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THE RIGHT TO LIFE OF THE UNBORN CHILD AND THE CASE ARTAVIA MURILLO AND OTHERS V. COSTA RICA

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Introduction

On March 15th, 2000 the Constitutional Division of the Supreme Court of Costa Rica stated that “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”¹; therefore, and based on article 4.1. of the American Convention on Human Rights² (ACHR) and article 21 of the Constitution of Costa Rica³ it held the Executive Decree that regulated In vitro fertilization (IVF) in Costa Rica to be unconstitutional.

Nevertheless, the Inter-American Court of Human Rights (Inter-American Court or the Court) declared in its Judgment of November 28th, 2012, Series C No. 257, that Costa Rica “is responsible for the violation of Articles 5(1), 7, 11(2) and 17(2) of the ACHR⁴, and established that the “State must adopt, as soon as possible, appropriate measures to annul the prohibition to

² Article 4.1 provides “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”. American Convention on Human Rights, November 22, 1969, entered into force July 18, 1978. Organization of American States, Treaty Series No. 36. At: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm
practice IVF, so that those persons who wish to use this assisted reproduction technique can do so without any impediment to the exercise of the rights that were declared violated"5. The main argument where the Inter-American Court supports its judgment comes from an interpretation in accordance with the ordinary meaning of the term “conception”, which is used to affect the scope of the right to life recognized in article 4.1. of the ACHR.

This paper assesses the main arguments of the judgment of the Inter-American Court of Human Rights in order to demonstrate that they lack credibility and undermine the right to life as a fundamental human right that is “essential for the exercise of all other human rights”6. In order to support this thesis, the paper is divided in four sections. The interpretation in accordance with the ordinary meaning of the term “conception” is the first one. Secondly, the paper discusses the systematic and historical interpretation of the Inter-American system and the European Human Rights system used by the Inter-American Court. The third section refers to the principle of the most favorable interpretation, and the object and purpose of the treaty and the expression “in general”. Fourth, the paper concludes, after all, that the judgment of the Inter-American Court has several argumentative problems that undermine its credibility, the right to life and the Inter-American system.

1. Interpretation in accordance with the ordinary meaning of the term conception

In order to offer an interpretation based on the ordinary meaning of the term “conception” the Inter-American Court highlighted the existence in “the current scientific context” of two different interpretations of the term “conception”. On one hand, the school that “understands 'conception' as the moment of union, or fertilization of the egg by the spermatozoid” and on the other hand, the school that “understands 'conception' as the moment when the fertilized egg is

5 Id. Par. 107.
6 Inter-American Court of Human Rights. Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala Judgment of November 19, 1999 (Merits) Series C. Par. 144. At: http://www.corteidh.or.cr/casos.cfm
implanted in the uterus”7. Thereafter, the Court basically rejected the former interpretation of the term “conception” based on not only its belief that it “may be associated with concepts that confer certain metaphysical attributes on embryos [and] 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”8, but also in its perception that “when Article 4 of the American Convention was drafted the dictionary of the Real Academia differentiated between the moment of fertilization and the moment of conception, understanding conception as implantation. When drafting the relevant provisions in the American Convention, the moment of fertilization was not mentioned”9.

As a consequence of this position the Inter-American Court stated that it “understands the word 'conception' from the moment at which implantation occurs, and therefore considers that, before this event, Article 4 of the American Convention cannot be applied”10; and in order to reinforce its understanding of the term “conception” the Court expressed “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 its possibilities of development are nil. If an embryo never manages to implant itself in the uterus, it could not develop, because it would not receive the necessary nutrients, nor would it be in a suitable environment for its development”11.

Now then, the first argument used to reject the definition of conception as the moment of the fertilization of the ovum rather than be based on scientific arguments was supported on the belief that it could be associated with some metaphysical ideas about the embryo. Indeed, the

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8 Id. Par. 185.
9 Id. Par. 187.
10 Id. Par. 189.
11 Id. Par. 186.
Court did not assess the scientific basis of this interpretation. This shows the lack of modern scientific knowledge of the Inter-American Court of Human Rights, because considering the embryo as a human being “does not depend on metaphysical assumption or religious belief, though it does depend on the fact that the embryo is genetically unique and has the potential to become more”\textsuperscript{12}. From the conception, namely “from the time that the ovum is fertilized, a life is begun which is neither that of the father not the mother; it is rather the life of a new human being with his own growth. It would never be made human if it were not human already”\textsuperscript{13}.

Moreover, California Medicine, the official journal of the California Medical Association, a pro-choice journal, in 1970 recognized that: “Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death”\textsuperscript{14}, and the Abortion Act of the State of Missouri states that “the term unborn children or unborn child shall include all unborn child (sic) or children or the offspring of human beings from the moment of conception until birth at every stage of biological development’. This definition includes the zygote, the embryo and the fetus, since it affirms that the beginning of the existence of the unborn child is from the moment of the conception”\textsuperscript{15}.

Closely related to the above, it is important to highlight that the definition of conception adopted by the Court also has a philosophical content. In fact, Norman M. Ford in order to support this definition has stated that “tangentially, the history of the question did also touch on


theological topics. (...) It seemed preferable to explain the necessary philosophical concepts and principles that ought to be employed and apply them to the facts of early human embryology"\textsuperscript{16}, and Sullivan expressed that “Conception, defined as fertilization of the egg, has historically been considered the beginning of life. Yet there has been an attempt, in recent years, to redefine the point at which human life begins, an attempt driven more by social ideology than science"\textsuperscript{17}. Therefore, the same argument used by the Court to reject the definition of conception as synonymous of fertilization could be applied to the definition adopted by it, which demonstrates the weakness of the position assumed by the Inter-American Court.

Similarly, the argument that when article 4 of the ACHR was drafted the dictionary of the Real Academia distinguished between fertilization and conception and therefore it understood conception as implantation lacks credibility, basically because of three important facts. First, according to literature the distinction between conception and fertilization and the understanding of the former as implantation is a relatively new definition that did not exist at the moment that the ACHR was drafted. Indeed, Ford in 1988 expresses that the “logic would favour dissociating 'conception' from 'fertilization' at least when 'conceive' is used by a person in the passive voice. There are good reasons for receiving the active voice of 'conceive' to refer to the completion of implantation as well. \textit{This latter change might be more difficult to bring about for the historical and cultural reasons we have already seen}”\textsuperscript{18}. Jude Ibegbu in 2000 stated that “\textit{there is a new tendency} to change the traditional meaning of 'conception' by dissociating it from fertilization”\textsuperscript{19}, a circumstance pointed out by Sullivan the year before\textsuperscript{20}.

\textsuperscript{18} Norman M. Ford. Supra note 16. P. 182. The bold is mine.
Secondly, the analysis of the Court about the definition of the dictionary of the Real Academia is false and incomplete. It is false because the dictionary did not define conception as implantation, and it is incomplete for the reason that the Court did not realize that to get pregnant is defined as fertilize by the dictionary of the Real Academia. Indeed, the dictionary defines “conception” as “the action and effect of conceiving”\textsuperscript{21}, “to conceive” as “for the female to become pregnant”\textsuperscript{22} and “to get pregnant or impregnate” as “fertilize” \textsuperscript{23}, and “fertilize” as “to unite the male and female reproductive elements, to create a new being”\textsuperscript{24}. Hence, the dictionary of the Real Academy, as others dictionaries edited before, during and after the adoption of the ACHR, considers “conception” and “fertilization” or “conceive” and “fertilize” as synonymous\textsuperscript{25}. To sum up, the Court has disregarded that “over the last hundred years or so,

\textsuperscript{20} Dennis M. Sullivan. Supra note 17. P. 28  
\textsuperscript{21} Diccionario de la Real Academia de la Lengua Española. At: http://lema.rae.es/drae/?val=pre%C3%B1ada  
\textsuperscript{22} Diccionario de la Real Academia de la Lengua Española. At: http://lema.rae.es/drae/?val=pre%C3%B1ada  
\textsuperscript{23} Diccionario de la Real Academia de la Lengua Española. At: http://lema.rae.es/drae/?val=pre%C3%B1ada  
\textsuperscript{24} Diccionario de la Real Academia de la Lengua Española. At: http://lema.rae.es/drae/?val=pre%C3%B1ada  
the process of fertilization has become to be identified with conception in the view of most people. Hence fertilization, almost universally, has acquired the cultural heritage and status of conception itself\(^{26}\).

Third, and last, it is logical to affirm that “if the ACHR did not purport to declare and protect the right to life from the moment of fertilization, the reference to conception in Article 4(1) would be rendered useless. This would be at odds with the basic principle of interpretation stating that norms should be read in a way in which they are not rendered meaningless”\(^{27}\).

Additionally, the affirmation of the Court that conception occurs with implantation, because “if this embryo is not implanted in a woman’s body its possibilities of development are nil”\(^{28}\), has two conceptual problems. The first “problem with this view is that it ignores the fact that”\(^{29}\) a new human being has been formed and that actions over this new human life could affect "whether a new child will be born”\(^{30}\). Furthermore, “according to biology the earliest time that the definition of human life could be traced back is the moment of the fertilization (the formation of the zygote). From that moment all the necessary information exist for the process of

\(^{26}\) Norman M. Ford. Supra note 16. P. 10.


\(^{30}\) Id. P. 102.
continuous development” of the new human being\textsuperscript{31}. Nowadays, “no respectable embryologist could refute that the embryo formed at the moment of the fertilization is a human embryo. The fertilization itself occurs as a continuous concatenation of events in which each event is the precondition for the next episode”\textsuperscript{32}, hence “from fertilization the zygote has acquired full capacity to reach [his] full development by a highly complex mechanism, whereas the scientific experimentation has shown no functional relationships between the body of the mother and fetus affect this determinism”\textsuperscript{33}. The zygote has an independent life of his mother, which begins with his existence and can be evidenced by his development before implantation in the uterus which marks the beginning of the relationship with the woman. Indeed, "the experience of in vitro fertilization speaks for itself: the zygote has his own life, not received from his mother; proof of this is that the life of the in vitro fertilized zygote, unique and unrepeatable, has begun outside the womb\textsuperscript{34}. What follows is only environmental dependence”\textsuperscript{35}. 

\textsuperscript{31} Luis Arroyo Zapatero (1980) Prohibición del Aborto y Constitución. In: Revista de la Facultad de Derecho de la Universidad Complutense de Madrid. Monográfico 3. P. 199. At: http://portal.uclm.es/descargas/idp_docs/doctrinas/prohibicion%20del%20aborto%20y%20constitucion.pdf; English translation of the author. The original text in Spanish states: “El momento más temprano al que puede reconducirse la definición de la vida humana es, conforme a los datos de la biología, el de la concepción; con más precisión, el momento en que se unen los cromosomas masculinos y femeninos (formación del zigoto). A partir de ese momento se dan todos los presupuestos necesarios para que tenga lugar el proceso del desarrollo continuado, que va a encontrar su término en el nacimiento”.


\textsuperscript{34} Bonnie Steinbock describes this process: “They are mixed [ovules] in a petri dish with sperm. After about 3 days, when the fertilized eggs get to be clumps of about eight cells each, they may be transferred to a uterus (or the fallopian tubes) Alternatively, the provider may wait until the fifth day after fertilization when the embryos contain over 100 cells each, and are known as blastocysts”\textsuperscript{34}. Cfr. Bonnie Steinbock (2011) Life Before Birth. The Moral and Legal Status of Embryos and Fetuses. Second Edition. Oxford. USA. P. 201

\textsuperscript{35} Francisco José Herrera. Supra note 33. P. 117. English translation of the author. The original text in Spanish states: “La experiencia de la fecundación in vitro habla por sí sola: la vida del cigoto es propia, no recibida de su madre; prueba de esto es que la vida del cigoto fecundado in vitro, única e irrepetible, comenzó fuere del clauastro materno. Lo que viene después sólo es dependencia ambiental”.

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The second conceptual problem is that the Inter-American Court confuses the beginning of the human life with the necessary environment to guarantee the normal development of the new human being. “The unborn needs the mother and depends on her; but he depends on her as environment, nutrition source, not because she implies his intrinsic principle of life. If we can create that environment for the zygote, he would become a normal child and then an adult. This would be unthinkable if he were a part of another living being, the mother, and he had not have in himself his own principle of life. The zygote is, already, a different human being, perfectly individualized”36. Clearly, “each phase of development of the new human being leads without interruption to the next. There is no point where you could say here the embryo becomes an individual. The embryo implies a human life from fertilization and has the ability to deploy fully human life if the necessary environmental conditions are offered to do so”37.

Therefore, confusing the beginning of a human being with the environmental conditions required for his development is a terrible mistake; just as the unborn’s interaction with the mother's body is essential for his development and subsequent birth, food and drink are also necessary for the baby to continue his growth. Neither the interaction with the mother’s body nor the food and drink give us our nature and condition of human being. The argument of the Inter-American Court to deny protection before the implantation of the embryo in the uterus could be used to deny protection after the birth to any person unable to get his food and drink, based on the impossibility to survive without them. “The development of the human being does not end with the birth, it continues throughout the whole life. Life itself is nothing more than

36 Id. P. 115. English translation of the author. The original text in Spanish states: “el ser humano necesita de la madre, depende de ella; pero depende de ella como ambiente, fuente de alimentación, no porque tenga en sí su principio intrínseco de vida. Si se logra crear ese medio para el cigoto, éste se convertiría en niño normal y luego en adulto. Esto sería impensable si fuese un parte de otro ser vivo, de la madre, y no tuviese en sí su propio principio vital. El cigoto es, ya, un ser humano distinto, perfectamente individualizado”.

37 Günter Rager. Supra note 32. P. 1053. English translation of the author. The original text in Spanish states: “Cada fase del desarrollo conduce sin solución de continuidad a la siguiente. No hay ningún momento del desarrollo en la que pudiera decirse: aquí se convierte el embrión en individuo. El embrión presenta una vida humana desde la fecundación y tiene la posibilidad de desplegar plenamente esa vida humana si le son ofrecidas para ello las necesarias condiciones de su entorno”.
development to reach its natural limits”\textsuperscript{38}. On the whole, “the right to life is inherent to the human being; it exists from the moment that human life appears”\textsuperscript{39}. Thereupon, “the embryo has the right to his continued development in natural conditions”\textsuperscript{40}, and “as the adult human being has the rights to pollution free environment and not to be treated as a slave or thing, the embryo is also worthy of respectful treatment according to his human nature”\textsuperscript{41}. The definition adopted by the Court therefore entails a violation of “the principle of equality because it leaves out of the legal protection a certain stage of human life that begins with conception”\textsuperscript{42}.

Finally, and even though the Inter-American Court stated that it was appropriate to interpret article 4.1 using the “systematic and historical, and the evolutionary and teleological interpretation”\textsuperscript{43}, the truth is that the Court has assessed the term conception exclusively through the ordinary meaning of the term, and then has used the definition adopted by it to support the rest of its interpretations. This circumstance disavows the doctrine of the Court according to which “the 'usual meaning' of the terms cannot be a rule in itself, but should be examined in the context and, especially, from the perspective of the object and purpose of the treaty, so that the interpretation does not result in a deterioration in the protection system embodied in the

\textsuperscript{38} Günter Rager. Supra note 32. P. 1060. English translation of the author. The original text in Spanish states: “El desarrollo no termina con el nacimiento; se extiende durante toda la vida hasta llegar a la sabiduría de la vejez. La vida misma no es otra cosa que el desarrollo hasta alcanzar sus límites naturales”.

\textsuperscript{39} Francisco José Herrera Supra note 33. P. 106. English translation of the author. The original text in Spanish states: “El derecho a la vida es inherente al ser humano. Desde el momento en que aparece la vida humana hay derecho a la vida”.


\textsuperscript{41} Id. P. 388. English translation of the author. The original text in Spanish states: “Así como el hombre adulto tiene derecho a vivir en un medio ambiente libre de contaminación, a no ser tratado como esclavo o cosa y a un trabajo digno y no degradante, nos parece que el embrión también es merecedor de un trato respetuoso de su dignidad”.

\textsuperscript{42} Luis Arroyo Zapatero. Supra note 31. P. 199. English translation of the author. The original text in Spanish states: “La solución de los plazos infringe el principio de igualdad porque deja fuera de la protección legal un determinado estadio del proceso de desarrollo unitario que da comienzo con la concepción”.

\textsuperscript{43} Inter-American Court of Human Rights. Case of Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica. Supra note 4. Par. 190.
Convention”\textsuperscript{44}, and if one term, such as conception, “is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted”\textsuperscript{45}. After all, the Inter-American Court should have been more careful at the moment to define the term conception, reminding that “the task of a treaty body is to monitor the implementation of its constituent instrument, not to change its content, spirit and procedure. Human rights instruments are ‘drafted in such a way as to limit the possibilities of dramatic change from within, by processes of interpretation and application as distinct from amendment’”\textsuperscript{46} and “to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty”\textsuperscript{47}.

2. Systematic and historical interpretation

The Inter-American Court of Human Rights assesses some aspect of the Inter-American Human Rights system and the European Human Rights system from a systematic and historical interpretation to reinforce its interpretation of the term conception and to deprive the embryo of the legal protection of article 4.1. of the American Convention on Human Rights. Concerning the Inter-American Human Rights system the Court states that “the expression “every person” is used in numerous articles of the American Convention [and] it is not feasible to maintain that an


\textsuperscript{47} International Law Commission. Supra note 45.
embryo is the holder of and exercises the rights established in each of these articles” 48. This argument confuses the possibility to enjoy and exercise human rights with the right-holder. Every human being is holder of these rights, but this does not mean that he should be able to exercise all at the same time during his whole existence. The argument of the Court “that incapacity of the unborn to enjoy every right established in the ACHR is proof of their non-personality (…) is not well grounded because there are rights in the ACHR that cannot be exercised even by adults in certain circumstances, for example, when they are in a vegetative state. In addition, there are many rights that cannot be fully exercised by born children, mostly during their early years”49.

Citing the doctrine of the Inter-American Court, “adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent. But they are all subjects of rights, entitled to inalienable and inherent rights of the human person”50, conditions “that the unborn child, in particular, satisfies” 51. What is more, “it must be noted that the second sentence of Article 4(1) draws its understanding of the unborn’s right to life from the first sentence, which declares that every person has this right. Thus, the [American Convention on Human Rights] not only declares that unborn children have a right to life, but also that they are persons. In this regard, Article 4(1) allows no other interpretation, since its first sentence refers to the right of every person to have his or her life

49 Álvaro Paúl. Supra note 27. P. 217.
respected and the second prescribes an obligation to protect *this right*, in general, from the moment of conception”\(^{52}\).

The other argument stated by the Court in regard to the Inter-American system was that the “conception can only take place within a woman’s body, [hence] 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”\(^{53}\). Sharing the opinion of the Judge Vio Grossi “this statement cannot be agreed with because, if the intent had been to protect the unborn’s “right to have his life respected” through protection of the pregnant woman, the Convention would have specifically stated so, which was not the case”\(^{54}\); and also “it leads to the conclusion that not only the embryos before implantation, but also unborn or conceived children, have no inherent 'right to have [their] life respected' Their right would be dependent, not only on the respect for the pregnant woman’s life, but also on her will to respect the rights of her child. Such an approach is contradictory to the letter and spirit of Article 4(1) of the Convention”\(^{55}\).

Regarding the European Human Rights system the Inter-American Court has used different decisions of the European Commission on Human Rights and the European Court of Human Rights to reinforce its position that the embryo does not have the right to life and is not protected by article 2 of the European Convention on Human Rights\(^{56}\) (European Convention). Nevertheless, the Inter-American Court did not assess the reasons of those decisions, which are

\(^{52}\) Álvaro Paúl. Supra note 27. P. 216


\(^{55}\) Id.

based on a legal framework that differs from article 4.1 of the American Convention on Human Rights.

The distinction comes from the content of article 2 of the European Convention that does not expressly mention the protection of the right to life from the moment of conception, and the European Court has relied on this difference in the case Vo. v. France when it stated that: “Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected 'in general, from the moment of conception', Article 2 of the Convention is silent as to the temporal limitations of the right to life”.

That is why the European Court of Human Rights in the same case expressed that it “has yet to determine the issue of the “beginning” of “everyone’s right to life” within the meaning of this provision and whether the unborn child has such a right” and that “the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere”. This margin of appreciation is wider when “there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues”, and as a consequence of this “it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life”.

59 Id.
60 Id.
According to the position of the European Court, based on the silence of article 2 of the European Convention in regard to the protection of the right to life from the moment of conception and the doctrine of the margin of appreciation, each European State has the liberty to determine the protection of the right to life of the embryo, which prevents the possibility to affirm or deny that the embryo in general has or not the right to life.

Closely related to the above, in the case of *S.H. and others v. Austria* the European Court of Human Rights stated that “since the use of IVF treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is not yet clear common ground amongst the member States, the margin of appreciation to be afforded to the respondent State must be a wide one”\(^63\), and after assessing the arguments of the State the Court held that the prohibition “of ovum donation for the purposes of artificial procreation and of sperm donation for *in vitro* fertilization”\(^64\) that did not allow the petitioners “to fulfill their wish for a child”\(^65\) did not “exceeded the margin of appreciation” nor constituted a “breach of article 8 of the [European] Convention”\(^66\). Hence, this doctrine prevents the possibility of its use to support a general rule regarding not only the authorization or prohibition of the IVF treatment, but also the protection or not of the embryo’s right to life.\(^67\)

Therefore, the doctrine of the European Court which gives to the European states a wider margin of appreciation to ban or not IVF treatment and to admit or not the embryo to be a person and to protect his life cannot be used to assert the existence of a general rule that deprives the

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\(^63\) European Court of Human Rights. Supra note 61. Par. 97.
\(^64\) Id. Par. 115.
\(^65\) Id. Par. 108.
\(^66\) Id. Par. 115-116.
\(^67\) Indeed, the Grand Chamber of the European Court in this case pointed out the Directive 2004/23/EC of the European Parliament and of the Council dated 31 March 2004 which provides that: “(12) This Directive should not interfere with the decisions made by Member States concerning the use of or non-use of any specific type of human cells, including germ cells and embryonic stem cells. (…) Moreover, this Directive should not interfere with provisions of Member States defining the legal term “person” or “individual”. Cfr. European Court of Human Rights. Supra note 61. Par. 44.
embryo of his right to life and human being nature as the Inter-American Court has suggested in the case under analysis.

Moreover, the European doctrine could not fix in the Inter-American system because article 4.1. of the American Convention, as the European Court has stated, provides protection to the right to life in general from conception, and hence it does not give to American States parties of the American Convention on Human Rights the freedom to “choose to provide this protection from a particular stage of human development, since it is obliged to grant it” in general from the begging of the human life 68 nor “to determine how to protect life, since it is compelled to defend it by law” 69. In order to confirm this interpretation, “during the drafting of the [American Convention on Human Rights], the relevant norm was understood as recognizing personhood in the unborn, which is why Brazil proposed to suppress the phrase ‘and, in general, from the moment of conception’” 70 in order to allow “American countries to regulate the termination of pregnancies” 71, a proposal which failed under the argument expressed by Venezuela that “domestic law could not be used for determining international civil and political rights, and that the ACHR could make no concessions regarding the existence of the rights to life from the moment of conception, as it would be unacceptable for the [American Convention] not to establish such a principle” 72. The difference observed above between the European system and the Inter-American system clearly prevents the possibility to use the former to assess the interpretation of article 4.1. of the American Convention on Human Rights.

68 Álvaro Paúl. Supra note 27. P. 215-216.
69 Id.
Lastly, “according to the systematic argument, norms should be interpreted as part of a whole, whose meaning and scope must be established in function of the juridical system to which they belong”\textsuperscript{73} and the European Convention on Human Rights and other treaties used by the Inter-American Court to support its interpretation “lack the relevant features for being considered as instruments or agreements made as a consequence of or in connection with the Convention. Hence, they cannot be used as a means for interpreting the Convention. They neither refer, strictly speaking, to subsequent practice, to the way how States parties to the Convention apply this treaty, whereby showing their agreement regarding the Convention’s interpretation. It is evident that they do not fulfill Article 31(4) of the Vienna Convention’s requirement of being “relevant” to the case”\textsuperscript{74}.

3. The principle of the most favorable interpretation, and the object and purpose of the treaty and the expression “in general”

The Inter-American Court expressed, based on the affirmation that “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”\textsuperscript{75}, that “in application of the principle of the most favorable interpretation, the alleged 'broadest protection' in the domestic sphere cannot allow or justify the suppression of the enjoyment and exercise of the rights and freedoms recognized in the Convention or limit them to a greater extent that the Convention establishes”\textsuperscript{76}, therefore, and after referring to judgments of Constitutional Tribunals or Superior Tribunals from Germany, Spain, USA, Colombia, Argentina and México, that recognize the legitimate interest in protecting prenatal life, “but where this interest is

\textsuperscript{73} Inter-American Court of Human Rights. Case of González et al. ("Cotton Field") v. Mexico. Supra note 44. Par. 43.
\textsuperscript{75} Inter-American Court of Human Rights. Case of Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica. Supra note 4. Par. 258.
\textsuperscript{76} Id. Par. 259.
differentiated from entitlement of the right to life”77, it concludes that “the absolute protection of the embryo cannot be alleged, annulling other rights”78.

In regard to the application of the most favorable norm, as the internal norm cannot justify the affectation of the rights recognized by the Convention, the latter cannot be interpreted to restrict the enjoyment or “exercise of any right or freedom recognized by virtue of the laws of any State”79. In a case of conflict of norms “it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being”80. Therefore, “the most favorable alternative for the protection of the human rights enshrined in this Convention should always be chosen. As [the] Court has established, if two different norms are applicable to a situation, “the norm most favorable to the individual must prevail”81 and “the interpretation to be adopted may not lead to a result that "weakens the system of protection established by [the Convention]," bearing in mind the fact that the purpose and aim of that instrument is "the protection of the basic rights of individual human beings”82.

Thereby, if on one hand in vitro fertilization involves the treatment of the embryo as an object and means to solve a medical problem of the woman or men or both, considering the embryo as property of the parents83 whose future could be subject of contractual agreement84 and

77 Id. Par. 260.
78 Id. Par. 263.
81 Inter-American Court of Human Rights Case of Ricardo Canese v. Paraguay JUDGMENT OF AUGUST 31, 2004 (Merits, Reparations and Costs) Series C. No. 111. Par. 181. At: http://www.corteidh.or.cr/casos.cfm?&CFID=1601840&CFTOKEN=61820742
83 Martín Hevia and Carlos Herrera Vacaflor have stated that: “The IACHR did not contemplate this issue of IVF from the angle of property rights either. (…) If the problem is seen through the lens of property rights, the result might be that the frozen embryos belong jointly to the woman and the man as co-owners who each have individual veto power over uses of their property
on the other hand if “the embryo is a human being from the moment of his conception, [who] must be attributed human dignity, (…) he can never be a means to an end”85, because every human being “is an end in himself and should never be treated merely as a means to an end”86 and “no experiment can be undertaken if it is not justified by the benefits that can be derived from it for the human being that lends himself to experimentation” 87. Hence, according to the most favorable norm the right to life of the unborn child must prevail over the others rights involved in this case.

Relative to the judgments referred by the Court it is important to highlight that all are used to reinforce its point of view about the protection of the embryo, regardless that three of the six judgments cited come from Tribunals of States not parties of the American Convention. Moreover, the Inter-American Court did not cite judgments of the Constitutional Tribunal of Peru and the Constitutional Tribunal of Chile which both have recognized that the existence of a new human being begins with his conception, namely from the fertilization of the ovum by the spermatozoon, and not from the moment of the implantation88. Nor did the Court take into

84 Martin Hevia and Carlos Herrera Vacaflor have stated that: “There have also been decisions by local Latin-American courts on this issue. Recently in Argentina, in P., A. v. S., A. C., a couple made an agreement about cryopreserving their embryos through a contract stipulating that, in the case of the dissolutions of their marriage, the consent of both spouses would be required in order for a competent authority to determine the embryos’ fate”. Cfr. Martin Hevia and Carlos Herrera Vacaflor. Supra note 82. P. 22; Bonnie Steinbock, citing the case Kass V. Kass, states: “Unlike the Davises, Maureen and Steven Kass has executed informed consent documents regarding the disposition of their embryos, stating that the embryos would be donated for research in the event that the couple no longer wished to use them to instantiate a pregnancy”. Cfr. Bonnie Steinbock Supra note 34. P. 236.
85 Günter Rager. Supra note 32. P. 1053; English translation of the author. The original text in Spanish states: “Ninguna experimentación puede emprenderse i no está justificada por el beneficio que de ella pueda derivarse para el sujeto mismo que se presta para la experimentación”.
86 Tribunale Constituzionale del Perú. Expediente No. 02005-2009-PA/TC. Sentencia del 16 de octubre de 2009. ONG “ACCIÓN DE LUCHA ANTICORRUPCIÓN”. At: http://www.tc.gob.pe/jurisprudencia/2009/02005-2009-AA.html; In this judgment the Tribunal stated that: “este Colegiado se decanta por considerar que la concepción de un nuevo ser humano se produce con la fusión de las células materna y paterna con lo cual se da origen a una nueva célula que, de acuerdo al estado actual de la ciencia,
account that “the ACHR’s approach to the right to life could be considered as a guiding value of this regional system because it reflects the special importance which domestic legislation grants to the unborn in the context of the Americas. Indeed, many political constitutions—some of which were promulgated as recently as 2008 and 2010—protect life from the moment of conception” 89.

Finally, the phrase “in general” implies “that the rule on the protection of the right to life from the moment of conception may have some exceptions” 90. Nevertheless, “it cannot be granted only to certain categories of people: those born but not the unborn, wanted children but not the unwanted” 91. Therefore, “the derogation of the unborn child's life by allowing his death or destruction by a simple act of their parents would be a violation of this principle. Similarly, the derogation of the right to life from conception based on calculations of proportionality constitutes el inicio de la vida de un nuevo ser. Un ser único e irrepetible, con su configuración e individualidad genética completa y que podrá, de no interrumpirse su proceso vital, seguir su curso hacia su vida independiente. La anidación o implantación, en consecuencia, forma parte del desarrollo del proceso vital, mas no constituye su inicio. Por lo demás, aun cuando hay un vínculo inescindible entre concebido-madre y concepción-embarazo, se trata de individuos y situaciones diferentes, respectivamente: pues es la concepción la que condiciona el embarazo y no el embarazo a la concepción, y es el concebido el que origina la condición de mujer embarazada, y no la mujer embarazada la que origina la condición de concebido” Tribunal Constitucional Chileno. Sentencia del 18 de Abril de 2008. Causa 740-07-CDS. At: http://www.google.com/#q=tribunal+constitucional+chileno+sentencia+sobre+el+decreto+supremo+que+regula+la+distribuci%C3%B3n+de+la+p%C3%ADldora+del+d%C3%ADa&hl=en&ei=3p1XUbiZOpLuqwHOPYHIAw&start=10&sa=N&bav=on.2,or.r_qf.&fp=aa7899e64e1d28d6&biw=900&bih=355; In this case the Tribunal stated: “QUINCUAGÉSIMO: En efecto, si al momento de la concepción surge un individuo que cuenta con toda la información genética necesaria para su desarrollo, constituyéndose en un ser distinto y distinguible completamente de su padre y de su madre –como ha sido afirmado en estos autos–, es posible afirmar que estamos frente a una persona en cuanto sujeto de derecho. La singularidad que posee el embrión, desde la concepción, permite observarlo ya como un ser único e irrepetible que se hace acreedor, desde ese mismo momento, a la protección del derecho y que no podría simplemente ser subsumido en otra entidad, ni menos manipulado, sin afectar la dignidad sustancial de la que ya goza en cuanto persona. (…) SEXAGESIMOSEPTIMO: Que, en esta perspectiva, la duda razonable suscitada en estos sentenciadores acerca de si la distribución obligatoria de la “píldora del día después” en los establecimientos que integran la Red Asistencial del Sistema Nacional de Servicios de Salud puede ocasionar la interrupción de la vida del embrión, al impedirle implantarse en el endometrio femenino, genera, a su vez, una incertidumbre acerca de una posible afectación del derecho a la vida de quien ya es persona desde su concepción en los términos asegurados por el artículo 19 N° 1 de la Constitución. La referida duda debe llevar, de acuerdo a lo que se ha razonado, a privilegiar aquella interpretación que favorezca el derecho de “la persona” a la vida frente a cualquiera otra interpretación que suponga anular ese derecho”.

Álvaro Paúl. Supra note 27. P. 219. Such as for example: Article 19 of the Constitution of Chile; Article 4 of the Constitution of Paraguay; Article 45 of the Constitution of Ecuador; Article 37 of the Constitution of República Dominicana; Article 75.23 of the Constitution of Argentina; Article 3 of the Constitution of Guatemala; Article 67 of the Constitution of Honduras; Article 110.3 of the Constitution of Panama; Article 76 of the Constitution of Venezuela. All the constitutions can be consulted at: http://www.wipo.int/wipolex/es/details.jsp?id=2137

Id. P. 217.

Ligia Mariela De Jesús. Supra note 51. P. 123-124. English translation of the author. The original text in Spanish states: “Por lo tanto, no puede ser otorgado exclusivamente a ciertas categorías de personas: a los nacidos pero no a los no nacidos, a los niños deseados pero no a los no deseados”.

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89 Álvaro Paúl. Supra note 27. P. 219.
90 Id. P. 217.
91 Ligia Mariela De Jesús. Supra note 51. P. 123-124. English translation of the author. The original text in Spanish states: “Por lo tanto, no puede ser otorgado exclusivamente a ciertas categorías de personas: a los nacidos pero no a los no nacidos, a los niños deseados pero no a los no deseados”.

between the life of the unborn and the supposed right to privacy or the right to humane treatment of women undermine the Convention” 92. That is why “an interpretation in good faith in accordance with the ordinary meaning to be given to the terms of the treaty - in their context and the light of its object and purpose - shall lead to conclude that article 4.1 of the ACHR enshrined the protection of the right to life of the unborn child against any voluntary act aimed at his destruction, because clearly the Convention protect the human life in utero from the moment of conception”93, namely fertilization.

4. Conclusion

The Inter-American Court has based its judgment on false and incomplete information, which entails several argumentative problems that undermine the credibility of its judgment and affect the real scope of the right to life recognized in article 4.1 of the American Convention. Its interpretation of the term “conception” neither was made in good faith nor in the light of the object and purpose of the Inter-American Convention on Human Rights, weakening the Inter-American Human Rights system and opening the door to the culture of death.

92 Id. P. 124-125. English translation of the author. The original text in Spanish states: “La derogación de la vida del niño no nacido autorizando su muerte o destrucción por simple acto de voluntad de sus padres sería por lo tanto, una violación de este principio. Igualmente, la derogación del derecho a la vida desde la concepción en base a cálculos de proporcionalidad entre la vida del no nacido y el supuesto derecho a la privacidad o derecho a la integridad personal de la mujer atentaría contra la Convención”.

93 Ligia Mariela De Jesús. Supra note 51. P. 122; English translation of the author. The original text in Spanish states: “Una interpretación de buena fe y de acuerdo al sentido corriente de los términos del tratado ciertamente llevaría a concluir que el artículo 4(1) protege al niño no nacido contra (...) todo acto voluntario tendiente a su destrucción, ya que la Convención claramente protege la vida humana in utero desde el momento de la concepción”.