

**REPORT Nº 25/04**  
PETITION 12.361  
ADMISSIBILITY  
ANA VICTORIA SANCHEZ VILLALOBOS AND OTHERS  
COSTA RICA  
March 11, 2004

**I. SUMMARY**

1. On January 19, 2001, Mr. Gerardo Trejos Salas (hereafter "the petitioner") submitted a complaint before the Inter-American Commission on Human Rights (hereafter "the Commission", "the Inter-American Commission" or "IACHR") against the Republic of Costa Rica (hereafter "the State", "Costa Rica", or "the Costa Rican State"), invoking the international responsibility of the Costa Rican State because of judgment number 2000-02306 of March 15, 2000, issued by the Constitutional Chamber of Costa Rica, declaring unconstitutional Presidential Decree 24029-S of February 3, 1995, regulating the practice of *in vitro* fertilization in Costa Rica.

2. The petitioner argues that the judgment in question violates Articles 1, 2, 4, 5, 8, 11.2, 17, 24, 25, 26 and 32 of the American Convention on Human Rights (hereafter "the Convention" or "the American Convention"), as well as Articles 3, 10 and 15 of the Additional Protocol to the American Commission on Human Rights in the Area of Economic, Social and Cultural Rights (hereafter referred to as the "Protocol of San Salvador") and Articles 1 and 7(h) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereafter referred to as the "Convention of Belém do Pará") with respect to Ana Victoria Sanchez Villalobos, Fernando Salazar Portilla; Gretel Artavia Murillo, Miguel Mejía Carballo, Andrea Bianchi Bruno, German Alberto Moreno Valencia, Ana Cristina Castillo León, Enrique Acuña Cartín, Ileana Henchos Bolaños, Miguel Antonio Yamuni Zeledón, Claudia María Carro Maklouf, Victor Hugo Sanabria León, Karen Espinoza Vindas, Hector Jimenez Acuña, Maria del Socorro Calderán P., Joaquina Arroyo Fonseca, Geovanni Antonio Vega, Carlos E. Vargas Solorzano, Julieta González Ledezma and Oriester Rojas Carranza (hereafter "the presumed victims"), all patients of Dr. Gerardo Escalante López and Dr. Della Ribas and against the Costa Rican companies *Ultrasonografía S.A.* and *Instituto Costarricense de Fertilidad*.

3. With respect to admissibility, the State maintained that the complaint was groundless and out of order and that it should be considered inadmissible. It also insisted that the tardiness with which the victims were individually identified, and the lack of standing in the case of those victims that were initially identified, should render the petition inadmissible. The State also argued failure to exhaust domestic remedies, and claimed that the petition was submitted too late, in relation to the victims who were subsequently identified.

4. The petitioner, on the contrary, declared that the presumed victims had requested confidentiality for fear of disruption of their private lives. On a future date the Commission received a communication sign by all patients of doctors Gerardo Escalante López and Delia Ribas in which they waived the confidentiality.

5. The petitioner also alleges that because of the binding nature of decisions of the Constitutional Chamber they had no further recourse to exhaust.

6. On the basis of its analysis of the arguments presented by the two parties, pursuant to Articles 46 and 47 of the Convention, the Commission has decided to declare the petition admissible, with respect to the alleged violations of Articles 1, 2, 11, 17 and 24 of the American Convention, and to proceed with an analysis of its merits.

**II. PROCEEDINGS BEFORE THE COMMISSION**

7. On February 6, 2001 the Commission acknowledged receipt of the petitioner's communication and announced the opening of the case under number 12.361, in accordance with its rules of procedure at that time. On the same date, the relevant portions of the communication were transmitted to the State, which was asked to provide information within 90 days.

8. On May 4, 2001 the Commission received the response of the State. That response claimed that the petition was out of order, considering that the judgment of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica was fully consistent with the American Convention. On June 1 of that year, the Commission sent a copy of the government's response to the petitioner for comment.

9. On June 12, 2001 the Commission received the petitioner's comments to the response of the Costa Rican government. On that same day those observations were sent to the State.

10. On July 18, 2001 the government submitted new observations on the case, arguing that the petition should not be admitted because there were no identified individual victims, and because those victims who were identified, i.e. the Costa Rican companies *Ultrasonografia S.A.* and *Instituto Costarricense de Fertilidad*, had no legitimate standing in the case. That information was transmitted to the petitioner on July 23, 2001.

11. On October 2, 2002, the Commission acknowledged receipt of the communication dated September 25, 2002, submitted by the petitioner, in which he requested that consideration of admissibility and of merits be combined, in accordance with Article 37(3) of the Commission's Rules of Procedure, and declared that he was renouncing the friendly settlement procedure. The pertinent portions of the State's response dated July 18, 2001, were again sent to the petitioner, having been sent for the first time by the Commission on July 23, 2001, giving him a period of 15 days to respond.

12. On that same date the pertinent portions of the petitioner's note of September 25, 2002, were sent to the State, giving it a period of 30 days to respond. On January 29, 2003, the Commission acknowledged receipt of the observations of October 30, 2002, submitted by the State, which were transmitted to the petitioner on that same day, and to which he responded on December 24, 2002, and on January 23, 2003.

13. In those communications the presumed victims were identified and they granted powers to the petitioner to represent them before the Commission. They reiterated the statement of the petitioner that they had not identified themselves for fear of disruption of their privacy. They also reiterated their request that consideration of admissibility and merits be combined, pursuant to Article 37(3) of the Convention. Those observations were transmitted to the State on March 11, 2003, which responded on May 27, 2003, opposing the combination of procedures and insisting on inadmissibility.

14. On October 10, 2003 a communication was received from the petitioner in which he sought to expand the petition to include Articles 1, 2, 5, 8, 11(2), 24, 25 and 26 of the American Convention, as well as Articles 3, 10 and 15 of the Protocol of San Salvador. This communication was received on October 10, 2003, and its pertinent portions were transmitted to the State on November 25, 2003, giving it a period of 60 days to respond.

15. On January 23, 2004, the response of the government to the expanded petition was received. In that communication, the State requested that the petition be declared inadmissible for the reasons mentioned earlier, i.e. the lack of standing of the parties and the failure to characterize violations, and it also argued that the petition was untimely and that domestic remedies had not been exhausted with respect to the victims who were subsequently identified.

### **III. POSITION OF THE PARTIES**

#### **A. The petitioner**

16. The petitioner relates that on February 3, 1995, Presidential Decree 24029-S was issued, authorizing the practice of *in vitro* fertilization in Costa Rica and regulating that practice. He explains that the model established in that decree differed from the model used in other countries, because it applied only to married couples; it prohibited the insemination of more than 6 ovules, and it provided that all embryos must be deposited in the maternal uterus, prohibiting the freezing, preservation or discarding of embryos.

17. The petitioner reports that on March 15, 2000, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, by means of judgment 2000.02306, granted a motion of unconstitutionality, annulling Presidential Decree 24049-S on the grounds that the practice of *in vitro* fertilization, as regulated in that decree, was unconstitutional in Costa Rica. The Constitutional Chamber based its decision on the fact that the technique of *in vitro* fertilization practice at that time implied a high loss of embryos, caused directly by the conscious and deliberate manipulation of reproductive cells.

18. The petitioner argued that the technique of *in vitro* fertilization as regulated in Costa Rica was not a threat to life. He claimed, on the basis of medical studies, that not all human embryos develop to birth, and that the percentages of successful gestation in natural processes and in *in vitro* fertilization are similar.

19. The petitioner also challenged the ruling by the Constitutional Chamber that the human embryo is a person in law. He referred to Article 31 and Article 1004 of the Costa Rican Civil Code, arguing that, while there is protection for the fetus, this is not absolute but conditional upon its live birth.

20. The petitioner argues that the right to life is relative, and that although it is a fundamental right, it is subject to limitations when it is opposed to the protection of other fundamental rights. He presents the present situation in that context, maintaining that to protect one right unconditionally is in effect to deny other rights.

21. The petitioner extends this concept of relativity to the protection of life as of the moment of conception. He claims that the American Convention recognizes this relativity in declaring, in Article 4, that life must be protected by law and, in general, from the moment of conception. He adds, however, that this right must be examined in light of Article 32 of the Convention, which stipulates the relationship between rights and duties.

22. The petitioner maintains that the prohibition on the practice of *in vitro* fertilization in Costa Rica constitutes discrimination and unequal treatment among patients, thereby violating Articles 1 and 24 of the American Convention. He argues that this prohibition makes it impossible to treat persons suffering from sterility or infertility, while at the same time it allows for the use of scientific and technological advances to cure or alleviate other illnesses. The petitioner argues further that the prohibition of *in vitro* fertilization implies violation of the right to health, enshrined in Article 10 of the Protocol of San Salvador, and the right to physical, mental and moral integrity protected in Article 5 of the American Convention.

23. The petitioner also claims that the State of Costa Rica violated Article 17 of the American Convention through its prohibition of *in vitro* fertilization, by denying to men and women who suffer from infertility or sterility the possibility of founding or constituting a family. He adds that, by the same reasoning, the State of Costa Rica has violated Article 15(2) of the Protocol of San Salvador.

24. The petitioner argues that the prohibition on *in vitro* fertilization in Costa Rica also constitutes arbitrary and abusive interference in the private and family life of persons who need and want to undergo that medical procedure in order to found a family, thereby violating Article 11(2) of the American Convention. He adds that, given the nature of the unconstitutionality judgment, the presumed victims were unable to enforce their rights or to be heard, which he claims is a violation of the judicial guaranties established in Articles 8 and 25 of the American Convention.

25. The petitioner further claims violation of Articles 1 and 7(h) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Convention of Belém do Pará. The petitioner observes that the prohibition of *in vitro* fertilization in Costa Rica has caused severe pain and suffering to the presumed victims, and in particular to the women, and maintains that the Costa Rican State failed to take effective measures to prevent or address those violations. He stresses that there is very strong pressure, especially on women, to have children, and that the lack of treatment prolongs and exacerbates the emotional suffering caused by that pressure.

26. The petitioner argued at first that the victims in the present case could not be identified individually because they chose confidentiality in order not to be subjected to interference in their private lives. Moreover, he declared that the identity of the victims would only be revealed if requested by the Commission. Nevertheless, as noted earlier, in his later communications the petitioner presented a list of signatures of the presumed victims, who declared that they were granting him powers to represent them before the Commission.

27. The petitioner asks the Commission to declare that the prohibition of *in vitro* fertilization violates Articles 1, 2, 4, 5, 8, 11.2, 17, 24, 25, 26 and 32 of the American Convention, and also Articles 3, 10 and 15 of the Protocol of San Salvador and Articles 1 and 7(h) of the Convention of Belém do Pará. He also asks that the victims be granted the right to fair compensation for the injuries caused to them, in particular in relation to those victims who had to move abroad in order to perform fertilization, and those who, because of their advanced age, would be unable to have children even if the practice were allowed in the future.

28. The petitioner also asks that the status of victim be accorded the company that acquired the medical equipment for practicing *in vitro* fertilization in Costa Rica, and that was unable to make use of that equipment because of the prohibition issued by the Constitutional Chamber.

## **B. The State**

29. The State argues that, from the biological and legislative viewpoint, it can be demonstrated that the duty to protect a life begins at the moment that life is determined to exist. The State adds that it does not matter whether that life is incorporated in a visible human being, but that on the contrary, protection must be given to that life at the earliest moment of its existence. It insists that, with fertilization, a human life begins to develop, and that it must be protected.

30. The State maintains that, even though Executive Decree 24029-S required that all fertilized audios must be implanted in the maternal uterus, and it prohibited their elimination or preservation, the mere manipulation of embryos so that only one will survive means the death of other embryos. Moreover, it argues, even if deaths occur within the maternal uterus as a result of natural causes it is unacceptable that death should be predictable as a result of human manipulation. The State adds that the problem is not limited to the number of human lives lost, but has to do primarily with the predictability of those deaths.

31. The State rejects the petitioner's argument that the embryo has no legal personality. The State uses legislative arguments such as the provisions of the Costa Rican Civil Code, Article 31 of which protects the right to life as of 300 days prior to birth.

32. In addition, the State argues that the technique of *in vitro* fertilization is not an emergency treatment to save lives. It maintains that infertility or sterility should not be considered a disease, because it does not involve an alteration of a person's health, but is rather a biological condition or consequence of a disease. It maintains that *in vitro* fertilization is not an emergency treatment nor a cure for a disease, since it does not resolve its causes: it is, instead, an artificial recourse that seeks to overcome that biological condition. The State concludes that it would be playing with human lives to practice *in vitro* fertilization, for this reason it would be contrary to the rights that protect life within Costa Rican domestic law.

33. The State also argues that authorization of *in vitro* fertilization in Costa Rica would be violating not only the right to life recognized in the American Convention, but also other instruments of international human rights law such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which recognizes the need for special protection for children, both before and after birth.

34. The State maintains that the principle of equality and nondiscrimination does not mean giving identical treatment to each medical situation, but instead requires that the particular circumstances of each case be considered in order to provide proper medical intervention. It insists that the treatment to which people suffering from infertility or sterility may submit must be limited by the provisions of the Constitution and by international provisions for the protection of human rights.

35. With respect to the right to raise a family, the State argues that, while there is a right to have children and to found a family, that right must be limited by higher values such as the right of all human beings, without distinction, to have their life protected. On this point, it declares that the principle of the indivisibility and interdependence of human rights means that some rights cannot be sacrificed for the sake of other rights. It is not legitimate to exercise that right by depriving other human beings of their life. On this point, it declares that the principle of the indivisibility and interdependence of human rights holds that some rights cannot be sacrificed for the sake of others.

36. As to the relationship between rights, the State argues that the principle implies that every right has its limits, which are determined by the rights of others. In its own interest, it declares that the right to life for embryos implies a limit on the rights of others, including couples seeking to have children and scientists seeking to experiment with embryos.

37. As to the alleged violation of privacy, the State maintains that the practice of *in vitro* fertilization is not a private matter, or one that implies no offense to society. It adds that, as established, the current technique of *in vitro* fertilization is not only contrary to public order, morals and customs, but in deed inconsistent with the right to life, which means that the State has a legitimate interest in intervening.

38. With respect to the alleged violation of judicial guaranties and protection, the State points out that constitutionality proceedings in Costa Rica (Articles 81 and 83 of the Constitutional Jurisdiction Act) require notice to be published three times in the official gazette, indicating intention to file a petition. The purpose of this is to provide public notice that proceedings are to be initiated, so that persons with a legitimate interest can participate in those proceedings.

39. The State also points out that, while constitutional jurisprudence is binding, it does not tie the hands of the Chamber itself, which could eventually reverse its decision if there were sufficient grounds for doing so. Thus, the State maintains, the presumed victims identified did not have their complaints examined by domestic courts, and on these grounds it argues failure to exhaust domestic remedies, and the untimeliness of the petition, because of the late identification of the prison victims.

40. With respect to the petitioner's argument that the ruling of the Costa Rican Constitutional Chamber represents a form of violence against women, the State declares that this is an extended interpretation of the letter of the Convention of Belém do Pará, and that it strays far from the spirit of that instrument. It maintains that the petition in question does not refer to any act of violence against women, or any lack of diligence that might provoke such violence. It adds that the suffering caused to men and women by the problem of infertility has no causal link to the Costa Rican State.

41. With respect to admissibility, the State argues that the petitioner lacks standing in the case because he has failed to identify the victims individually at the proper time during the proceedings, and he did not establish the relationship between those victims and the case in question. It also maintains that the companies Costa Rica *Ultrasonografía* S.A. and *Instituto Costarricense de Fertilidad* lack legitimate standing because they are not physical persons and are therefore not protected by the American Convention.

42. The State again argues that the petition is groundless and out of order because it does not State facts that would characterize a violation of the human rights protected in the American Convention.

#### **IV. ANALYSIS OF ADMISSIBILITY**

##### **A. The Commission's jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci***

###### **1. Jurisdiction *ratione personae***

43. Article 44 of the American Convention and Article 23 of the IACHR's Rules of Procedure stipulate that "any person or group of persons" may lodge petitions with the Commission containing denunciations or complaints of violation of the Convention.

44. The State of Costa Rica argues that the individual victims were identified too late, and that their relationship to the facts denounced in the petition was not mentioned. It maintains that the Commission should declare that it lacks jurisdiction *ratione personae* to examine the petition, because no real victims were identified in the initial petition. The State also argues the Commission's lack of jurisdiction *ratione personae* with respect to the companies Costa Rica *Ultrasonografia S.A.* and *Instituto Costarricense de Fertilidad*. The petitioner, however, argues that he submitted the list of resume victims only on December 24, 2002, because they had chosen confidentiality out of fear of interference by the press in their personal life.

45. The requirements of admissibility for a petition must generally be examined at the time the Commission decides on admissibility.<sup>1</sup> Thus, the occasion of presenting the petition and that of declaring admissibility are distinct. Article 33 of the IACHR's rules of procedure, for example, empowers the Commission to ask the petitioner to fulfill the requirements omitted in the petition, when the Commission considers that the petition is inadmissible or incomplete.<sup>2</sup>

46. To accept the argument of the State that the complaint should be inadmissible because the individual victims were not identified in the initial petition, although they were subsequently identified, would imply a formalistic decision inconsistent with protecting the human rights enshrined in the Convention, and would place the presumed victims in a position of defenselessness. The Inter-American Court of Human Rights has declared that it is a commonly accepted principle that the procedural system is a means for seeing that justice is done, and that it is not sacrificed for the sake of mere formalities.

47. Similarly, the failure to identify the individual victims could in no way diminish the Costa Rican State's awareness of the situation described in the petition, since that situation arose in relation to a judgment of the Constitutional Chamber of Costa Rica, prohibiting the practice of *in vitro* fertilization in the country.

48. The Commission therefore considers that it has jurisdiction *ratione personae* for those persons covered by the definition of persons in Article 1.2 of the Convention.

49. With respect to the companies Costa Rica *Ultrasonografia S.A.* and *Instituto Costarricense de Fertilidad*, the Commission affirms its practice and doctrine established in the cases of *Banco de Lima*<sup>3</sup>, *Tabalacera Boqueron*<sup>4</sup>, *Mevopal S.A.*<sup>5</sup> and *Bendeck Cohdinsa*<sup>6</sup>, in which it declared that it does not have jurisdiction *ratione personae* to examine a petition submitted before the Commission by a legal person, because these are excluded from the protection of the Convention. The present petition contains no elements that would justify an amendment to the Commission's jurisprudence.

50. Thus, for purposes of admissibility, the Commission decides that it has jurisdiction *ratione personae* with respect to the presumed victims cited above, but not with respect to the companies Costa Rica *Ultrasonografia S.A.* and *Instituto Costarricense de Fertilidad*.

## **2. Jurisdiction *ratione materiae***

51. The Commission notes that the petition complains of the presumed violation of rights protected in the American Convention on Human Rights, and in particular those in its Articles 1, 2, 4, 5, 8, 11.2, 17, 24, 25, 26 and 32.

52. The petition also complains of violations of Articles 3, 10 and 15 of the Protocol of San Salvador. The Commission notes that although it lacks jurisdiction to establish violations of those Articles of the Protocol of San Salvador, it will take into consideration those provisions

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1 IACHR, Report Nº 28/98, case 11.625, *Maria Eugenia Morales de Sierra*, March 6, 1998, Guatemala, Annual Report 1997.

2 IACHR, Report Nº 52/00, cases 11.830 and 12.038, *Dismissed Workers of Congress*, Peru, June 15, 2000, Annual Report 2000.

3 IACHR, Report Nº 10/91, Case 10.169, *Banco de Lima*, Annual Report 1990-1991. In that case, the Commission recognized its jurisdiction to protect the rights of an individual whose property was expropriated, but not to protect "the rights of juridical beings" such as corporations or banking institutions. *Idem*, para. 2.

4 IACHR, Report Nº 47/97, *Tabacalera Boqueron*, October 16, 1997, Paraguay, Annual Report 1997.

5 IACHR, Report Nº 39/99, *Mevopal S.A.*, March 11, 1999, para. 20, Argentina, Annual Report 1998.

6 IACHR, Report Nº 106/99, *Bendeck Cohdinsa*, September 27, 1999, paras 17 ff., Honduras, Annual Report 1999.

referring to the obligation of nondiscrimination, the right to health, and the right to constitute and protect a family, in its analysis of the merits of this case, in accordance with Articles 26 and 29 of the American Convention.

53. With respect to petitioners' allegations regarding violations of Articles 1 and 7.h of the Convention of Belém do Pará, the Commission observes that according to Article 12 of the Convention of Belém do Pará, one can present petitions to the IACHR alleging violations of Article 7 of that Convention by a state party, and the Commission shall consider them, in keeping with the procedural rules and requirements for the presentation and consideration of petitions stipulated in the American Convention on Human Rights and in the Statute and Rules of Procedure of the Inter-American Commission on Human Rights.<sup>7</sup>

54. This being the case, if the facts of the complaint should be proven, they would constitute violations of the human rights protected in the American Convention. The Commission therefore considers that it has jurisdiction *ratione materiae* to examine the complaint.

### **3. Jurisdiction *ratione temporis***

55. The Commission also has jurisdiction *ratione temporis*, because the facts alleged in the petition took place when the obligation to respect and guarantee the rights established in the Convention was already in force for the Costa Rican State.<sup>8</sup>

### **4. Jurisdiction *ratione loci***

56. Finally, the Commission has jurisdiction *ratione loci* to consider the petition, because it alleges violations of rights protected in the American Convention that took place within the territory of a State party to that Convention.

## **B. Other requirements of admissibility**

### **1. Exhaustion of domestic remedies**

57. The petitioner declares that on March 15, 2000, the Costa Rican Constitutional Chamber, in a ruling of unconstitutionality, issued a judgment annulling Executive Decree Number 24029-S of February 2, 1995, thereby prohibiting the practice of *in vitro* fertilization in Costa Rica. That judgment was notified to the parties in October 2000.

58. The petitioner argues that there is no recourse against that decision, pursuant to Article 11 of the Constitutional Jurisdiction Act, which declares that there is no recourse against judgments, rulings or orders of the constitutional court. For the reasons cited above, the petitioner argues that domestic remedies were exhausted, in accordance with Article 46.1.a of the American Convention.

59. The State alleges that the presumed victims identified did not have their complaints examined by domestic courts, and on these grounds it argues failure to exhaust domestic remedies. The State points out that, while constitutional jurisprudence is binding, it does not tie the hands of the Chamber itself, which could eventually reverse its decision if there were sufficient grounds for doing so.

60. The Commission considers that there has been a definitive and binding decision by the highest court of the land, which declared unconstitutional the practice of *in vitro* fertilization as regulated in Presidential Decree 24029-S. The State does not dispute this fact. The Commission therefore sees no need to conduct mechanical proceedings on those facts in order to fulfill a mere formality.

61. The Commission has repeatedly declared that it is not enough for the State simply to allege failure to exhaust domestic remedies in order for that exception to prevail. On this point, the Inter-American Court has ruled that a State invoking this exception must also

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<sup>7</sup> IACHR, Report No 73/01, case 12,350, MZ, October 10, 2001, Bolivia, Annual Report 2001, paragraph 24.

<sup>8</sup> Costa Rica ratified the American Convention on April 8, 1970, and on June 2, 1980 it deposited with the OAS General Secretariat the instrument recognizing the jurisdiction of the Inter-American Court of Human Rights, pursuant to Articles 45 and 62 of the Convention.

identify those domestic remedies that should have been exhausted, and demonstrate that they would have been effective under the circumstances.<sup>9</sup>

62. The Commission recalls that the Inter-American Court of Human Rights has also found that the mere existence of domestic remedies does not imply the obligation to exhaust them, because they may not be adequate and effective. If they are to be adequate, their functioning within domestic law must be suitable for protecting the legal situation infringed. An effective remedy, in turn, is one that is capable of producing the outcome for which it was established.

63. The State has cited judicial domestic remedies that were still available for the petitioner, but it has not proven their effectiveness. The IACHR therefore considers that domestic legal remedies have been exhausted.

## **2. Time limit for submission of the petition**

64. The final judgment of the Constitutional Chamber was issued on March 15, 2000, but the petitioner argues that the parties were only notified of that decision in October 2000. Article 46.1.b establishes that the petition must be "lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment".

65. The petitioner submitted his petition on January 19, 2001, within the time limit of six-month established by Article 46.1.b of the American Convention.

## **3. Duplication of proceedings and *res judicata***

66. The Commission understands, according to the information contained in the submissions, that the matter is not pending settlement in another international proceeding, nor has it been previously decided by this or any other international body. The IACHR therefore considers that the requirements of Article 46.1.c and d of the American Convention are satisfied.

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

67. In the present case, the petitioner has presented a list of named victims, women and men seeking treatment for infertility, and has alleged that the actions of the State in prohibiting access to one of the treatments available constitute violations of Articles 1, 2, 4, 5, 8, 11(2), 17, 24, 25, 26 and 32 of the American Convention, Articles 3, 10 and 15 of the Protocol of San Salvador, and Articles 1 and 7 of the Convention of Belém do Pará.

68. The Commission observes that the submissions of the petitioner concerning the rights of those named as victims relate principally to Articles 1, 2, 11, 17 and 24 of the American Convention. In particular, Article 17(2) of the American Convention indicates that the "right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention." Developments in international law dating back to the Teheran Conference, the Cairo Programme of Action, and the Beijing Platform of Action, have recognized the right of 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 reproductive and sexual health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion, and violence as expressed in human rights documents. (International Conference on Population and Development, Cairo, 1994.)

69. At the merits stage, the Commission will examine the general right to found a family set forth in the American Convention and other international human rights treaties, as well as in many constitutions, along with the right to protection for private and family life in light of the issues raised in the present petition. The rights at issue are not absolute; the particular question to be examined is whether State action to restrict individual access to measures in favor of family planning and childbearing is compatible with the terms of the American

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<sup>9</sup> I-A Court, *Velasquez Rodriguez* case, Preliminary Objections, Judgment of June 26, 1987, Series C., N° 1, para. 88.



Convention referred to above. The petition is not, in this sense, manifestly groundless under the terms of the Convention.

70. The petitioner has provided no basis in fact or law that would indicate how the rights of the named adult victims under Articles 4 and 32 of the American Convention have been affected by the facts denounced, nor has he provided a sufficient foundation to characterize violations of Articles 5, 8 and 25 of the American Convention, or of Article 7 of the Convention of Belém do Pará. The allegations raised under the Protocol of San Salvador may be taken into account in interpreting the international obligations of the State under Article 26 of the American Convention, insofar as that may be pertinent to the review at the merits stage, but those Articles of the Protocol are not directly cognizable within the individual petition system.

## **V. CONCLUSIONS**

75. For the reasons set forth above, the Commission considers that it has jurisdiction to consider the present case and that, pursuant to Articles 46 and 47 of the American Convention, the petition is admissible, in the terms described above.

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

#### **DECIDES:**

1. To declare the present petition admissible with respect to the alleged violations of right protected in Articles 1, 2, 11, 17 and 24<sup>10</sup> of the American Convention.
2. To declare the present petition inadmissible as it relates to the companies Costa Rica *Ultrasonografia S.A.* and *Instituto Costarricense de Fertilidad*.
3. To declare the present petition inadmissible as it relates to Articles 4, 5, 8, 25, 26 and 32 of the American Convention, to Articles 3, 10 and 15 of the Protocol of San Salvador and to Articles 1 and 7 of the Convention of Belém do Pará.
4. To notify the parties of this decision.
5. To continue its analysis of the substance of the issue.
6. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 11 day of the month of March 2004. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez Commissioners.

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<sup>10</sup> Commissioners José Zalaquett, Evelio Fernández and Freddy Gutiérrez voted against including Article 24 of the Convention as they understand that the fact alleged do not tend to amount to a violation of this provision.