court’s reasoning in Roe v. Wade, by declaring that the Convention required a balancing test between the rights and interests at stake thereby reducing the human embryo’s life to a mere “interest” in this
case, rather than a right. But it left out Roe’s admission that, were the unborn found to be persons, they would have been entitled to human rights protection: “If this suggestion [that a fetus is a “person”] is established, [Roe]’s case, of course collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.” Roe’s creation of abortion rights within a right to privacy may have inspired the Artavia court, but the U.S. Supreme Court has stopped using the “privacy” rationale after Planned Parenthood of Southeastern Pa. v. Casey.

Furthermore, the judgment failed to mention subsequent U.S. Supreme Court case law, like Gonzales v. Carhart, upholding a federal ban on partial-birth abortion, where the court referred to the unborn as an “unborn child” and a “baby,” and to “the State’s interest in promoting respect for human life at all stages in the pregnancy.” The judgment ignored post-Roe U.S. federal statutes, such as the Unborn Victims of Violence Act, that has continued to protect the unborn from the moment of conception, understood as fertilization, in contexts where Roe did not apply.

The evolving interpretation analysis also mentioned three Latin American high court decisions that legalized abortion under limited circumstances but left out three Mexican Supreme Court decisions upholding state amendments protecting the right to life from conception and five high court decisions banning emergency abortion.

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47 Id. at ¶ 260.
49 Id.
52 Id. at 124, 163.
53 Unborn Victims Of Violence Act, 18 U.S.C.A § 1841(d) (2004) (defining “an unborn child” as “a member of the species homo sapiens, at any stage of development, who is carried in the womb”) (emphasis added).
54 Artavia, supra note 4, at ¶ 172–262.
contraception. Evidently, the mere existence of judicial decisions favoring abortion in states parties does not create abortion rights under the American Convention. In Advisory Opinion OC-14/94, the Inter-American Court on Human Rights held that the existence of domestic laws validating violations of human rights do not justify a breach of the American Convention; therefore, three decisions on abortion cannot justify its validation under the American Convention. Furthermore, the three decisions it enumerated do not represent a regional consensus on the issue, an essential element of an evolving interpretation.

Judge Pérez Pérez once complained that the Inter-American Court had dismissed the need of reaching a consensus...
among the States Party to the ACHR before considering that the
treaty has evolved, as it seems to be the case in Artavia.

II

POTENTIAL EFFECTS OF THE ARTAVIA JUDGMENT IN THE
CREATION OF ABORTION RIGHTS IN THE INTER-AMERICAN
SYSTEM

The Artavia holding is both broad and narrow, and its effects in
depriving the unborn of human rights protection in the Inter-
American system may be manifested accordingly. It is broad in the
sense that, even though it is not directly applicable to abortion laws or
laws on abortifacients, some of the very broad language on abortion
might, and probably will, be used by abortion rights advocates to
support claims for legalization of emergency contraception. It may
also be used to promote access to reproductive technologies as a
human right, favoring the commercial interests of the biotechnology
industry. The decision has already prompted such lawsuits in at least
one Latin American domestic jurisdiction. But the judgment’s
effects on the creation of abortion rights in the Inter-American system
of human rights remain unclear.

It can be expected that some of Judge García-Sayán’s broad
rhetoric on privacy as a supreme right that prevails over all others and
his reiterated claim that the right to life can be subject to multiple
limitations can and will be used to politically pressure states to
recognize abortion rights, particularly those that have comprehensive
bans on abortion. The decision’s redefinition of conception as
implantation would leave room for protection of the human embryo
after implantation, e.g., even in selective abortions following IVF, but

60 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-
61 See Lafferriere, Jorge Nicolas, La Corte Interamericana de Derechos Humanos y un
Injusto Fallo Sobre el embrión humano ante las Biotecnologías [The Inter-American
Court on Human Rights and an unjust ruling on the human embryo confronting
biotechnology], Revista de Derecho de Familia y las Personas, ¶ 9, La Ley [L.L.] (2013)
(Arg.) (pointing out that the judgment may indirectly benefit the embryo market
biotechnology industry). See also Guanajuato Declaration, C-FAM.ORG (Aug. 27, 2010),
62 See Juzgado Federal de Salta No. 1 [Federal court of Salta N. 1], 8/7/2013, “Lodi
Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ Amparo,” Expte. No.
61000007/13, La Ley [L.L.] (Arg.).
63 Artavia, supra note 4, at ¶ 278–279, 326.
64 Id. at ¶ 258–259, 261–262.
the statements on a gradual, incremental approach, suggest that the younger the embryo or fetus in question, the more likely the court would be to validate his destruction.

It appears that most members of the Commission and the Inter-American Court are currently unwilling to give the unborn’s right to life any meaningful protection under the Convention, but the outcome of future litigation may not be as predictable as one may think. For instance, in May 2013, a request for abortion as a provisional measure was filed before the Inter-American Court six months after Artavia on behalf of Beatriz, a lupus patient who allegedly wanted to have a late-term abortion in El Salvador, a state that bans abortion under all circumstances.65 Interestingly enough, when ordering provisional measures, the court asked that El Salvador ensure she be given necessary medical treatment, not an abortion.66 This result was probably not based on a change of mind on the part of the court, but on the specific facts of the case and the impeccable logic of the national Supreme Court decision.

A. Artavia’s Applicability in Costa Rica

The Artavia’s holding itself is narrow in the sense that it does not apply anywhere outside of Costa Rica. Furthermore, the holding is unlikely to be directly on point in any other state party to the American Convention, given that no other country has an explicit ban on IVF and such a situation is now unlikely to repeat itself. Even if other court decisions mandating emergency contraception or abortion under some circumstances follow, other states parties may not be as willing as Costa Rica to comply with such a decision.

In fact, under Article 29 of the American Convention, states that include the human embryo in the category of persons or give the human embryo greater protections than those stated in Artavia would certainly have no obligation to permit embryo-destructive technologies or abortion. Article 29 of the American Convention preempts the Court from “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party” and restricting “other rights or guarantees that are inherent in the

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66 Id. at ¶ 9.
human personality.” Article 29 also codifies the pro homine principle: “No provision of this Convention shall be interpreted as . . . precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”67 This rule has been repeatedly applied by the Inter-American Court to children and illegal immigrants,68 and may be used in favor of the human embryo, as pointed out by an Argentinian federal court.69

The state has so far complied with many of the court’s recommendations: the Executive has produced a bill allowing and regulating in vitro fertilization and submitted it for congressional consideration, and the government has publicized the Inter-American Court decision, carried out trainings on sexual and reproductive rights for employees of the judiciary, and has ordered that reparations be paid to the petitionaries.70 As of February 2014, the actual regulation of the practice by Congress and the implementation of subsidized IVF services, however, remain uncompleted,71 perhaps due to the economic challenges that state-funded IVF would pose.

Existing claims that all of the Artavia decision would be self-executing in Costa Rican courts72 would directly contradict Article


71 See Hubert May, El Estado incumple la sentencia FIV [the state failed to comply with IVF ruling], LA NACION, http://www.nacion.com/opinion/foros/incumple-sentencia-FIV_0_1360263964.html.

72 See Jorge Oviedo, Costa Rica después de la sentencia de la CIDH en Artavia Murillo [Costa Rica after the ruling of the IACHR in Artavia Murillo], OBSERVATORIO INTERNACIONAL DE POLÍTICAS PÚBLICAS Y FAMILIA (Feb. 14, 2014) (Arg.),
68(2) of the American Convention which limits a judgment’s direct effect to provisions on reparations. The specific reference to a particular section of the judgment in that Article clearly indicates that states did not intend for all of the judgment to be self-executing in domestic courts; therefore it is highly doubtful that the court’s statements on abortion, for instance, would be binding on Costa Rica. Only domestic law could provide for automatic, comprehensive compliance with Inter-American Court decisions, as illustrated by the former Executive Secretary of the IACHK, Santiago Cantón, who suggested that “states should pass internal legislation to ensure compliance with the decisions of the Commission and court.” In the region, only Peru, Costa Rica, and Colombia have such legislation, though none of these States provide an ideal model to follow. In Costa Rica’s case, Supreme Court precedent has established that only Congress, and not domestic courts, may order compliance with Inter-American Court decisions.

It should be noted that the decision, like most Latin American judgments, does not make clear distinctions between the *ratio decidendi* and *dicta* in terms of their legal weight, perhaps because this distinction is not as important where a jurisprudence is not bound by the doctrine of *stare decisis*, traditionally the case for civil law
nations. The distinction is, however, particularly important for common law states parties to the Convention, and should be taken into account when evaluating the weight of certain statements in international court decisions. Alvaro Paul notes “[t]his distinction is fundamental for a court aspiring to have its precedents applied by domestic State bodies, as the Inter-American Court claims.”

A starting point for the distinction between ratio and dicta could be Article 68 of the Convention, which provides that only “[t]hat part of a judgment that stipulates compensatory damages,” that is, the dispositive section, may be directly executed by domestic courts. The fact that the judgment’s operative section made no mention whatsoever of Article 4(1), as pointed out by Judge Vio Grossi, could mean that the Court’s interpretation of the right to life from conception would not have the same level of authority as the dispositive paragraphs. This would make the Artavia holding relatively narrow. In any case, in the absence of stare decisis, it seems unlikely that judges would be bound by the Court’s interpretation of the right to life from conception in Artavia.

B. Artavia’s Applicability in Latin American Jurisdictions

Any claims that the Artavia decision would have a direct effect on other states parties to the Convention that were not parties to the dispute would be in direct contradiction with the treaty text itself. The treaty, like other Romano-Germanic treaties, provides that states are bound only by decisions in cases to which they are parties. Article 68(1) of the Convention leaves little room for doubt in that regard: “The states parties to the Convention undertake to comply with the judgment of the court in any case to which they are parties (emphasis

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78 American Convention, supra note 1.

79 Artavia, supra note 4, at 23 (Vio Grossi, J., dissenting).


81 See Comejo, supra note 74.
added).” Thus, nonparties to a case are not automatically bound by Inter-American Court judgments.

Some members of the Inter-American Court and Inter-American Commission have promoted the idea that their interpretations of the American Convention must prevail over domestic courts, but it is unlikely that Artavia will consolidate that kind of authority. Known as control de convencionalidad, or as translated decisions call it, “control of conformity” or “control of compliance,” this doctrine was created in 2006 by Judge Diego García Sayán in Almonacid Arellano v. Chile and reiterated in subsequent court decisions and Commission communications.

The theory appears to have been copied from the European Court of Justice (ECJ), which has long insisted that its interpretations of European law are superior to national laws (including national constitutions) as well as directly effective in conferring individual rights and duties. Acceptance of the ECJ’s demands for unlimited supremacy of its treaty interpretations over the courts and nations of Europe has been neither complete nor unanimous, however. Early European treaties constituted a kind of economic and political union in which certain national powers had been surrendered by the signatory states, and the ECJ had been explicitly given the authority to interpret those delegated powers when called upon by a court to do

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86 See also IACHR, Questionnaire to Consult the States and Civil Society for Drawing up the Annual Overview of the Human Rights Situation in the Hemisphere, http://www.oas.org/en/iachr/consultation/docs/cap4A-en.pdf (where IACHR requests official information on domestic laws, resolutions and judicial decisions incorporating this doctrine).
so. Despite this, the German Constitutional court determined, in the decision known as Solange I, that the fundamental individual rights found in the German constitution take precedence over any conflicting doctrines developed by the ECJ. A basic reason given by the German court was that the government of the federal Republic never had a power to override inalienable constitutional rights to begin with, so it could not have delegated (alienated) such a power to any European institution through a treaty. In the subsequent Maastricht case, the German high court further held that an implausible ECJ interpretation of a treaty (i.e., one that went significantly beyond any reasonable interpretation of the treaty’s language), was ultra vires and thus amounted to a disguised attempt at a treaty amendment. Such a solely court-generated amendment, however, is impermissible, for it lacks the democratic legitimacy that would support a treaty amendment approved by European Union member states. A wholly implausible interpretation by the ECJ cannot, therefore, have domestic effects within Germany, according to Maastricht.

Judge García Sayán has stated that the application of this doctrine would enable the court’s jurisprudence to be “multiplied in hundreds or perhaps thousands of domestic courts in cases that it would never have been able to hear directly” and to become a source of

88 Entscheidungen des Bundesverfassungsgerichts [BVERFG] [Federal Constitutional Court] May 29, 1974, 37, 271 (Ger).
89 Id. A subsequent decision known as Solange II drastically raised the burden of proof on opponents of the ECJ but nevertheless reaffirmed that treaty interpretations in conflict with fundamental German constitutional rights do not in principle have domestic validity; see BVERFG 73, 339 2 BvR 197/83.
doctrinal and jurisprudential inspiration for national courts. But the Inter-American Convention on Human Rights was never intended to produce the quasi-constitutional unity of the European Union treaties (nor that of the Latin American and Caribbean economic union treaties). So, a fortiori, the Inter-American Court has no power to make its treaty interpretations override inalienable and thus undelegable national constitutional rights. These rights include the fundamental right to life or the right to be considered a juridical person. Nor does the Court have the power to freely amend the Convention by means of an unbounded control de convencionalidad extending beyond the parties in a case to encompass every signatory nation and every individual therein without regard to the limits of democratic legitimacy. Indeed, in his dissenting opinion in Artavia, Judge Vio Grossi points out precisely that the Inter-American Court of Human Rights has no power to amend the treaty: “[T]he Court must interpret and apply the Convention, instead of assuming ... the lawmaking function. The latter belongs to the States, which have the exclusive power to modify the Convention.”

At least one domestic court has already rejected application of the Artavia decision on this basis. The Federal Court of Salta, an Argentinian province, partially rejected a couple’s request based on Artavia for full insurance coverage of artificial reproductive technologies, holding that the decision was not binding on the state of Argentina, because it was not a party to the dispute. The court held Artavia’s rejection of the embryo’s personhood conflicted with Argentinian jurisprudence. The court observed that the control of compliance doctrine could only be found among the court’s own jurisprudence, and not in any independent source, thus providing no

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92 See Diego García Sayán, Exámenes del horizonte [Assessments from the horizon], in La reforma de la Comisión Interamericana de Derechos Humanos [Inter-American Commission on Human Rights Reform], 19 APORTES DPLF, REVISTA DE LA FUNDACIÓN PARA EL DEBIDO PROCESO 54 (2014), available at http://perso.unifr.ch/derechopenal/assets/files/obrasportales/op_20140508_03.pdf.

93 Artavia, supra note 4, at 7–8 (Vio Grossi, J., dissenting).


evidence of a duty to follow the said doctrine.\footnote{Juzgado Federal de Salta No. 1 [Federal court of Salta N. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).} The court also reiterated the national Supreme Court’s authority over constitutional interpretation, including international treaties that became a part of domestic constitutional law and rejected the premise that the Inter-American Court could legitimately interpret Argentinian constitutional law, which protects the unborn child.\footnote{Juzgado Federal de Salta No. 1 [Juzg. Fed.] [Federal Court of Salta No. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).} Likewise, a group of Argentinian academics adopted a statement indicating that the \emph{Artavia} decision was not binding on Argentinian law.\footnote{Conclusiones, Comisión de Parte General: “Persona Humana: comienzo de la existencia. Estatuto,” XXIV JORNADAS NACIONALES DE DERECHO CIVIL, UNIVERSIDAD DE BUENOS AIRES 26–28 (Sept. 2013), www.cfra.org.ar/agenda-y-jornadas/jornadas-2013/xxiv-jornadas-nacionales-de-derecho-civil/ (“La doctrina del fallo ‘Artavia Murillo’ dictado por la Corte Interamericana de Derechos Humanos no es vinculante para nuestro derecho.”) [“The doctrine in Artavia Murillo decided by the Inter-American Court of Human Rights is not binding in our legal system.”].}

Although judge García Sayán argues that states parties have accepted his control of conformity doctrine,\footnote{See García Sayán, Panel I. Dialogo jurisprudencial y control de convencionalidad. Una Mirada comparada [Panel I. Jurisprudential dialogue and control of conformity. A comparative look.] VIMEO (Oct. 11, 2013). http://vimeo.com/album/2565106/video/76720365 (García Sayán claims Inter-American Court decisions have led to 39 domestic court convictions in different states parties).} the highest courts of Argentina, Mexico, and Uruguay have explicitly rejected the idea that Inter-American Court decisions have binding authority over domestic courts. The Uruguayan Supreme court, in the “Two Coronels” case, held that Inter-American Court decisions are only binding on domestic courts in their dispositive section, i.e., the resolution.\footnote{Suprema Corte de Justicia del Uruguay [S.C.J.] [Uruguay Supreme Court of Justice], 22/02/2013, M. L., J. F. F., O.–Denuncia–Excepcion de inconstitucionalidad arts 1, 2 y 3 de la ley 18831, ¶ CONSIDERANDO III (a), No. 20/2013 (Uru.).} It also held that the ultimate interpreter of the Uruguayan Constitution is the Uruguayan Supreme court, and that no duty to be bound by the Inter-American Court’s jurisprudence can be found in the American Convention.\footnote{Id.} The Argentinian Supreme court stated that Inter-American Court decisions have no binding authority over domestic courts but only “moral significance.”\footnote{Fallos: 330:4040, 332:1488, cited in Juzgado Federal de Salta No. 1 [Juzg. Fed.] [Federal Court of Salta N. 1], 8/7/2013, “Lodi Ortiz Andrea Melisa–Larran Cristian c. Swiss Medical s/ amparo,” Expte. No. 61000007/13, (Arg.).} Likewise, the Mexican
Supreme court has found that Inter-American Court judgments to which Mexico was not a party may provide guidance to Mexican judges only as long as they favor the human person and the protection of his rights, not where their interpretation is more restrictive, or where domestic law grants greater protection than the American Convention. Even when courts have acknowledged or invoked Inter-American Court decisions in their high court decisions, they have only attributed them non-binding authority.

Only one country seems to have adopted the control of conformity doctrine in its full form: Peru, García Sayán’s country of origin, where the Constitutional court held that the judgments of the Inter-American Court of Human Rights, including their ratio decidendi, were “binding for all public authorities . . . , even in those cases in which the Peruvian State has not been a party to the proceedings.” But even in that case, the Constitutional court of Peru specifically limited the judgments’ authority to the ratio decidendi and not the decision as a whole.

C. Artavia’s Potential Effects on the Inter-American Court’s Authority

Controversial decisions, albeit on different issues, have historically raised among states parties a great deal of opposition and skepticism against the Commission, to the point where some states have sought to diminish its powers. Such tensions eventually led states parties to

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104 According to Judge García Sayan, Inter-American Court decisions have been mostly cited in domestic high court decisions involving four issues: amnesties, the obligation to investigate human rights violations, the right to an effective remedy, and nondiscrimination and the rights of indigenous peoples. See Diego García-Sayan, The Inter-American Court and Constitutionalism in Latin America, 89 TEX. L. REV. 1835, 1841 (2011).


106 Judgment of the Constitutional court of Peru, supra note 105.

107 See La reforma de la Comisión Interamericana de Derechos Humanos [Inter-American Commission on Human Rights reform], 19 APORTES DPLF, REVISTA DE LA FUNDACIÓN PARA EL DEBIDO PROCESO (2014), available at http://perso.unifr.ch
carry out a comprehensive review of the IACHR’s functions that concluded in reform of its Rules of Procedure, among others. Decisions like Artavia could, at least in theory, have a similar effect on states parties’ acceptance of the court’s authority.

The court’s lack of flexibility in refusing to grant a state deference in controversial matters of moral relevance does little to reinforce its authority in the long term. Restricting national judges’ ability to interpret national Constitutions and imposing interpretative uniformity, according to the court’s personal views on human life, may dissuade states parties from submitting to its jurisdiction. Furthermore, the requirement that Costa Rican judges and their staff be retrained in proper judging on matters of abortion and reproductive technologies may strike some national judges as arrogant and paternalistic, while others could view such trainings as a tool of ideological imposition of pro-choice views on the judiciary. Such perceptions may dissuade states from increasing the Court and Commission’s funding, as members of both bodies have repeatedly requested.

Artavia’s disregard for national sovereignty may also dissuade non-parties to the treaty, like the United States, from ratifying the

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111 Artavia, supra note 4, at ¶ 341, 381 operative paragraph #7.

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American Convention. Even though state representatives may agree with some parts of the holding, the court’s overruling of a Supreme Court decision and the subsequent imposition of a duty to facilitate IVF through government agencies and provide government funds may prove unacceptable for traditional U.S. constitutional standards. For similar reasons, nonparties to the Inter-American Court’s Statute (Dominica, Grenada, and Jamaica) may be dissuaded from recognizing the court’s jurisdiction.113

Furthermore, Artavia may weaken states parties’ perceptions on the enforceability of Inter-American Court decisions in general. Even for Costa Rica, a country that has so much invested in the Inter-American System on human rights, host to the Inter-American Court headquarters and the first state to ratify the American Convention,114 compliance with the court’s unreasonable demands, specially in regard to IVF state subsidies, has been less than perfect. As of February of 2014, Costa Rica complied with the victim compensation mandate and the Executive, namely the Ministry of Health, has submitted a bill that would authorize and regulate IVF for congressional approval.115 But the country probably lacks the resources to provide subsidized IVF services in the near future,116 and it is uncertain that it ever will. Santiago Cantón stated that “despite the important markers of success of the Inter-American system on human rights, states do not fully comply with a large majority of its decisions,” and Artavia may be no exception.117

Finally, the Artavia decision or subsequent similar decisions may alert the Organization of American States General Assembly to the


114 Id.

115 E-mail interview with Jorge Oviedo Alvarez, Deputy Solicitor General, and member of the legal defense team for the state in Artavia Murillo v. Costa Rica (Dec. 25 2012). See also Luis Eduardo Diaz, Salud decidira si la FIV se reactiva via ley o reglamento [Health Ministry will decide if IVF is reactivated through statute or regulation], LA NACION (last visited Jan. 10, 2014), http://www.nacion.com/nacional/comunidades/Salud-decidira-FIV-reactiva-reglamento_0_1316668385.html.

116 See L. Arias, Human Rights Court Orders Costa Rica to Legalize In Vitro Fertilization, TICO TIMES (Dec. 20, 2012), http://www.geneticsandsociety.org/Article.php?id=6601 (where the Director of Costa Rica’s Social security authority indicates that the institution does not yet have the resources to comply with the judgment).

117 Cantón, supra note 74.
need for discussion of the court’s decisions and the Commission’s reports and activities in greater detail. Santiago Cantón indicates that:

[T]oday, the combined time given to the Commission and the court during the General Assemblies is no more than fifteen minutes. Most of the time, there is absolutely no discussion of the activities carried out during the year by these two bodies. In the last fifteen years, the only discussions about the System took place in El Salvador in 2011 and Bolivia in 2012, and those instances were both to discuss the reform process, not necessarily to discuss strengthening the System.  

**CONCLUSION**

Due to the court’s limited jurisdiction under the American Convention, the *Artavia* decision should not have any direct effect anywhere other than Costa Rica. However, in practice, its rationale may be used to promote abortion rights in Latin America and the Caribbean. Individual states may give *Artavia* as much or as little authority as they want, given that nothing in the Convention mandates that non-parties to the dispute give it any authority at all, and that the doctrine of control of conformity has questionable acceptance.

It is unlikely that *Artavia* will be deemed to be the final word on the interpretation the right to life from conception. The court’s biased interpretation of Article 4(1) in *Artavia* may, inevitably, succumb under its own weight and be overturned by a future composition of the Inter-American Court, since the court does not consistently follow the anglo-saxon doctrine of *stare decisis*.  

In the long term, the decision may also motivate states parties to produce counter-legislation protecting the unborn, or to modify the court statute to amend its interpretation faculties. Judge Vio Grossi encouraged states to use their legislative faculties, warning that:

If they fail to do so, there is the risk that—as it somewhat happens in this case—the court may not only decide on these issues, which require a more political pronouncement, but may also be obliged to assume this normative function. This would distort the court’s jurisdictional function, affecting thus the performance of the whole Inter-American system of human rights.

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118 *Id.* at 7.


120 *Artavia*, *supra* note 4, at 23 (Vio Grossi, J., dissenting).