I. INTRODUCTION

People have a tendency to act somewhat impulsively when they are exposed to extreme situations. They lower the barriers of good manners, and certain characteristics of their personality are intensified. This effect can also be noted in institutions without clearly regulated decision-making processes.  

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processes, or whose outcomes depend on the decision of a handful of people. There are not many cases where international institutions are faced with these “extreme situations,” so observers must seize the opportunity to analyze the “personality” of institutions whenever they arise. The filing of Artavia-Murillo et al. (In Vitro Fertilization) v. Costa Rica\(^1\) was one of these moments for the Inter-American Court of Human Rights (IACtHR).\(^2\) This was so because this case dealt with the extremely controversial issue of pre-natal life, a topic on which people tend to have strong personal opinions. In fact, some IACtHR’s judges previously made their personal views explicit,\(^3\) seemingly in conflict with the text of the American Convention on Human Rights (ACHR).\(^4\) This case afforded a unique opportunity to determine the extent to which the decision-making process of the Court allows judges’ personal opinions to govern the Court’s decisions.

Interestingly enough, the issue of in vitro fertilization (IVF) becomes secondary in the Artavia judgment. Indeed, the ACHR was drafted before the development of this technique, so the IACtHR could have decided in favor of, or against, Costa Rica’s prohibition of practicing IVF. Either outcome would have had strengths and weaknesses. In Artavia, by contrast, some interesting features of the IACtHR’s decision-making came to the forefront. The IACtHR’s interpretation of Article 4(1) of the ACHR, and how this provision relates to abortion, was also an interesting feature of this case. The author’s interpretation of this Article has already been developed

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2. The Inter-American system was created within the context of the Organization of American States (OAS). It resembles to some extent the European system of human rights in its early years of existence, because there is a joint operation of a commission and a court of human rights. The IACtHR was established by the 1969 ACHR as the competent organ for the protection of this treaty’s wide catalog of human rights. Applicants do not lodge their applications directly with the IACtHR, but with the Inter-American Commission, which after a quasi-judicial procedure decides whether to file a case with the IACtHR. In the almost more than thirty-five years of operation of the IACtHR, it has issued nearly two hundred final judgments dealing with an extensive range of issues.

3. Ligia M. De Jesus, Post Baby Boy v. United States Developments in the Inter-American System of Human Rights: Inconsistent Application of the American Convention’s Protection of the Right to Life from Conception, 17 LAW & BUS. REV. AM. 435, 467–69 (2011) (both the President of the IACtHR, Diego García Sayán, and then judge Margarete May Macaulay, had strongly stated their opinions favoring abortion. Some of these positions were also made clear during the hearing of Artavia-Murillo).

in a different paper, so it will not addressed again, nor will this commentary focus on the merits of Artavia. This judgment will only be used for analyzing “in vitro” the decision-making process of the IACtHR. In doing so, this commentary will seek to appeal to both those who agree and those who disagree with the actual results of Artavia.

Each feature of the IACtHR’s decision-making process that this commentary addresses deserves a study of its own. Hence, this paper can only describe briefly the internal processes of the IACtHR. It is worth pointing out that in spite of the criticisms that this commentary makes of the decision-making process of the IACtHR, the author is firmly convinced of the extraordinary potential that a regional body could have for the application of human rights standards. Nevertheless, the author is also convinced that flattery is of no use when it comes to strengthening institutions. Only well-founded criticisms can help to build an Inter-American system that is stable and respected by different regional actors.

II. A PRELIMINARY ISSUE: DESCRIPTION OF ARTAVIA

Before going into this commentary’s main theme, it is necessary to briefly describe Artavia. The applicants challenged a decision of the Supreme Court of Costa Rica, issued in 2000, as incompatible with the ACHR. This domestic decision declared that an executive order regulating

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6. Only twenty States are under the IACtHR’s jurisdiction (out of thirty-five OAS Members). They are mostly Latin-American countries. The most recent submissions to the IACtHR’s jurisdiction occurred in 1998. This same year one of the only two English-speaking countries under the IACtHR’s jurisdiction denounced the ACHR. William A. Schabas, Canadian Ratification of the American Convention on Human Rights, 16 NETH. Q. HUM. RTS. 315, 316 (1998). William Schabas considers that the acceptance of the ACHR in the Americas is, proportionally, much less than that of its European and African counterparts. This situation may not improve if the IACtHR continues applying some doctrines inconsistent with the system of checks and balances and the traditional norms of international law (e.g., the conventionality control, described below). These doctrines may generate mistrust among States, especially because the IACtHR’s interpretation of the ACHR entered some time ago into the region of the legitimately disputable. This is aggravated by the lack of self-restraint in the IACtHR’s performance. This is why a judge of the IACtHR once stated that the IACtHR should be aware “that, as an autonomous and independent entity, there is no higher authority controlling it, which means that . . . it must strictly respect the limits of this function, and remain and evolve within the sphere appropriate to a [court].” Díaz-Peña v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 244 (Vio-Grossi, J., separate opinion) (June 26, 2012). Regarding the lack of universality as a problem of the system, see Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 340–42 (2003). Because of all of the foregoing, it seems that hopes for the universality of the Inter-American system (its application to all States of the Americas) will be just chimerical, unless some practices of the IACtHR are reformed.
IVF was unconstitutional. The Court’s first reason for this ruling was that the order breached the principle of legality because the Constitution of Costa Rica forbids any executive regulation of the rights involved in IVF (the right to life and the dignity of the human being). According to the Supreme Court of Costa Rica, the Constitution considers the conceived human being as a person who must be protected by the State and civil society. The Costa Rican Supreme Court’s second reason for banning this technique was that IVF constitutes an attack on the person, because it treated the embryo as an object, and it entails a high rate of embryonic death. It is for this reason that the Supreme Court ruled that this technique could not be allowed by law, “at least while its scientific development remains at the current state and entails conscious damage to human life.”

In response to the applicants’ request, the IACtHR concluded that the Costa Rican Supreme Court’s prohibition of IVF violated their rights to personal integrity, personal liberty, privacy, and the rights of the family. At times it is difficult to distinguish between the statements of the IACtHR and those that are simply given as examples taken from other international bodies. However, the reader can be sure that Artavia stands for a number of propositions. The IACtHR considered itself competent to adjudicate on reproductive rights, including people’s capacity to decide on the number and spacing of their children, and to achieve the highest standard of sexual and reproductive health. As to IVF and the pre-implantational embryo, the IACtHR ruled that the latter could not be understood as a person. In so holding, the IACtHR also seems to aim at preventing States from defining the embryo as a person in their domestic legal systems. The IACtHR also ruled that the prohibition of IVF in Costa Rica lead to an indirect discrimination against persons with disabilities (the IACtHR

8. *Id.* at ¶ 72 (the IACtHR did not give enough attention to this argument).
9. *Id.* at ¶ 74.
10. *Id.* at ¶ 76.
11. *Id.*
14. *Id.* at ¶ 256; cf. at ¶ 264.
15. This can be understood by reading *Artavia-Murillo* as a whole. The IACtHR held at ¶ 264 that “the embryo cannot be understood to be a person for the purposes of Article 4(1) of the American Convention.” Reading this paragraph in isolation, the IACtHR seems to limit this statement to the interpretation of the ACHR. However, reading *Artavia-Murillo* as a whole, it seems that the IACtHR wishes to have a wider effect.
included infertile people within this category), women, and those who have a poor economic situation.\footnote{16}

\textit{Artavia} went beyond the analysis of IVF. It also interpreted the relevant section of Article 4(1) ACHR, which 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.”\footnote{17} When interpreting Article 4(1) of the ACHR, the IACtHR used different techniques, but it failed to use them adequately.\footnote{18} This is why, among other things, it ruled that the ACHR’s use of the word “conception,” actually refers to “implantation,” and that the expression “in general” means “gradual and incremental.”\footnote{19}

The IACtHR ruled that the protection of the unborn is carried out “essentially through the protection of the woman.”\footnote{20} The IACtHR also ruled that the unborn has a right to life, but that it would not be appropriate to give it absolute protection.\footnote{21} It considered that this would be contrary to the protection of other human rights.\footnote{22} By doing this, the IACtHR seems to give abortion the status of a right under some circumstances, but it did not explain when.\footnote{23} \textit{Artavia} rules that the right to life is not absolute, but, at the same time, implies that other rights would enjoy this quality. In subordinating the right to life to other less fundamental rights, the IACtHR seems to forget that the ACHR establishes that “[e]very person has responsibilities to his family, his community, and mankind,” and that “[t]he

\begin{itemize}
\item \footnote{16} \textit{Id.} at ¶ 288–304.
\item \footnote{17} \textit{ACHR, supra note 4, at art. 4(1).}
\item \footnote{18} \textit{Cf. Controversial Conceptions, supra note 5.}
\item \footnote{19} \textit{Artavia-Murillo, Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶ 264.}
\item \footnote{20} \textit{Id.} at ¶ 222.
\item \footnote{21} \textit{Id.} at ¶ 258. In light of this ruling (that the unborn has a right to life), the previous case \textit{Xákmok Kásek} reveals its deficiency in relation to the unborn. In this case the IACtHR decided to exclude two unborn from the number of deaths that gave rise to compensation. \textit{Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 228} (Aug. 24, 2010).
\item \footnote{22} \textit{Artavia-Murillo, Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶ 258.}
\item \footnote{23} The IACtHR seems to give some forms of abortion the status of a right when it: states that the protection of the unborn should be gradual and that it cannot go against other rights established in the ACHR; quotes as being authoritative the decisions of bodies such as the Committee on the Elimination of Discrimination against Women (CEDAW) (according to which “the fundamental principles of equality and non-discrimination require that precedence be given to protecting the rights of pregnant women over the interest of protecting the life in formation”); and states that “[t]he Committee has established that the total ban on abortion, as well as its criminalization under certain circumstances, violates the provisions of the [CEDAW].” \textit{Artavia-Murillo, Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶ 227–28.} It also points out as examples to follow the legislation of countries such as the United States and Germany. \textit{Id. at ¶¶ 260–263.} \end{itemize}
rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."  

Artavia’s lack of appropriate legal techniques gives rise to many questions and some inconsistencies. To name but one, Artavia affirms that the implanted human being has a non-absolute right to life, but it later recommends approaches in which pre-natal life is considered to be a mere interest, instead of a right-holder.

Having said this, it must be stressed that the IACtHR is free to modify each and every one of Artavia’s rulings. This is so because the IACtHR does not operate within a system of binding precedent. The IACtHR tends to support its decisions by referring to its previous judgments, but the principle of stare decisis has no standing in the IACtHR’s practice. Indeed, the jurisprudence of the IACtHR has only been consistent in some areas, yet changing or erratic in others. Furthermore, except for some isolated

24. ACHR, supra note 4, at art. 32 (under the heading “Relationship between Duties and Rights.” The IACtHR’s case law seems to have consigned this provision to oblivion).
26. Id. at ¶ 260.
examples, the IACtHR tends to be unapologetic when departing from its previous decisions, thereby showing that it does not consider itself obliged to follow its previous judgments. The only way in which prior decisions of the IACtHR could have some real importance for subsequent cases, would be according to the civil law concept of jurisprudence constante, to which the IACtHR often refers. However, even the IACtHR’s use of this system could be contested. Be that as it may, a single decision creates no judicial pattern, so not even jurisprudence constante can be invoked in relation to pre-natal life.

The IACtHR ordered many remedies, among which were the following:

a) annulling the prohibition of IVF;

b) providing for implementing IVF, establishing “systems for the inspection and quality control of the qualified professionals and institutions that perform this type of assisted reproduction technique;”

c) making IVF gradually available as an infertility treatment or program at the Costa Rican Social Security Institute, “in


29. Of the examples given in the previous footnote, only the change affecting the use of ad-hoc and national judges was explained by the IACtHR. This change was so noticeable, that the IACtHR could not have done otherwise.

30. See Vincy Fon & Francesco Parisi, Judicial Precedents in Civil Law Systems: A Dynamic Analysis, 26 INT’L REV. L. & ECON. 519 (2006) (in relation to the distinction between stare decisis and jurisprudence constante); see also A. L. Goodhart, Precedent in English and Continental Law, L.Q. REV. 40 (1934). An example of the use of the concept “jurisprudence constante” is given by the “concurring opinion” of Gutiérrez-Soler v. Colombia, which argues against the reasoning in the dissenting opinion by making several references to the constant jurisprudence of the IACtHR (this opinion was given the name “concurring opinion,” in spite of the fact that it was signed by all the judges who voted in favor of the majority’s decision). Gutiérrez-Soler v. Colombia, Provisional Measures, Order of the Court, Inter-Am. Ct. H.R. (June 30, 2011).

31. The IACtHR’s practice seems to reveal that references to previous judgments are only illustrative. It is safe to say that the IACtHR considers its previous judgments to be more authoritative than those issued by courts of other jurisdictions (such as those of the ECtHR). Nevertheless, this authority cannot be equated with binding power.


33. Id. at ¶ 337.
accordance with the obligation to respect and guarantee the principle of non-discrimination;" and
d) implementing "permanent education and training programs and courses on human rights, reproductive rights and non-discrimination . . . for judicial employees in all areas and at all echelons of the Judiciary."

The judgment has both a concurring and a dissenting opinion. Judge García-Sayán is the author of the concurring opinion with which Judge Abreu-Blondet adhered. This concurrence simply restates the judgment’s ruling, but dwells somewhat more on the gradual implementation of Costa Rica’s obligation to include IVF treatments within its health system. The dissenting opinion was issued by Judge Vio-Grossi, who strongly criticized the majority’s decision.

It is not possible to refer to all of the various arguments of the dissenting opinion, so this commentary will focus on only a few. Judge Vio-Grossi begins his opinion by reiterating a previous criticism that is not particularly relevant to this commentary. Vio-Grossi then criticizes the perspective from which Artavia was addressed. This perspective would have ended up relegating Article 4(1)—the right to life—to a secondary position in relation to the other rights involved in the case. The dissenting opinion also complained that, in practice, the IACtHR ends up affirming that the expression “in general” means “exceptionally,” which is clearly against the text of the ACHR.

Vio-Grossi also criticized the mistakes of the majority when interpreting Article 4(1) in light of the Vienna Convention on the Law of

34. Id. at ¶ 338.
35. Id. at ¶ 341 (these programs must make special mention of the Artavia decision).
37. See id.
39. Vio-Grossi complains that judges of the IACtHR had tried in previous cases to use their concurring opinions as a way of censoring and silencing the minority’s opinions. See generally Eduardo Vio-Grossi, Constancia de Queja, con Relación a Parte del Voto Concurrente Conjunto Emitido con Ocasión de las Resoluciones “Medidas Provisionales Respecto de la República de Colombia, Caso Gutiérrez Soler Vs. Colombia”, “Medidas Provisionales Respecto de los Estados Unidos Mexicanos, Caso Rosendo Cantú y Otra Vs. México”, y “Medidas Provisionales Respecto de la República de Honduras, Caso Kawas Fernández Vs. Honduras” [Complaint Regarding a Section of the Concurring opinion in the Case of the Resolution “Provisional Measures in Regards to the Colombian Republic, Case Gutiérrez Soler v. Colombia”, “Provisional Measures in regards to the United States of Mexico, Case Rosendo Cantú v. Mexico”, and “Provisional Measures in Regards to the Republic of Honduras Caso Kawas Fernández Vs. Honduras’] (2010) (on file with author).
He criticizes the use of international instruments and domestic laws of non-member States as if they were the “context” of the ACHR, on the basis that they lack the features necessary to constitute context of the ACHR. Vio-Grossi also referred to the step backwards that was made by the IACtHR’s jurisprudence in relation to the right to life. The IACtHR formerly ruled that the right to life was a requirement for the enjoyment of all other rights, so that restrictive interpretations of it were inadmissible. In Artavia, by contrast, while recognizing that the implanted human being has a right to life, the IACtHR held that such right could be subject to a proportionality test where it is balanced with other rights.

The dissenting opinion also criticized the IACtHR’s ruling that the protection of unborn children must be essentially implemented through the protection of their mothers. Such an interpretation leaves the unborn unprotected, intertwining their fate to their mothers’ decision. Such an interpretation strays very far from the purpose of the ACHR which specifically sought to address the issue of abortion. Judge Vio-Grossi also stated that the IACtHR lacked good faith in its evolutive interpretation of the ACHR because it sought to suppress the effect of one of the provisions of this treaty. Vio-Grossi’s opinion ends by stating that the IACtHR stepped into the realm of rule-making, a function that belongs exclusively to the States. In doing so, the IACtHR distorted its judicial mission, so Vio-Grossi urged States “to exercise their normative function in the way they deem best.”

41. Id.
42. Id.
43. Id.
44. Id.
46. Id.
47. Cf., in addition to the dissenting opinion’s argument, it must be taken into account that during the discussion of the ACHR’s wording, the framers considered including a specific social right granting special protection to pregnant women. This would have been redundant if the end of Art. 4(1) would have been to protect women. The provision granting special protection to expectant mothers—as happened with all other social rights—was not included in the final draft of the ACHR. Inter-American Yearbook on Human Rights (1968), General Secretariat of the Organization of American States (Washington D.C. 1973).
49. Id.
III. EXTRA-CONVENTION JURISDICTION

A study dealing with the decision-making process of the IACtHR should firstly refer to the extent of this court’s jurisdiction. On several occasions the IACtHR has claimed to have jurisdiction over some treaties other than the ACHR. According to the IACtHR, these treaties became part of the human rights *corpus juris*.

Some of these claims are correct, because a number of Inter-American treaties, such as the Protocol of San Salvador, explicitly give jurisdiction to the IACtHR over certain rights. This extra-Convention jurisdiction, however, goes further than this as stated by then-ad-hoc Judge Ferrer-Mac-Gregor—currently a sitting judge. He also stated, in relation to the conventionality control, that the IACtHR may interpret “the American Convention, its additional Protocols, and other international instruments of the same nature that are integrated in said Inter-American *corpus juris*,” those of which are within the jurisdiction of the Inter-American Court.

This section will show the IACtHR’s broad understanding of human rights treaties that are supposedly part of the Inter-American *corpus juris*, and will refer to some effects of adjudicating on them.

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52. This paper refers in more detail to the “conventionality control” in a footnote in the section dealing with the IACtHR’s maximalist approach. In Spanish, the expression “control de convencionalidad” tries to emulate the expression “control de constitucionalidad” (constitutional review). In the abovementioned quote of Ferrer-Mac-Gregor, the conventionality control is given a different name. See Álvaro Paéz, *Translation Challenges of the Inter-American Court of Human Rights and Cost-Effective Proposals for Improvement*, 5 INTER-AM. & EUR. HUM. RTS. J. / REV. INTERAM. Y EUR. DD.HH. 3, 10–11 (2012) (on the different translations of this concept) [hereinafter Translation].

There are different ways of asserting jurisdiction in order to apply international treaties other than the ACHR. The IACtHR may explicitly declare the direct violation of specific Articles of some treaties, as it has done with those of the Inter-American Convention on Forced Disappearance of Persons.\textsuperscript{54} There is also an indirect way of asserting extra-Convention jurisdiction, by defining various concepts of the ACHR according to the legal definitions of other treaties. In some cases, it is important to interpret certain international obligations by taking into consideration what the different conventions provide for. The problem arises, however, when other treaties are used without further questioning, as if they were directly applicable by the IACtHR; or, as if the differences in wording and the existence of specialized bodies applying them (or the intentional lack thereof) were somewhat irrelevant.

The IACtHR has ruled that it cannot adjudicate a treaty that has been signed but not yet ratified.\textsuperscript{55} Among ratified instruments, the IACtHR has applied treaties with both a generalized acceptance in the Americas, and others with less widespread approval. Among the former, the IACtHR has referred, on some occasions, to the Vienna Convention on Consular Relations which has been ratified by all States in the continent.\textsuperscript{56} Something similar can be said of the Convention on the Rights of the Child\textsuperscript{57} and the International Labour Organization (ILO) Convention 29.\textsuperscript{58}

\begin{footnotes}
\item[55.] \textit{See} Baena et al. v. Panama, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶¶ 95–99 (Feb. 2, 2001) (when providing the aforementioned, the IACtHR went against the request made by the Inter-American Commission. Nevertheless, it reminded that Art. 26 Vienna Convention on the Law of Treaties requires States to abstain from committing acts against the object and purpose of a treaty that has been signed. \textit{See} Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 26 (Jan. 1980) [hereinafter \textit{VCLT}]).
\item[57.] Vilagrán-Morales et al. v. Guatemala (Street Children), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 194–95 (Nov. 19, 1999) (the IACtHR ruled: Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international corpus juris for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.) [hereinafter \textit{Street Children}]; \textit{see also} Street Children, at ¶ 195 (where the IACtHR quotes verbatim some Articles of the Convention on the Rights of the Child).
\item[58.] \textit{See} Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 156–57 (July 1, 2006) (where the IACtHR used the International Labour Organization Convention 29, regarding forced labor, to interpret the ACHR’s article concerning freedom from slavery).
\end{footnotes}
In *Miguel Castro-Castro Prison v. Peru*, the IACtHR relied on treaties pertaining to violence and discrimination against women, which had been ratified by Peru and the majority of the Organization of American States (OAS), at least by the time of the judgment. The IACtHR used these treaties regarding women as a reference for interpreting the scope of Article 5 of the ACHR regarding the right to humane treatment. The IACtHR also ruled that they would "complement" the corpus juris in relation to the international protection of women.

A significant problem in interpreting provisions of the ACHR by reference to other treaties, is that the IACtHR incorporates these interpretations into its case law, and may then apply them to other States that have not yet ratified the relevant treaties. The Court performed such a maneuver in *Yakye Axa Indigenous Community v. Paraguay*, where the IACtHR used the ILO Convention 169 on the Rights of Indigenous and Tribal Peoples for determining the extent of Article 21 of the ACHR (the right to property). Paraguay had ratified this treaty by the time of the judgment, but this was not the case for the majority of OAS Members. The IACtHR, however, later applied this same interpretation to Suriname, which is not party to ILO Convention 169. In doing so, it extended, in a rather creative way, the obligations emanating from an international

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59. *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 276 (Nov. 25, 2006). The treaties that were taken into consideration were the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Para," and United Nations Convention on the Elimination of All Forms of Discrimination against Women. The first treaty had not been enacted by the time of the facts, but it was by the time of the judgment, when most OAS members had ratified it (except for Canada and the United States). *See O.A.S., Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem do Para,” June 9, 1994, 33 I.L.M. 1534*. The second treaty had been ratified by the overwhelming majority of OAS members by the time of the facts. *See also U.N., Convention on the Elimination of All Forms of Discrimination Against Women, Jan. 1980, 19 I.L.M. 33* (the United States was the sole State that had not ratified by the time of the judgment).


61. *Id.*

62. *Id.*


This argument of the IACtHR's seems to be an a priori reasoning.

The IACtHR has also considered the State responsible for non-compliance with standards taken from non-binding instruments. For instance, in Fleury v. Haiti, the IACtHR explicitly declared that the State violated the ACHR's right to humane treatment because “the detention conditions endured by Mr. Fleury did not meet the minimum standards of detention required by the international instruments” (alluding to the United Nations Standard Minimum Rules for the Treatment of Prisoners).

Extra-Convention jurisdiction is visible at several points in Artavia, such as when developing the rights of persons with disabilities. The ACHR makes no mention of special rights of people with disabilities. The sole bases on which the IACtHR could have claimed authority to decide on issues related to disability are the provisions forbidding discrimination. Thus, Artavia looked for further bases in the U.N. Convention on the Rights of Persons with Disabilities, an Article of the “Protocol of San Salvador” (which is not subject to the jurisdiction of the IACtHR), and the Inter-American Convention on theElimination of all Forms of Discrimination Against Persons with Disabilities (which makes no reference to the individual petition system of the IACtHR). Based on the aforementioned provisions, the IACtHR ruled “States are obliged to facilitate the inclusion of persons with disabilities by means of equality of conditions, opportunities and participation in all spheres of society, in order to guarantee that the said limitations are dismantled.” It also ruled “that persons with infertility in Costa Rica, faced with the barriers created by the Constitutional Chamber’s decision, should consider that they are protected by the rights of persons with disabilities, which include the right to have access to the necessary techniques to resolve reproductive health
problems. These statements blatantly go beyond a simple prohibition of discrimination. The IACtHR took a similar approach when ruling on reproductive rights.

It was in its first advisory opinion that the IACtHR, based on the broad powers that the ACHR grants the IACtHR in consultative matters, ruled that it could interpret provisions alien to the ACHR when issuing advisory opinions. However, the IACtHR has extended these broad interpretive powers to its contentious jurisdiction. It did so in spite of the ACHR's narrower framing of this kind of jurisdiction. The IACtHR bases its application of other treaties partly on Article 29 of the ACHR. In broad terms, this provision states that the ACHR shall not be used for restricting other rights recognized by the State. Using Article 29 for claiming extra-Convention jurisdiction is, however, contestable. The reasons why require an in-depth analysis impossible in this commentary. Suffice it to

74. Id. at ¶ 293.
75. Id. at ¶¶ 144, 161, 277, 288.
79. For instance, not applying Convention 169 is not tantamount to using the ACHR for restricting other rights. Convention 169 would still bind Paraguay in the relevant fora, even if the IACtHR does not use it for adjudicating. Nevertheless, the IACtHR’s view is shared by many scholars. See, e.g., Cecilia Medina Quiroga & Claudio Nash Rojas, Sistema Interamericano de Derechos Humanos: Introducción a Sus Mecanismos de Protección, [Inter-American System of Human Rights: Introduction to its Protection Mechanism] Centro de Derechos Humanos, 82–83 (2007).
80. The main issue that must be determined is whether the “restrictions regarding interpretation” (heading of Article 29) are supposed to be applied by States in their domestic proceedings or also by the IACtHR in contentious proceedings. In this regard, it must be borne in mind that:

1) The State is the first interpreter of the ACHR (the IACtHR interprets it only once cases are lodged before it, whereas States must interpret it in relation to specific cases and in areas that have not yet been addressed by the IACtHR);
2) Art. 29(a) refers to some kind of prohibition of abuse of rights (similar to that of Art. 17 of the European Convention on Human Rights), which establishes
say that it goes against the spirit of the ACHR to hold that Article 29 gives the IACtHR jurisdiction for applying more favorable treaties. If this provision is interpreted as granting extra powers to the IACtHR, it could also be argued that the IACtHR has the jurisdiction to issue judgments on “other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government” (also referred to in Article 29).81 This would give the IACtHR an absolute law-making power in the area of human rights, rendering useless the long discussions that took place when determining the specific wording of the rights enshrined in the ACHR. Indeed, the framers of the ACHR “went to considerable effort[s] to negotiate and adopt their own regional human rights treaty. They did not reduce the treaty to a local enforcement mechanism for the global Covenants.”82 In addition, such interpretation would be in stark opposition to Article 31, which establishes that other rights and freedoms can be included in the protection system of the ACHR by following the amendment procedures established in this very treaty.83

The legitimacy and power of a court are not based on its judges’ knowledge, expertise or originality, which may ultimately be surpassed by those of an expert council of university professors. Legitimacy and power stem mainly from the mandate that States have given a court for interpreting specific international instruments. These powers are explicitly

prohibitions to any “group, or person,” toward which only the State has jurisdiction;
3) Art. 29(b) forbids using the ACHR for “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party.” So, if it is understood that the IACtHR should apply Art. 29, the aforementioned provision would end up giving the IACtHR jurisdiction for judging on domestic laws (preliminary drafts of the ACHR not only referred to “laws,” but also to “customs”);
4) The prohibition on excluding “other rights or guarantees that are inherent in the human personality” would grant the IACtHR an unlimited and unrestricted power;
5) Art. 29 is not located in “Part II–Means of Protection,” the section that regulates the IACtHR and its power, but in “Part I–State Obligations and Rights Protected” (but not within the chapter regulating rights and freedoms under the IACtHR’s jurisdiction); and
6) The heading of Art. 29 is “Restrictions Regarding Interpretation” (the Spanish version is “Normas de Interpretación” [Rules of Interpretation]), and if Art. 29 is read as giving extra-Convention jurisdiction to the IACtHR, it would not be a restriction, but an extension of its interpretive powers. ACHR, supra note 4, at art. 29(a) & (b).
81. ACHR, supra note 4, at art. 29(c).
82. Neuman, supra note 50, at 115.
83. ACHR, supra note 4, at art. 31.
established in the treaties that give jurisdiction to courts. Hence, if judges start applying treaties over which they have no jurisdiction according to their courts' founding instruments, they will be distancing themselves from the source of the power that was given to them. They would be undermining their legitimacy.

When it is only one judge who fails to limit him or herself to applying only the treaties for which his or her court has jurisdiction, States have the easy option of not re-electing him or her for a further period. By contrast, when an entire international court distances itself from its source of legitimacy, States are not left with many options. They may accept these new powers arrogated by the court, modify the procedural and interpretive rules of the court, or, simply denounce the treaty that gave the court its powers. In other words, if international courts arrogate to themselves jurisdiction over treaties other than those over which they have explicit competence—regardless of whether these treaties have been ratified by the State against which they are applied—they will be taking a path that may have extremely serious consequences for the system as a whole. These assertions are better understood in light of the criticisms of the IACtHR generated by Artavia in Chile, the author's home country. These criticisms were even stronger than those formulated in some cases against Chile itself. 84

IV. MAXIMALIST APPROACH

A court dealing with human rights cases may take a more minimalist or maximalist approach to adjudication. 85 An international human rights court that took a minimalist approach would refer only to the main issue of a case, abstaining from additional comments, even if they were relevant for


85. Cass Sunstein refers to such a distinction, but he does not apply it to courts' fact-finding. This paper's account will make some reference to Sunstein's theory, but does not try to mirror it. In fact, this paper calls minimalism what may be considered subminimalism in Sunstein's theory. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 25 (First Harvard University Press paperback edition, 2001) [hereinafter SUNSTEIN].
the present or future cases. At the opposite extreme there is the maximalist approach, both regarding facts and law. A court with this approach will try to refer to each of the applicant’s arguments, aiming to establish what happened in relation to each one of the unclear facts of a case. Such a court will also try to establish many abstract rules. Of course, no court will necessarily always be, and in every respect, minimalist or maximalist. There are, however, some courts that display tendencies in one way or the other.

Between the minimalist and maximalist approach there is a moderate position. A court adopting this position will aim at referring exclusively to a case’s core issues and the closely connected ones. It will establish only rules that are applicable to the current case and to future identical cases. An international court that is aware of its limitations will take this position. Such a court acknowledges the difficulty in establishing the truth of what happened in a particular case, due to its temporal and spatial distance from the time and place where the facts occurred, and probably also because of the insufficiency of its financial resources. This approach is consistent with the principle of subsidiarity, which will be described below.

The IACtHR finds itself within the courts that have a maximalist approach. Some manifestations of this position are its attempts to determine even the most minimal details of the facts that are related to the applicants’ claims, its custom of expanding the reach of its case law by issuing extensive judgments, and its enunciation of many abstract general principles.

86. Cass Sunstein considers that minimalists seek to rule narrowly rather than broadly. In a single case, they do not wish to resolve other, related problems that might have relevant differences. They are willing to live with the costs and burdens of uncertainty, which they tend to prefer to the risks of premature resolution of difficult issues. Sunstein also considered the U.S. Supreme Court Chief Justice Rehnquist to be an example of minimalism. Cass R. Sunstein, Testing Minimalism: A Reply, 104 MICH. L. REV. 123, (2005) [hereinafter Testing Minimalism]; see also Robert Anderson IV, Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court, 32 HARV. J.L. & PUB. POL’Y 1045 (2009).

87. Sunstein understands maximalists to be “those who seek to decide cases in a way that sets broad rules for the future and that also gives ambitious theoretical justifications for outcomes.” SUNSTEIN, supra note 85, at 9–11 (where U.S. Justices Scalia and Thomas are said to be maximalists in relation to the setting down of broad rules).

88. See Álvaro Paul, In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights, 55 REV. I.I.D.H. 57, 79–81 (2012) (The IACHR has even referred to the personality of the alleged victims within the “proven facts.” Many of these facts are not necessary for solving a case, and they are sometimes proven with a “minimal” standard of proof).

89. E.g., the facts of the Barrios Altos case dealt only with a self-amnesty law issued in Peru, but the IACHR’s decision also referred other kinds of amnesties, statutes of limitation, and “the establishment of measures designed to eliminate responsibility.” Barrios Altos v. Peru, Merits,
A concrete example is the IACtHR’s response to States’ acknowledgements of responsibility. While the European Court of Human Rights (ECtHR) tends to close a case as soon as it receives an acknowledgement of responsibility, the IACtHR tries to issue, nevertheless, a detailed account of the actual facts that gave rise to the case. There are several reasons that could justify this attitude, for instance, the restorative effect that these declarations could have for the victim. There is, however, an important problem with the IACtHR’s stance on acknowledgements of responsibility. This lies in the fact that it is very difficult to reach a detailed account of the actual facts of a case when the State decides not to oppose the version of the facts that is alleged by the applicants, because there will be no real adversarial proceedings. This difficulty is enhanced by some practices of the IACtHR. First, where the respondent State concedes the applicant’s factual allegations, the IACtHR


91. For some of the pros and cons of responsibility acknowledgments, see James L. Cavallaro & Stephanie Erin Brewer, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, 102 AM. J. INT'L L. 768, 808–16 (2008).
requires only a low standard of proof. Second, once the State has accepted an allegation, the IACtHR refuses to admit evidence aimed at undermining it. Third, once the State has acknowledged its responsibility, the IACtHR has accepted further claims by the applicant, without giving the State as full an opportunity to respond to these new allegations as it would have had for the original allegations. Due to this lack of an adversarial process, it is not surprising that the IACtHR has made mistakes. This happened in the case of the “Mapiripán Massacre.” There, the IACtHR named some people who had been allegedly killed in a massacre, but it then transpired that some of them were alive or had died in different circumstances.

The IACtHR’s maximalism is evident in Artavia. The first example is that the applicants only referred to IVF, but the IACtHR went beyond that, addressing the issue of pre-natal life and abortion. A second example is the IACtHR’s analysis of the facts of the case which gave a very detailed account of the personal situation of each one of the alleged victims. Finally, the IACtHR referred to several abstract concepts and general principles. The extent of these concepts and principles will probably need to be qualified in the future, as has happened with other issues, such as the impossibility of applying a statute of limitations to human rights violations. This is due to the inherent difficulty that exists in drawing broad general principles.

In some maximalist decisions, such as Artavia, there are often abundant declarations, examples, and references to international bodies. This makes it more difficult to know if some statements form part of the ratio decidendi or of the obiter dicta of the case. This distinction is fundamental for a court aspiring to have its precedents applied by domestic State bodies, as the IACtHR claims with its doctrine of the control of

92. See Paúl, supra note 88, at 94–95.


96. Id.


98. E.g., id. at ¶ 256, 286 (“Principle of gradual and incremental—rather than absolute—protection of prenatal life”, or the “principle of the peremptory right to equal and effective protection of the law and non-discrimination.”).

conventionality or control of conformity with the Convention. At times it is hard to determine whether the IACtHR is adopting statements of other bodies that are quoted within the judgment as its own.

A maximalist court that tries to analyze in detail each and every one of the facts and juridical arguments alleged by the parties will end up spreading itself too thin. It will probably not be able to address all of the matters and arguments raised by the parties. In the case of the IACtHR, its desire to address even the minuscule facts of a case has, more than once, co-existed with the IACtHR’s dismissal of some important claims. This ends up creating suspicion among those whose claims are not addressed. In Artavia, for instance, one of the petitioners requested the IACtHR declare a violation of the alleged victims’ rights established in Article 4(1) ACHR. The IACtHR, however, did not refer to this, in spite of its importance. Another example is that the IACtHR explicitly decided not to address some of the State’s claims regarding the negative effects of IVF, arguing that the decision would be limited to controversies that had been addressed by the Constitutional Chamber of the Costa Rican Supreme Court. This was

100. The IACtHR’s unconventional doctrine of the control of conventionality requires domestic courts and all other domestic public bodies to apply the ACHR and the IACtHR’s interpretations of it, even when they are clearly against some domestic laws, including the constitution. This doctrine is highly contestable and would be difficult, if not impossible, to apply in practice. For a favorable view of this doctrine, see Oswaldo R. Ruiz-Chiriboga, The Conventionality Control: Examples of (Un)Successful Experiences in Latin America, 3 INTER-AM. & EUR. HUM. RTS. J. / REV. INTERAM. Y EUR. DD.HH. 200, 200–19 (2010). For a critical view of it, see Castilla Juirez, supra note 38, at 51–97; see also Ezequiel Malarino, Acerca de la Pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales Nacionales [In the Matter of the Alleged Mandatory Jurisprudence of the Inter-American Agencies for the Protection of Human Rights and the National Court], in SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL 435, 25–61 (Christian Steiner ed., 2011). Similarly, some highest courts of member States also have critical views of the IACtHR’s doctrine of the control of conformity with the Convention, see Suprema Corte de Justicia [SCJ] [Supreme Court of Justice] 22/2/2013, Judgment No. 20, IUE 2-109971/2011, (Uru.) (Dec. 24, 2013), available at http://medios.elpais.com.uy/downloads/2013/sentenciascj.pdf (last visited Oct. 17, 2014).


103. E.g., the effects in the health of women and their children, in the legal system, and when cryoconserving embryos. Id. at ¶¶ 134–35.

104. Id. at ¶¶ 134–35 (the IACtHR based this decision on an alleged requirement of the subsidiarity principle. This statement of the IACtHR is obscure, because this court tends to limit the discussion only in relation to the facts that are alleged, but not in relation to the arguments raised by the
done in spite of the direct relation existing between these allegations and the State’s prohibition of IVF. Something similar happened with the IACtHR’s decision not to address the State’s petition to grant a margin of appreciation. In these latter two cases, the IACtHR’s way of proceeding not only excluded some arguments—which contrasts with the IACtHR’s maximalist approach—but also limited the State’s possibility to defend itself. This is not consistent with the IACtHR’s position in *Artavia* toward the claims of the applicants and the Commission because they had no more limitation than to refer to the account of the facts given in the Commission’s report.

Cass Sunstein considers that courts adopting a maximalist approach, in relation to the setting of rules and the giving of theoretical justifications, are more likely to make mistakes and are less compatible with liberty amid pluralism, something central to democracy. In addition, the IACtHR’s maximalist approach increases its chances of behaving inconsistently. This happens because it is impossible for a court to analyze every single detail related to a case; so the IACtHR will end up analyzing scrupulously some facts and arguments in certain matters, but not in others. This behavior contrasts with the more moderate position of the ECtHR, which tends to address only those issues that are necessary for deciding a case, establishing only narrow principles. Such an attitude gives the ECtHR the appearance of being more predictable and impartial.

V. THE USE OF SOFT LAW, CASE DECISIONS, AND OTHER NON-BINDING INSTRUMENTS

The IACtHR tends to make reference to non-binding treaties, soft law, and domestic and international judgments, often to justify its own decisions. However, it does not clarify the value it gives them. The use of non-binding instruments may be necessary in some specific situations. Nevertheless, it has disadvantages that suggest leaving such use only for parties. Besides, those opposed to IVF at the domestic level made similar claims to those of the State. *Id.* at ¶ 71.

105. This is described below, under the heading “IX. Uniformity of Appreciation.”


108. For an example of the ECtHR’s practice of analyzing only the main alleged violations of a case, see Fernández Martínez *v.* Spain (App. No. 56030/07) Eur. Ct. H.R. ¶ 108 (June 12, 2014).

109. This can be seen in most cases of the IACtHR, so it is not necessary to give specific examples. Regarding the use of comparative law by courts in general, see Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1217–37 (1998).
exceptional circumstances. One of the problems with this technique is that it may place binding instruments at the same level as non-binding ones, as if this difference, which is essential in international law, was irrelevant. Indeed, at times it appears that the IACtHR requires member States to abide by norms taken from some non-binding instrument and not from the ACHR. 1110 This is complex because members of the OAS "did not simply delegate to the Court the task of adopting whatever standards it chooses from a future corpus of soft law texts." 1111 Treating soft law as if it were applicable law may also have the collateral effect of generating, in States, a higher reluctance to agree on non-binding instruments and non-directly-enforceable international treaties.

On the other hand, the unlimited use of international instruments also favors their consideration out of context, because the reader of the IACtHR's judgments may not be aware of the circumstances surrounding each one of the agreements and decisions that are quoted. This is especially complex when the IACtHR quotes only half or part of a sentence. Finally, the use of case law from other jurisdictions inevitably leads to dismissing the differences in wording that exist between the legal provisions that courts are supposed to apply. For instance, in Artavia, the IACtHR gave a disproportionate importance to European judgments when defining the legal status of the embryo. 1112 It did so in a way that dismissed the fundamental difference that exists between the wording of the ACHR and of the European Convention on Human Rights. 1113 Such a difference was clearly perceived by the ECtHR, as it can be read in a paragraph that was, ironically, quoted by the IACtHR:

> 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 and, in particular, does not define "everyone" ("toute personne") whose "life" is protected by the Convention. 1114

The use of non-binding instruments is also complex because the IACtHR ends up utilizing local or different regions' instruments for interpreting a treaty framed within a particular region. The ACHR's

111. Neuman, supra note 50, at 115.
framers were intent on giving this treaty a distinctive hallmark according to the peculiarities of the Americas. This is why one author remarked that the IACtHR’s extensive use of the ECtHR’s case law could prompt States to complain that they had agreed to abide by the ACHR and not by several decades of ECtHR’s case law.\textsuperscript{115} He even affirmed that States had apparently done so at the OAS.\textsuperscript{116} The IACtHR may also quote some U.N. treaties that do not enjoy a wide acceptance, or which do enjoy it only because they did not establish a jurisdictional system for enforcing compliance with them (a role that the IACtHR seems to try to fulfill).

Ruiz-Chiriboga, a former senior attorney of the IACtHR, considers that importing concepts and definitions from other human rights systems dismisses the fact that the IACtHR owes its existence to the Inter-American system.\textsuperscript{117} It also overlooks that judgments of other regions are the result of an analysis of the existing consensus among the States of these other regional systems. Hence, importing these decisions without any further analysis entails the imposition in the Americas of the consensuses that were reached on a different continent. This holds especially true in relation to the ECtHR’s case law, which according to Ruiz-Chiriboga is quoted with particular ardor by the IACtHR.\textsuperscript{118} Finally, using foreign instruments may result in ignoring consensuses that States in the Americas have actually reached.\textsuperscript{119} Somebody may argue that using foreign consensuses may not be formally adequate, but that it ends up being more protective of human rights. This is, however, not necessarily so. In fact, disregarding the ACHR may result in granting less human rights.\textsuperscript{120}

One of the most relevant criticisms to this technique is the IACtHR’s lack of clear criteria for selecting the documents and judgments that it quotes. In Artavia, for instance, the reader may wonder why the IACtHR

\begin{itemize}
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{118} \textit{Id.} at 179.
\item \textsuperscript{119} \textit{Id.} at 178–80.
\item \textsuperscript{120} See, e.g., Boeglin Naumovic, \textit{ supra} note 115, at 25–26 (wondering whether the IACtHR’s advisory opinion No. 4 was too restrictive because of being based on a decision of the ECtHR, in spite of the fact that the European Convention’s text would be more restrictive than the ACHR in the matter of non-discrimination).
\end{itemize}
chose to quote court decisions of the United States and Colombia, instead of those of Peru and Chile, which had contrary outcomes; why did it quote Irish law for referring to the embryos’ status before implantation, but not after that moment, when the lives of unborn children and their mothers have equal constitutional protection; why did the IACtHR not stress, when quoting the ECtHR, that this court grants States a high margin of appreciation for deciding on the protection of pre-natal life. In other words, the use of instruments of other jurisdictions, unless they cover the totality of a particular region or describe a legal system in detail, allow questioning the impartiality of the court that chooses the documents it quotes at its discretion. If the IACtHR uses this technique, it should not be surprised if some readers wonder whether it is judging in accordance with law or with the personal preferences of its judges. In fact, Ruiz-Chiriboga has already been critical in this regard of a case of discrimination. He affirmed that the IACtHR referred to domestic legislation of States, regardless of whether they were under the IACtHR’s jurisdiction, only when it served its purposes, avoiding all references to domestic decisions that went against its own arguments.

VI. INTERPRETATION

The IACtHR’s practices when interpreting the ACHR are very much related with the foregoing theme. This issue is in itself one of high complexity, which would require an in-depth study. Hence, this commentary can only outline some of the main aspects of the interpretive mechanisms used by the IACtHR. It is important to note that the following paragraphs are not suggesting that the IACtHR use an originalist system of interpretation. This section is only aimed at highlighting some difficulties that result from not following more objective criteria when interpreting a legal document.

A. Interpretation According to the Rules of the Vienna Convention

On several occasions the IACtHR has stated that the VCLT’s interpretation rules are the principles guiding its interpretation of the

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122. Id.  
123. IR. CONST., 1937, art. 40(3)(3) (“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”).
124. Ruiz Chiriboga, supra note 117, at 188; see also Neuman, supra note 50, at 114 (“[T]he importation of soft law standards more likely results from pragmatic, institutional considerations.”).
ACHR. The VCLT not only sets out the criteria whereby a norm must be interpreted, but it also enshrines a system of precedence between these different criteria. It states that treaties should “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Hence, the first thing that must be taken into account when interpreting a treaty is its wording, which must be interpreted according to the usual meaning given to the relevant words according to the object and purpose of the treaty. If the wording is clear, the interpreter should not pursue the next interpretive criteria.

This seems to be very clear, but it is worth giving an example. When the ACHR forbids all forms of “exploitation of man by man,” the word “man” must be read according to its ordinary meaning. However, the word “man” has several ordinary meanings, such as “human being,” and “adult male,” among others. Hence, the ordinary meaning of the word is not enough for interpreting it, and the reader must take into account the context of this Article (which is not the same as when the ACHR refers to the “right of men and women of marriageable age to marry and to raise a family”). Finally, the reader must analyze the object and purpose of the treaty, which is the judicial protection of a certain number of human rights, and determine whether this interpretation is compatible with this object and purpose. As a result, it will be concluded that the word “man” refers to “human being.” There are moments when the “context” may be found not only in the convention itself, but also in some other treaties or related agreements. Article 31(2) of the Vienna Convention on the Law of Treaties (VCLT) gives an exhaustive list of these instruments. Besides the foregoing, the VCLT refers to some supplementary means of interpretation,


126. VCLT, supra note 55, at art. 31(1).


128. ACHR, supra note 4, at art. 21(3).


130. ACHR, supra note 4, at art. 17(2).

such as the preparatory works of a treaty.\textsuperscript{132} These can be used if the previous rules are not enough in themselves to interpret a treaty.

On more than one occasion the IACtHR has failed to apply these interpretive methods correctly.\textsuperscript{133} In fact, in some cases the IACtHR has paid little attention to the text of the ACHR, which brings about the danger of transforming the wording of the treaty into something “banal and of little relevance.”\textsuperscript{134} This has happened, for instance, in relation to the right to equality,\textsuperscript{135} and with the expulsion of aliens whose presence in a State is blatantly unlawful.\textsuperscript{136} This may create the impression that the scope of the ACHR’s provisions depends on the will of the IACtHR’s judges.\textsuperscript{137}

In Artavia this problem was manifest when, after recognizing that there are different opinions as to when life begins, the IACtHR ruled that it could not give preference to one kind of scientific literature over another.\textsuperscript{138} The IACtHR failed to note that it is the ACHR itself which adopts a “preference.” The text of the treaty is clear when stating that there is a right to life from the moment of conception (even though it may not always be protected by law). The IACtHR makes another mistake when interpreting the word conception as meaning implantation. Such understanding is neither the ordinary nor the legal meaning of the term conception. The redefinition of this word was based exclusively on the declaration of expert witness Zegers, in total disregard of a great number of legal instruments in the Americas referring to conception.\textsuperscript{139} This term had also been

\textsuperscript{132} VCLT, supra note 55, at art. 32.

\textsuperscript{133} This problem does not only affect the IACtHR. For instance, former Commissioner Shelton stated that the Inter-American Commission of Human Rights’ interpretation of Art. 4(1) in the Baby Boy case had “major problems arising largely as a result of . . . ignoring the existence of the canons of interpretation codified by the Vienna Convention of the Law of Treaties.” Dinah Shelton, Abortion and the Right to Life in the Inter-American System: The Case of “Baby Boy”, 2 HUM. RTS. L.J. 309, 313 (1981).

\textsuperscript{134} Ariel E. Dulitzky, El Principio de Igualdad y No Discriminación [The Equality and Nondiscrimination Principle]. Claroscuros de la Jurisprudencia Interamericana, 3 ANUARIO DD.HH. 15, 17 (2007).

\textsuperscript{135} Id. at 17–18.

\textsuperscript{136} ACHR supra, note 4 at art. 22(6) (“An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.”); see also Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 158 (Oct. 24, 2012) (the IACtHR is making absolute abstraction of the requirement of “lawfulness” when interpreting the ACHR).

\textsuperscript{137} Dulitzky, supra note 134, at 19.


\textsuperscript{139} See Controversial Conceptions, supra note 5, at 219 (showing that many constitutions of the region are establishing an explicit protection of the unborn from the moment of conception).
interpreted, by domestic courts, as being a synonym for fertilization. Even in the Inter-American Commission's Baby Boy case the two dissenting opinions equate conception to fertilization (this notion was taken as a given, and was not contested by the majority). A dismissal of the text of the ACHR is also noticeable when the IACtHR rules that the expression "in general" means "gradual and incremental according to its development." The same can be said regarding the IACtHR's ruling that the provision protecting life from the moment of conception is essentially aimed at protecting women. In these cases, the IACtHR has added qualifications that do not exist in the ACHR. As a result, the "general" protection of the unborn becomes "exceptional." Judge Vio-Grossi's dissenting opinion deals with this issue in detail.

When interpreting according to the rules of the VCLT, the IACtHR also fails to understand fully what constitutes the "context" of the ACHR. While the VCLT, codifying international custom, specifically defines what constitutes a treaty's context, the IACtHR tends to extend it to all of the corpus juris of international law. This criterion, instead of being a guide for interpreting law, may become a mechanism for creating law, as was


143. Id. at ¶ 222.

144. VCLT, supra note 66, at art. 31(2), (3):

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
stated when referring to the use of soft law and other non-binding instruments when interpreting the ACHR.

B. Evolutive Interpretation Without Objective Parameters

Evolutive interpretation is in itself a developing concept "whose contours are as yet quite unclear." However, there seems to be a consensus in international practice that a treaty may evolve if it utilizes "evolutive terms," this means open-ended concepts, for defining the content of a particular right. This method of interpretation may be used for extending the content of a right in a way that was not foreseen by the framers of a treaty, or for departing from precedents. However, evolutive interpretations cannot derive from international treaties "a right that was not included therein at the outset," especially when its "omission was deliberate." Indeed, "[t]he only matter which can be evolutively interpreted—and perhaps thereby expanded into unforeseen fields of application—is a matter which is already explicit or implicit in the wording of the text." A fortiori, an evolutive interpretation should not contravene the express wording of a treaty. This is why, for instance, the European system ended the death penalty through the ratification of additional protocols to the European Convention, even though such punishment was practically extinct in Europe.

In spite of the foregoing, the IACtHR seems to consider itself absolutely free to determine when and how the ACHR evolves. The

145. Arato, supra note 127, at 444 n.5 (referring to an argument of Malgosia Fitzmaurice).

146. Id. at 468, 476 (Arato refers to a more contested rationale for evolution, one based on the object and purpose of a treaty. He considers that an evolution based on this rationale could only be used when it is necessary for giving effect to the object and purpose of a treaty, and that "mere convenience" would be an insufficient justification for using this rationale, since it could lead to a "superfluous application of evolutive interpretation", and could "seriously undermine certainty in the law of treaties, since anything could be judged to be evolutive." However, even evolution based on the object and purpose of a treaty cannot go against the explicit wording of a treaty.).


149. The ECtHR has stated hypothetically that some exceptions to human rights established in the European Convention may be considered abrogated if there is a generalized abolition of them, “removing a textual limit on the scope for evolutive interpretation of Article 3.” Soering v. The United Kingdom, 161 Eur. Ct. H.R. (Ser. A), ¶ 103 (1989); see also Öcalan v. Turkey, 2005-IV Eur. Ct. H.R., ¶¶ 163–65 (by contrast, in Artavia-Murillo, the IACtHR enlarged an exception to a particular right). Even a narrow hypothesis like that of the ECtHR could be argued against, because the abolition of a particular practice does not necessarily imply the will of States to limit their possibilities of revisiting previous policies.
IACtHR even incorporates rights that were explicitly excluded from this treaty, ruling against the ACHR’s wording, as happened in *Artavia*. In contrast with the IACtHR’s practice, the ECtHR utilizes some mechanisms for determining when it is possible for a treaty to evolve, and it will not establish rights that the framers of the European Convention excluded on purpose. The ECtHR will allow the evolution of rights to situations unforeseen by the framers of the Convention, but only when this treaty uses open-ended terms. It will also follow some more or less objective criteria allowing it to reach these kinds of conclusions. For instance, the ECtHR often uses the concept of consensus among member States of the Council of Europe. Judge Pérez-Pérez once complained that the IACtHR dismisses the need of reaching a consensus among the States Party, before considering that the ACHR has evolved. Consensus will not always be enough before the ECtHR. For instance, in *A, B & C v. Ireland*, the ECtHR determined that a broad consensus among European States about permitting abortions when the mother’s health is at stake was not enough for the Irish broad protection of the unborn to be disproportionate.

**C. Most Favorable Interpretation and the Object and Purpose of a Treaty**

*Artavia* also claims to interpret the ACHR in accordance with the “principle of the most favorable interpretation” and according to the “object and purpose of the treaty.” The IACtHR dealt with these two criteria at the same time, despite their differences. These two criteria are more complex than what they may appear at a first glance.

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1. Most Favorable Interpretation

The criterion of the most favorable interpretation (pro homine or pro persona)\textsuperscript{155} has some drawbacks in relation to the rights or interests underlying the State's position. This assertion requires explaining a preliminary issue. Contentious proceedings before the IACtHR appear as cases where there is a simple contest between the Commission and applicant, on one side, and the State on the other. The reality is, however, more complex. Appearances often conceal a clash of rights where the State is defending the position or rights of other people. In fact, in some cases the position represented by the State has been previously argued and adjudicated in domestic courts as a matter of human rights. It may even happen that, because of political agendas, the Government may not wish to further "the State's position."\textsuperscript{156} This leads to a situation where the State's formal position is not its material position.

A case where the rights or interests underlying the State's position were clear—regardless of whether the merits of this case are agreed with—was that of \textit{The Last Temptation of Christ}.\textsuperscript{157} At the international level, this was simply a case of freedom of expression. At the domestic level, however, "the State's position" had its origin in a case about the right to honor of certain people.\textsuperscript{158} In fact, the domestic prohibition of this film was a result of a "recurso de protección," a remedy devised specifically for the protection of human rights.\textsuperscript{159} The rights and interests underlying the State's position were made even clearer when those who had sought to protect their right to honor at the domestic level asked the IACtHR to allow them to intervene as third parties. The IACtHR, however, denied this request.\textsuperscript{160} This case shows that the "most favorable interpretation" is


\textsuperscript{156.} Verdugo and García refer to the problem that arises between acknowledgements of State responsibility and the rights and interests underlying the State's position. Sergio Verdugo R. & José Francisco García G., \textit{Radiografía al Sistema Interamericano de Derechos Humanos [The X-Ray of the Inter-American System of Human Rights]}, 25 REV. ACTUALIDAD JUR. 175, 183–84 (2012).


\textsuperscript{158.} This remedy was lodged before domestic courts by a group of people on behalf of themselves, Jesus Christ, and the Catholic Church. They asked domestic courts to prohibit the exhibition of the film alleging that it would violate, mainly, their right to honor. \textit{id. at ¶ 60(e) (in relation to 45(c) and 45(d)).

\textsuperscript{159.} \textit{id. at ¶ 71.

\textsuperscript{160.} Olmedo-Bustos, Inter-Am. Ct. H.R. (ser. C) No. 73, at ¶ 21; see also Atala-Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 8–
actually a relative concept. If the IACtHR decides to give freedom of expression the broadest interpretation, it will necessarily give a restrictive interpretation to the right to honor.

Something similar happens in cases of human rights violations that are of a criminal nature at the domestic level, where the interests that underlie the State’s position are clearly noticeable. The IACtHR’s approach to these cases has been categorized as one of “punitivism.” This means that when the IACtHR rules on the State’s duty to punish human rights offenders (applying thus a more favorable interpretation for the victims), it ends up restricting the offenders’ fair trial guarantees. It is interesting to note that, while the ACHR says nothing in relation to a State obligation to punish human rights offenders, it explicitly provides that fair trial guarantees are human rights. The existence of rights and interests underlying the State’s formal position should deter the IACtHR from using lightly the method of interpreting according to what is “the most favorable.” This is especially so in a case like Artavia, where “the most favorable” for those who wanted to make use of embryos or commit an abortion is clearly “the least favorable” position for those who have a right to life according to the relevant section of Article 4(1). Because of the foregoing, even though the pro homine principle is important, it cannot be transformed into a wild-card with which to extend State’s international obligations in one way or another.

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9 (Feb. 24, 2012) (something similar occurred, because the IACtHR denied the girls’ father (who had their legal custody) the chance to appear before the court).

161. Judicial Activism, supra note 150, at 681–84.

162. See id. at 684 (Malarino affirms that punitivism goes directly against the pro homine principle).

163. Judicial guarantees of alleged human rights violators provide a clear example of rights underlying the State’s position, especially in cases that are criminal in nature at the domestic level. There are many judgments where the IACtHR gives the names of alleged violators of human rights, without giving them the chance to appear before it. This is complex from the point of view of the presumption of innocence. This explains why the State of Colombia told the IACtHR that it would not be able to fulfill the remedy of publishing the judgment, unless it was authorized to erase the names of the people who were mentioned in the IACtHR’s decision, because they had not yet been sentenced at the domestic level. The IACtHR agreed to this petition. Escué-Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R., ¶¶ 3–4 (May 18, 2010). In contrast with the IACtHR’s custom, the ECtHR tends to give only the initials of third parties who have not appeared in trial.


165. Amaya-Villarreal, supra note 155, at 337.
2. Interpretation According to the Object and Purpose of the Treaty

The IACtHR affirms that the object of the ACHR involves the "protection of the basic rights of individual human beings."\(^\text{166}\) This definition is partly correct, as it would be to say that the object and purpose of the ACHR is "to bring justice." The broadness of this definition, however, may give rise to interpretive mistakes. Hence, it would be more appropriate to state that the object and purpose of the ACHR is the creation of regional binding standards for the protection of certain human rights, and the establishment of a system for supervising their fulfillment. This distinction is important, because the ACHR's framers did not want to protect all human rights, but only those, which are referred to in this treaty. This limited character of the rights recognized in international treaties cannot be considered simply a negative consequence of States' sovereignty. It has been said that it is also due to the fact that in a pluralist system, there are different conceptions of rights, and that States should enjoy a margin for recognizing or not some other non-enumerated rights.\(^\text{167}\)

Notwithstanding the fact that the object and purpose of a treaty can be used only for interpreting the text of a treaty, the IACtHR tends to use it for extending the ACHR's scope. This shows why it is so important to have an accurate description of the object and purpose of the ACHR. Defining it simply as the "protection of the basic rights of individual human beings" may serve to broaden the scope of the ACHR to cover an unlimited number of rights. This issue is particularly relevant in light of the existence of different conceptions of human rights, some of which are openly opposed to the rights established in the ACHR. In order to give just one example, there are authors who give many rights-based explanations for concluding that new-born infants have no inherent right to life.\(^\text{168}\) Such an understanding is


\(^{167}\) Manuel Núñez Poblete, Sobre la Doctrina del Margen de Apreciación Nacional. La Experiencia Latinoamericana Confrontada y el Thelos Constitucional de una Técnica de Adjudicación del Derecho Internacional de Los Derechos Humanos [In Regards to the States' Margin of Appreciation. The Latin American Experience and the Constitutional Thelos of an Adjudication Technique of International Human Rights Law], EL MARGEN DE APRECIACIÓN EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: PROYECCIONES REGIONALES Y NACIONALES 3, 28 (Manuel Núñez Poblete & Paola Andrea Acosta Alvarado, 2012).

\(^{168}\) HELGA KUHSE & PETER SINGER, SHOULD THE BABY LIVE? THE PROBLEM OF HANDICAPPED INFANTS 189–97 (1985) (restricting infanticide to undesired disabled babies until the 28th day after birth); see also Alberto Giubilini & Francesca Minerva, After-Birth Abortion: Why Should the Baby Live?, 39 J. MED. ETHICS 261, 263 (2013) (considering that parents should be allowed to request the killing of their newborn babies, regardless of their health, as long as there are circumstances that would allow mothers to undergo an abortion, including socioeconomic reasons).
clearly contrary to the values enshrined in the ACHR, so it could not be applied within the Inter-American system. In this regard, it is easier to avoid holding misconceptions when reading the ACHR if the interpreter considers that this treaty’s object and purpose is the protection of the rights that it explicitly enshrines.

While interpreting Article 4(1) according to the ACHR’s object and purpose in Artavia, the IACtHR gives examples of domestic courts attempting “to find an adequate balance between possible competing rights,” which would “constitute a relevant reference to interpret the scope of the expression ‘in general, from the moment of conception’ contained in Article 4(1).” These examples are perplexing. For instance, the IACtHR refers to the case of the United States, even though this country’s regulation of abortion is openly incompatible with the ACHR’s protection of the unborn. When doing so, the IACtHR seems to ignore that in Roe v. Wade, the U.S. Supreme Court ruled that if the Fourteenth Amendment would have suggested that the unborn had personhood, Roe’s case would have collapsed, “for the fetus’ right to life would then be guaranteed specifically by the Amendment.”

VII. EVALUATION OF EVIDENCE ACCORDING TO SOUND JUDICIAL DISCRETION

In contrast to the ECtHR, the IACtHR engages in much evaluation of evidence. This is due to several reasons, such as the unreliability of some domestic judiciaries. The IACtHR weighs evidence according to sound judicial discretion (sana critica). This is a Hispanic notion that requires

169. Artavia-Murillo, Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶ 260 (the Spanish authentic version uses the word procurar, which can mean both to attempt and to achieve, so it is not absolutely clear whether the IACtHR considered that they had succeeded or not in their attempt).

170. It was almost a unanimous understanding that the United States would have had to make a reservation on this matter if it wanted to ratify the ACHR while keeping its regulation of abortion. See e.g., Thomas Buergenthal, U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 47 (Richard B. Lillich ed., 1981); see also Pasqualucci, supra note 6, at 341; see also “Prepared Statement of Professor Thomas J. Farer,” in International Human Rights Treaties, Hearings Before the Commission on Foreign Relations. U.S. Senate, 9th Cong., 2d sess. 97, at 99 (1979) (quoted in Philip Alston, The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child, 12 Hum. Rts. Q. 156, 176–77 (1990)). However, there were a few isolated interpretations that considered the U.S. legislation on abortion compatible with the ACHR. E.g., Cecilia Medina Quiroga, La Convención Americana: Vida, Integridad Personal, Libertad Personal, Debeido Proceso y Recurso Judicial 76 (2003).


analyzing evidence according to the "rules of logic and experience." This traditional formulation of *sana critica* just means that evidence should be weighed according to the "commonsense rules of reason and to the average experience of the world." The system of sound judicial discretion resembles the way in which common law judges weigh evidence. It allows judges to evaluate evidence without being constrained by specific rules of weight, but requires them to explain their reasoning, so that the reader can assess whether they weighed the evidence properly. This is why the IACtHR goes into substantial detail when enumerating the evidence used in reaching each one of its particular conclusions. Such detailed accounts are positive and praiseworthy.

The IACtHR tends to weigh evidence appropriately. There are, however, areas in which it must be more attentive. For instance, the "rules of logic and experience" would require a court to take into account the interests that witnesses and expert witnesses may have in the result of a case when assessing their declarations. In *Artavia*, the IACtHR failed to do this when it based most of its biological statements on the evidence of a single expert witness, Fernando Zegers-Hochschild, dismissing all opposing evidence. Of course in some cases, there could be reasons for giving a higher weight to the declarations of a particular witness, such as his or her expertise. Zegers, indeed, has vast experience. However, the IACtHR failed to take into account that this expert's interests in the results of the case went beyond those found in a neutral witness. Not only was IVF his main professional activity, but he was previously a directive member of organizations devoted to promoting this technique. This does not mean that Zegers' statements should have been dismissed, but rather they should...

173. Joel González Castillo, *La Fundamentación de las Sentencias y La Sana Critica* [*The Reasoning Behind Judgments and Sound Judicial Discretion*], 33 REV. CHIL. DER. 93, 95–98 (2006) (supporting the need to follow the rules of logic and experience are the basic requirements of sound judicial discretion); see also Héctor Fix-Zamudio, *Orden y Valoración de las Pruebas en la Función Contenciosa de la Corte Interamericana de Derechos Humanos* [*Order and Evaluation of the Evidence in Contentious Proceedings Before the Inter-American Court for Human Rights*], I MEMORIA DEL SEMINARIO: EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMbral del Siglo XXI 197, 214 (Corte Interamericana de Derechos Humanos, 2003) (in the context of the Inter-American system).


175. As it would happen according to the system of legal proof. *Id.* at 668–73.


have been weighed in light of the other evidence, and that the IACtHR should have taken into account the fact that his interests in the results of the case went beyond mere scientific concern.

Similarly, it is not appropriate for the IACtHR to give a dogmatic value to the statement of an expert or international body, unless it gives explicit reasons as to why it grants them such great weight. The IACtHR could, for instance, describe the decision-making process of the body or the way in which it reached the particular conclusion on which it relies. This would not be something new to the IACtHR because it did so in *Miguel Castro-Castro Prison v. Peru.* The aforementioned is even more relevant when the IACtHR quotes reports or previous findings of the Inter-American Commission (a party in the case). In *Artavia,* the IACtHR quoted some of the Commission’s findings in the *Baby Boy* case as if they were undoubted facts. If the IACtHR wishes to uphold some of the Commission’s findings or reports, it should analyze them in detail. The IACtHR should have followed its approach in *Vera-Vera et al. v. Ecuador,* where it assessed a report of the Commission that was based on an *in loco* visit to Ecuador.

**VIII. HISPANOCENTRISM**

Some years ago, it was stated that the OAS was “still largely a Latin American organization shaped by the problems and idiosyncrasies of that particular group of States.” This assertion can also be made of the Inter-American system of human rights and, in particular, of the IACtHR.

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178. *Miguel Castro-Castro Prison,* Inter-Am. Ct. H.R. (ser. C) No. 160, at ¶¶ 197(3)–(5) (describing some features of the Peruvian Commission for Truth and Reconciliation, such as the way in which it was created, its aims, and how its members had been appointed).

179. *Artavia-Murillo,* Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶¶ 197, 199 (copying these findings was not even necessary, because they were an interpretation—highly contestable—of legal instruments, which the IACtHR could have done by itself).

180. In this case the IACtHR noted that the Commission did not provide enough data, surveys or evidence on a specific matter, and concluded that the Commission’s report was not enough to prove the facts asserted. *Vera Vera et al v. Ecuador,* Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H. R. (ser. C), ¶¶ 80–81 (May 19, 2011).


Such hispanocentrism is inadequate for an institution pertaining to the OAS, an international organization with four official languages that unite countries of diverse traditions. Several aspects of the of the IACtHR’s behavior reveal its hispanocentrism. For instance, its use of Hispanic legal concepts (such as *sana crítica*), its disregard of Anglo-Saxon legal concepts (such as the standard of review), and its dismissal of diverse understandings of law (such as the dualist conception of international law in some countries in the Americas).183

An example of hispanocentrism in *Artavia* is given by the IACtHR’s interpretation of the word “conception.” Both the majority and Vio-Grossi’s dissenting opinions (with opposite results) were based on a definition of this word according to the Dictionary of the Spanish Royal Academy (*Diccionario de la Real Academia Española*). When doing so, they forgot that the ACHR has three other authentic versions: English, French and Portuguese. Had these versions been taken into account, the interpretation of this concept would have been made easier, because authoritative French and English dictionaries give a clearer meaning to the word conception (equivalent to fertilization, not to implantation).184 This manifestation of hispanocentrism was largely absent from the early advisory opinions issued by the Court, which took into account the diverse translations of the ACHR.185

The IACtHR’s hispanocentrism is also patent when reading the English version of its judgments, because there is much room for improving them.186 Of course, there are inherent difficulties in translating, especially when doing so into a language of a different linguistic family, or of a diverse legal tradition. In addition, the translator must be careful not to imply a value judgment in a given situation when translating a concept in one way or another.187

183. This conception is dismissed by the doctrine of conventionality control.


186. See Translation, supra note 52 (for a general analysis of the IACtHR’s translations).

187. See Álvaro Paúl Díaz, *La Corte Interamericana in Vitro: Comentarios sobre su Proceso de Toma de Decisiones a Propósito del Caso Artavia* [The Inter-American Court in Vitro: Commentaries on its Decision-Making Process in Light of the Artavia Case], 2 DER. PUB.
IX. UNIFORMITY OF APPRECIATION

A. The Margin of Appreciation

The ECtHR tends to grant some deference to States’ interpretations of the provisions of the European Convention on Human Rights. This deference is called the margin of appreciation. It allows the existence of diverse interpretations on matters of fundamental rights and freedoms. By allowing “a certain latitude to differ in their application of the same abstract rights,” the ECtHR “has to a limited extent recognised the fact that while human rights are universal at the level of abstraction, they are national at the level of application.” The extent of the margin of appreciation is not clear cut because its breadth “varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference, and the object pursued by the interference.” When determining whether there is a need to apply the margin of appreciation, the ECtHR often analyzes the existence of regional consensus on the matter.

The IACtHR has referred to the margin of appreciation on only a few occasions. It tends to keep for itself the detailed appreciation or

IBEROAMERICANO 303, 331 (2013) (describing what could be called a value judgment in a translation of Artavia).

188. Protocol 15 to the European Convention seeks to include this concept in the preamble to the Convention. The new relevant section would provide:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.


190. Id.


determination of the content of rights, having no major deference toward States’ interpretation of them. This is even the case when the right has an open-ended formulation. Furthermore, the IACtHR pays little attention to whether the facts of a case confront national values, such as in Artavia. In this case, the State explicitly requested the IACtHR to refer to the margin of appreciation. The IACtHR, however, replied that it was not necessary to refer to the margin of appreciation in light of conclusions at which it had arrived previously in the judgment. Such a ruling is perplexing, because the State’s claim was that the margin of appreciation should take effect precisely before the IACtHR reached these conclusions.

A court’s use of the margin of appreciation clearly affects the outcome of a case. For instance, the ECtHR—in spite of the European Convention’s lack of an explicit protection of the unborn—has established that the regulation of abortion falls within the margin of appreciation of each State. By contrast, the IACtHR seems to be implicitly ruling that States cannot establish certain kinds of bans on abortion, in spite of the ACHR’s explicit protection of life from the moment of conception.

B. Argument Against the Margin of Appreciation

In the Inter-American context, the argument that is usually given against the doctrine of the margin of appreciation is that law, democracy and human rights in Latin-American nations are not as deep-rooted as in European nations. Thusly, it would be inadequate to grant these feeble

193. See Verdugo & Garcia, supra note 156, at 195–96 (they consider this as one of the democratic deficits of the Inter-American system).


196. See e.g., Artavia-Murillo, Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶ 315 (the IACtHR would be ruling this when stating that the protection of the unborn should only be gradual and incremental).

States the capacity to give alternative interpretations to the ACHR. This argument may be read as twofold. First, it may refer to the stage of development of nations individually considered, in which case, its validity and consequences would depend on the specific characteristics of the relevant State. Hence, the IACtHR would be obliged to give specific arguments to support a State's incapacity to reach a reasonable understanding of a particular right. The IACtHR, however, does not engage in such analyses, so this prong of the argument is not relevant to explaining the IACtHR's behavior. Secondly, the argument of States' feeble institutions can be understood as referring to the whole group of State parties to the ACHR. This prong of the claim may be valid for rejecting the use of regional consensus as a guide for deciding whether an open-ended or unclearly defined term of the ACHR allows diverse legitimate interpretations.

Undeniably, domestic legal consensus or disagreement within States of the Americas is not necessarily a good instrument for determining whether a right enshrined in the ACHR allows different interpretations. For instance, even if half of the States in the Americas were to have an inquisitive criminal proceeding with a mandatory secret stage, it would not be appropriate to claim that such regulation is a legitimate interpretation of Article 8(5) of the ACHR (which establishes that criminal proceedings must be public, "except insofar as may be necessary to protect the interests of justice"). Such a lack of consensus would not be an adequate indicator of the need to grant the State a margin of appreciation. Most likely, not even the ECtHR's utilizes regional consensus in that way.

The need to grant a margin of appreciation is not necessarily related to consensus, but to the nature and formulation of the right. Nevertheless, regional consensus may suggest the need to apply such a margin. There are many issues in which the rules of the ACHR are broad, allowing diverse legitimate interpretations in accordance with different national values. For instance, if there are different reasonable scientific or sociological hypotheses that may determine the interpretation of a particular right, the IACtHR should probably defer to the State's interpretation. This would be an application of the principle of subsidiarity.

C. The Principle of Subsidiarity

According to a former President of the Inter-American Commission of Human Rights, Paolo Carozza, a simplified definition of the principle of subsidiarity could be "the principle that each social and political group should help smaller or more local ones accomplish their respective ends
without, however, arrogating those tasks to itself."\textsuperscript{198} This principle is implicit in the Preamble of the ACHR and has been acknowledged by the IACtHR on several occasions,\textsuperscript{199} even though it has not always been properly understood.\textsuperscript{200} Recently the IACtHR equated the principle of subsidiarity with that of complementarity, and has stated that it "crosscuts the inter-American human rights system."\textsuperscript{201} The IACtHR has understood the principle of subsidiarity, in accordance with the Preamble of the ACHR, by saying that its own jurisdiction reinforces and complements the protection provided by domestic law, which means that the State is the main guarantor of the human rights of persons.\textsuperscript{202} The IACtHR also considered that there is a close relation between the principle of subsidiarity and the "conventionality control" or "control of conformity with the Convention."\textsuperscript{203}

The principle of subsidiarity has both a positive and a negative dimension. This means that it generates an obligation to act and another to abstain from acting.\textsuperscript{204} If the subsidiarity principle is applied to the interpretation of the ACHR, the positive dimension will indicate that the IACtHR must exercise its jurisdiction when domestic State bodies are

\begin{itemize}
  \item \textsuperscript{200} E.g., Artavia-Murillo, Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶¶ 134–35 (the principle was used for not referring to some of the State's arguments in relation to the negative effects of IVF in the legal system, and in the health of women and their children, and regarding the cryoconservation of embryos. The IACtHR ruled that it would limit itself to the controversies that had been dealt with by the Constitutional Court when deciding on the unconstitutionality of the relevant executive order. The IACtHR did this, in spite of the fact that these issues had been argued domestically, and of the direct relation existing between these negatives effects and IVF. The determination of the relevance of arguments is not necessarily germane to the principle of subsidiarity. It is related to the internal reasoning process of the IACtHR, which should always respect the right to due process.).
  \item \textsuperscript{201} Massacre of Santo Domingo v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶ 142 (Nov. 30, 2012).
  \item \textsuperscript{202} \textit{Id.; see also} Garcia-Lucero et al. v. Chile, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶ 133 (Aug. 28, 2013) (where the IACtHR understands some of the consequences of the principle, by saying "in principle, it is for the domestic authorities to determine the appropriateness of specific or precise measures in the context of the investigation").
  \item \textsuperscript{203} Massacre of Santo Domingo, Inter-Am. Ct. H. R. (ser. C) No. 259, at ¶ 142 (this interpretation is, however, debatable).
  \item \textsuperscript{204} \textit{Subsidiarity, supra} note 198, at 44.
\end{itemize}
unable to interpret the ACHR in a reasonable fashion. The negative dimension would mean that the IACtHR must abstain from acting when domestic bodies have interpreted the ACHR in a way that is reasonable and according to national reality. This is partly a consequence of the fact that domestic State authorities are, in principle, better placed to interpret and apply the ACHR to their national circumstances. For instance, they should be better able to determine when a particular restriction of rights fulfills the ACHR’s requirement of being “necessary.” In relation to Artavia, domestic bodies had already determined which kinds of threats to human life were acceptable. In spite of this, the IACtHR decided to rule that IVF had to be allowed and, furthermore, established several other consequences of its rulings, such as the authorization of “heterologous” IVF. The latter consequence was not at issue in this case and may strain national values and domestic legal norms even further than the ruling would have done without this additional stipulation.

X. REPARATIONS

The ACHR provides that, if there has been “a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated.” In addition, it states that the IACtHR “shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” In light of these provisions, whenever violations are due to structural situations, the IACtHR understands that it has the power to attempt to modify these structures, for instance, by ordering the abrogation of laws, the amendment of constitutions, or the performance of acts or proceedings that may aid in mitigating their effects. Furthermore, the IACtHR has stated that its system of reparations “must be designed” to change contexts of structural discrimination. In other words, the IACtHR considers that it has the duty


206. Artavia-Murillo, Inter-Am. Ct. H. R. (ser. C) No. 257, at ¶ 300 (“Moreover, women may resort to IVF without the need for a partner.”).

207. ACHR, supra note 4, at art. 63(1) (the phrase “protected by this Convention” is relevant for some of the issues dealt previously in this paper, such as extra-Convention jurisdiction).

208. Id.

209. González, Inter-Am. Ct. H.R. (ser. C) No. 205, at ¶¶ 450, 541 (the IACtHR ordering the implementation of programs and training sessions directed to the elimination of stereotypes of women’s role in society).
to define and demand specific solutions to structural problems that may be difficult to delineate and tackle.

Of course, in some cases, simple compensation is not enough for providing a suitable remedy to the victims. This could occur when the applicant is undergoing an illegal deprivation of freedom. Solving situations like this would be consistent with the IACtHR's power to remedy "the consequences" of the relevant human rights violation. There is, however, a big difference between noting the need for a tailored solution to a particular case, and considering that the IACtHR should try to put an end to structural societal problems. Indeed, it seems naïve to believe that the IACtHR's judges are capable of solving serious social problems that States themselves are not able to solve, even when trying to combat them in good faith, and in spite of having more means and specialized personnel than the IACtHR for doing so. In addition, the IACtHR may, at times, fail to "bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant." Some of the reparations ordered in Artavia have already been described. Among them, the implementation of awareness programs (permanent training and educational programs and courses) is particularly problematic. This kind of reparation is always complex—regardless of the matter it addresses—because it brings to memory the "official versions" of some totalitarian regimes. In Artavia, however, this kind of remedy is even more problematic, because the subject matter of this case is extremely controversial. The IACtHR itself acknowledged that there is no single opinion on this issue, and that it could not impose a single set of beliefs on those who did not agree with them. Hence, the IACtHR should not have mandated the implementation of awareness programs that reflect only one of these positions.

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210. Malarino analyzes some problems raised by the IACtHR's reparations system. He calls them the *supranationalisation* of the IACtHR. The problems he identifies are mainly related to the IACtHR's acting as the highest authority of States within the Inter-American system. *Judicial Activism*, supra note 150, at 684–94.

211. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, at Art. 8(4), available at http://www.ohchr.org/Documents/HRBodies/CESCR/OProtocol_en.pdf (last visited Oct. 17, 2014) (even though this quote is taken from a different treaty, it is relevant because it reminds that there are many ways of achieving similar ends, so it could be inadequate for the IACtHR to side with particular policies).

212. This form of reparation has received some criticisms. See e.g., Julio Alvear Tellez, *La Sentencia de la CIDH en el Caso Atala: Una Iniciativa para el Adoctrinamiento en Ideologías Radicales. Notas Breves a la Sentencia del 24 de Febrero del 2012* [The IACtHR's Judgement on the Atala Case: An Initiative for the Indoctrination of Radical Ideologies. Brief Notes About the Decision of February 24, 2012], 26 ACTUALIDAD JUR. 577 (2012).
It is also worth commenting on the IACtHR’s order that the Costa Rican public health system should “make IVF available within its health care infertility treatments and programs.”213 This request is a way of directly ordering the implementation of a social legal right. Such an approach dismisses the existence of a specific Inter-American protocol dealing with second generation human rights.214 In addition, when devising this reparation, the IACtHR did not properly analyze Costa Rica’s financial resources. It neither considered the budgetary implications of its decision in terms of the impact on different, potentially more pressing, matters on which the State may have wished to expend public money. On the other hand, the IACtHR itself noted that assisted reproduction treatments were not included in the State health care programs of countries under its jurisdiction, but that three States were “trying to take measures” to include them.215 Considering that these three States, Argentina, Chile, and Uruguay, are among the richest countries in the region, it is puzzling to see the IACtHR imposing such difficult standards. Last, but not least, the IACtHR failed to ponder the theoretical and moral differences that exist between tolerating an activity, and supporting it.

It is not particularly conscientious for an adjudicator to make specific demands without having previously analyzed in detail each relevant circumstance. The circumstances include the State’s resources, national values, legal system, etcetera. In fact, it is difficult to imagine another international court ordering a remedy of this kind. Furthermore, the question arises as to whether the IACtHR has the power to order these specific nationwide socio-economic reparations. The extravagance of this remedy is in no way lessened by ruling that its implementation should be gradual. This is, among other reasons, because the IACtHR, itself, decides during the phase of monitoring compliance whether the gradual implementation is fast enough.

XI. CONCLUSION

This commentary sought to use the Artavia case to briefly outline some common practices deployed by the IACtHR in its decision-making process. Without trying to belittle the contributions that this court has made to international law, it must be noted that its decision-making process displays some peculiarities that give rise to some concerns. Among the practices that this commentary analyzed are the application of instruments

214. See Two Intertwined Treaties, supra note 101.
other than the ACHR, the IACtHR’s maximalist approach when adjudicating, and some interpretive deficiencies. This commentary aims to encourage further study of these practices so that scholars may propose ways of improving the IACtHR’s decision-making process.

Unfortunately, a number of practices of the IACtHR are veering it away from the ACHR’s text. This generates some legal uncertainty, and prompts a decline in the system’s prestige. Furthermore, some of these effects have a negative impact on the IACtHR’s legitimacy. This is particularly serious for a court that claims to have broad powers and aims at having its case law applied directly by domestic bodies (according to its doctrine of the control of conformity with the Convention). The IACtHR’s decision-making process can be improved. One possible solution is to examine the practices of the oldest regional human rights court, the European Court of Human Rights (ECtHR), because some of its proceedings can be used as models. The ECtHR has always been aware of its own limitations, especially during its early years. This explains why it adopted a much more self-controlled attitude than its counterpart in the Americas.

It is never easy to make predictions. However, it is possible to foretell that, unless the IACtHR changes some of its decision-making practices, the number of States under its jurisdiction will steady or even fall.\(^{216}\) Decisions such as Artavia, which misinterpret the ACHR on a matter that was not even put to the IACtHR, tend to discredit the system in the eyes of a significant portion of the Latin-American population. So far States have not complained much in relation to the decision making process of the IACtHR (most criticisms have been due to some States’ reluctance to fulfill the ACHR’s requirements). The reason explaining the few complaints regarding the decision-making process of the IACtHR, may be a certain degree of ignorance about the way the Court operates. Other reasons could be that the IACtHR had not yet entered fully into the creation of rights in controversial areas, or that governments are not widely perceived as having the moral authority required for raising objections. Be that as it may, the IACtHR could be stretching too far the States willingness to agree with its rulings. Hence, it would be advisable for it to modify its decision-making practices. Unfortunately, some of them are so deeply ingrained that the IACtHR may not change them unless there is an amendment of the relevant procedural and interpretive legal provisions.

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\(^{216}\) Probably the sole exception to this will be the case of Venezuela, which may decide to resubmit itself to the IACtHR once the Chavista era is over.