

APPLICATION BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

**Gretel Artavia Murillo y Otros (“Fecundación in Vitro”)**

v.

**COSTA RICA**

September 19, 2012

Amicus Brief Prepared by

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## Interests of *Amicus Curiae*

The Center for Reproductive Rights and the International Reproductive and Sexual Health Law Programme at the Faculty of Law, University of Toronto, have the honor of submitting this brief as *Amicus Curiae* to the Inter-American Court of Human Rights (hereinafter also referred to as “Inter-American Court” or “The Court”) regarding the case of *Gretel Artavia Murillo y Otros (“Fecundación in Vitro”) v. Costa Rica*. This brief presents various considerations concerning protections of the rights to found a family, to non-interference in private and family life, to equal protection of the law, and to non-discrimination on grounds of disability, including infertility.

The Center for Reproductive Rights (CRR) is an independent non-governmental organization dedicated to advancing reproductive rights worldwide. These rights are based on principles of women’s autonomy and control over their bodies, sexuality and reproduction, and are underlying determinants of women’s abilities to fulfill a range of fundamental human rights. The Center for Reproductive Rights was founded in 1992, and has offices in New York City and Washington DC, United States of America; Bogota, Colombia; Nairobi, Kenya; and Kathmandu, Nepal. CRR’s work focuses on developing legal and advocacy strategies to promote and protect reproductive rights across the globe.

The International Reproductive and Sexual Health Law Programme at the Faculty of Law, University of Toronto (the Programme), is an academic programme dedicated to providing the legal research designed to contribute to the improvement of women’s rights generally, and reproductive and sexual health specifically. It has legal expertise in equality and nondiscrimination rights and rights regarding access to health care services. It has collaborated with governmental and international agencies, non-governmental organizations, and academic institutions to develop legal scholarship in these areas. In the Inter-American human rights system, the Programme most recently has filed an *amicus* brief in the case *Campo Algodonero: Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez*, Cases Nos. 12.496, 12.497 and 12.498 before the Inter-American Court of Human Rights.

## Summary of Argument

Costa Rica’s obligations under the American Convention on Human Rights preclude the prohibition of *in vitro fertilization* (IVF). In prohibiting IVF, Costa Rica offends the right to found and raise a family protected by Article 17, the right to be free from arbitrary interference with private and family life protected by Article 11, and the right to freedom of religion protected by Article 12. Contrary to Article 1(1), the prohibition of IVF also offends the right to be free from discrimination on grounds of disability, health status, sex or gender, which cannot be justified in a free and democratic society.

## Argument

I. The right to found and raise a family, protected by Article 17 of the American Convention on Human Rights (the Convention), precludes Costa Rica from prohibiting *in vitro* fertilization (IVF).

A. In accepting the Convention's Article 17(1) provision that the family is "the natural and fundamental group unit of society, and is entitled to protection", Costa Rica is obliged to refrain from prohibiting reproductively impaired couples from obtaining available medical assistance for the purpose of having children.

1. Regarding Article 17(1), the Inter-American Court of Human Rights (the Court) has explained that "the family as a natural and fundamental component of society," with the right to "protection by society and the State," is a "fundamental principle of International Human Rights Law, enshrined in Articles 16(3) of the Universal Declaration, VI of the American Declaration, 23(1) of the International Covenant on Civil and Political Rights and 17(1) of the American Convention"<sup>1</sup> The Court continued: "Every person's right to receive protection against arbitrary or illegal interference with his or her family is implicitly a part of the right to protection of the family and the child, and it is also explicitly recognized by Articles 12(1) of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man, 17 of the International Covenant on Civil and Political Rights, 11(2) of the American Convention on Human Rights, and 8 of the European Human Rights Convention".<sup>2</sup> The Court further explained that "the essential content of this precept is protection of the individual in face of arbitrary action by public authorities."<sup>3</sup>

2. An essence of the right to found a family is the ability to have biologically/genetically descended children.<sup>4</sup> When such ability is impaired through a biological or physical condition that creates infertility, medical advances may now relieve a couple's childlessness.<sup>5</sup> The State of Costa Rica (the State), in upholding the State Supreme Court's annulment of the Executive Decree No. 24029-S of February 3, 1995 (the Executive Decree), denies access to medical means available to overcome childlessness. In so doing, the State impairs the right to found and raise a family, and thus violates the rights and protections accorded by the Convention's Article 17(1).

3. Legitimate means of protection of life may require that IVF be regulated, but do not justify complete prohibition. There is no rational connection between protecting life, and preventing assisted creation of life. Through the prohibition of IVF, the State is not protecting life that will be conceived, but rather is preventing conception from

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<sup>1</sup> *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, para. 66 (Aug. 28, 2002).

<sup>2</sup> *Ibid.* para. 71.

<sup>3</sup> *Ibid.* para. 72.

<sup>4</sup> See *Dickson v. United Kingdom*, Application (44362/04 [2007] 3 F.C.R. 877, para. 78.

<sup>5</sup> E. Vayenna, P. Rowe & P. D. Griffin eds, *Current Practices and Controversies in Assisted Reproduction - Report of a WHO Meeting*, (Geneva: World Health Organization, 2002).

occurring. Protection of life can be provided by means of regulation of IVF that reduce embryo loss. The Supreme Court of Costa Rica departed from its own declared purpose of protecting life from conception, and from the State's obligation to observe the Convention, by annulling the norm that provided responsible regulation of the practice of IVF.

4. The State recognizes under Article 17(2) of the Convention the human right to have children and raise a family, but claims to subordinate that right to "higher values such as the right of all human beings, without distinction, to have their life protected."<sup>6</sup> The State declares that the principles of "indivisibility" and "interdependence" of human rights show that some rights "cannot be sacrificed for the sake of other rights."<sup>7</sup> The State therefore claims an entitlement to prohibit a right of access to IVF, which is known to be liable to result in some loss of embryonic life, because a legitimate exercise of a right should not entail "depriving other human beings of their life."<sup>8</sup> By involving the risk of loss of embryonic life, however, IVF replicates natural medically unassisted reproduction. Spontaneous loss has been found to affect over 60% of naturally conceived embryos, although the figure may be much higher because most embryo loss occurs before pregnancy has been detected, and is absorbed in regular menstruation.<sup>9</sup> By its prohibition of IVF, the State's professed "protection" of human lives achievable by IVF, ensures that they do not come into being. The State thereby imposes loss of the prospect of life of children who, through IVF, would come into being, and denies infertile couples the opportunity to raise them in their families, in violation of Article 17(2) of the Convention.

5. By its own Constitution, the State recognizes the family as a natural element and foundation of society entitled to State protection.<sup>10</sup> Such protection should include the accommodation, under appropriate regulation, of medical means towards this choice that may overcome childlessness due to infertility.

B. Costa Rica cannot set discriminatory conditions against reproductively impaired couples by preventing their exercise of the right to raise a family.

1. The right to found and raise a family, protected by Article 17(1), is subject under Article 17(2) to "the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention."

2. By prohibiting IVF, Costa Rica is offending the principle of nondiscrimination, protected by Convention Article 1(1), because the State is denying infertile couples access to medical assistance available to couples who, without or with medical

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<sup>6</sup> *Ana Victoria Sanchez Villalobos and Others v. Costa Rica*, Inter-Am. Comm'n H.R., Report No 25/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 para. 35 (2004) (hereinafter Admissibility Report).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Toby Ord, The Scourge: Moral Implications of Natural Embryo Loss, *The American Journal of Bioethics*, 2008 8(7) 12-19.

<sup>10</sup> Constitución Política de la República de Costa Rica de 1949, Article 51 (hereinafter Constitución) [*free translation to English*].

assistance such as artificial insemination, can conceive children without IVF. The State claims that adoption of abandoned or orphaned children is a legitimate alternative for some infertile families. The State's claim is contradicted by a series of judgments of the European Court of Human Rights, where the Grand Chamber observed in 2007 that it was dealing with a case "where a particular facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent)."<sup>11</sup> Further, the choice of adoption is not always available. Adoption often requires satisfaction of demanding screening criteria, for instance concerning family income level, personal physical and mental health, age of partners, personal history and life style, that distinguish eligible adoptive parents from natural parents.<sup>12</sup>

3. The State's response that adoption would overcome infertility aggravates discrimination against infertile couples and is inadequate and offensive on additional grounds. The State risks perversion of child adoption services, which are devoted to assisting homeless children to be installed in families, by having those services assist infertile couples to have children. The Costa Rican *Ley Orgánica del Patronato Nacional de la Infancia* provides in Article 3(d) that an aim of the Children's National Board is to "guarantee minors the right to grow and develop at the center of a family, either in a biological or adoptive family". This is distinct from addressing the needs of infertile couples. The State's argument objectifies and commodifies children, by proposing that any surplus supply of homeless children is available to meet the unmet demand for children of infertile couples. The State further discriminates against infertile couples by its implication that responsibility for the relief of children's homelessness should fall specifically on such couples rather than on the general community.

4. Discrimination also arises from the relative ease with which Costa Rican couples with financial means can obtain IVF services in other jurisdictions, such as Mexico. Documentation of cross-border reproductive services is extensive (often offensively described as "reproductive tourism") and there is every reason to suppose that Costa Rican individuals and couples with adequate financial resources will take advantage of IVF services in other countries to raise their families in Costa Rica. The prohibition of IVF services to couples without the financial or other means to travel abroad constitutes further discrimination.

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<sup>11</sup> *Dickson v. United Kingdom*, supra note 4, para. 78.

<sup>12</sup> To determine their competence and suitability, the couple wanting to adopt has to show, among other matters, a criminal record certificate, an income record certificate, a marriage certificate, and a health status report and go through a social evaluation and a psychological evaluation. Both evaluations have to take into consideration, among other matters, the couple's motivation to adopt, which has to be considered healthy and not harmful to the child; Patronato Nacional de la Infancia, *Guía de Información básica sobre requisitos y trámites para la adopción de personas menores de edad mayores de cinco años, con necesidades especiales y grupos de hermanos por parte de familias con residencia habitual en Costa Rica (Guía)*, at VI. 1) 1.c & d; <http://www.pani.go.cr/adopciones.php>. In the case of infertile couples, it is important to assess how they have confronted their infertility problem. Patronato Nacional de la Infancia, *Guía* at VI. 1) 1.c & d. The examinations have to explore myths, fantasies, adequacies and overall the life plan that the couple intends to implement with their new addition to the family; *Guía* at VI. 1) 1.c & d. After this first administrative stage is completed, the couple has to make an application before the judiciary and once the judge has established they met all the required conditions they have to register the decision; Patronato Nacional de la Infancia, *Guía* at VI. 2).

C. Costa Rica has no legal justification for preventing the potential family life of reproductively impaired couples by claiming that their health is not affected by involuntary childlessness, or that their relief would necessarily cost human life.

1. The State claims that infertility “should not be considered a disease, because it does not involve an alteration of a person’s health”<sup>13</sup>, and that “the current technique of *in vitro fertilization*” is inconsistent with the right to life.<sup>14</sup> Neither claim is justifiable.

2. The State is a member of the World Health Organization, whose Constitution treats “health” as a state of “physical, mental and social well-being, and not merely the absence of disease or infirmity.”<sup>15</sup> As adolescents grow into adulthood, and as adults prepare themselves for parenthood, the realization of infertility alters their perception of themselves as healthy, “normal” people, and, in lowering their sense of mental and social well-being, detracts from their health. Accordingly, even when infertility is unrelated to disease, it nevertheless impairs and denies health. The refusal to acknowledge the torment and despair of those who suffer reproductive disability and are unable to have the children they legitimately crave, speaks poorly of the compassion and human understanding of any State or Court that invokes a narrow, exclusively medical concept of health to justify prohibition of means to relieve involuntary childlessness.

3. The State further seeks to justify prohibition of IVF, as originally allowed in its Executive Decree of 1995, on the ground that “the current technique of *in vitro fertilization* is ... inconsistent with the right to life”. This ignores the history of developments in IVF, which is now understood generically to cover a variety of assisted reproductive techniques. Of several relevant developments, most significant is the move from exposing many ova to sperm in order to create multiple embryos (biologically often referred to as zygotes or blastocysts) and rejection of those which are morphologically non-viable, to intracytoplasmic sperm injection (ICSI) of ova, which is now more common in modern IVF clinics than earlier IVF techniques.<sup>16</sup> ICSI involves the injection of a sperm into a single selected ovum, by microscopic means, to achieve fertilization and produce a single embryo. ICSI, allied with single embryo transfer to a woman’s uterus for normal gestation, avoids or reduces discarding of surplus embryos, which is common in natural, medically-unassisted human reproduction. Modern practice favors single embryo transfer, since multiple pregnancies are contra-indicated on grounds of fetal and maternal health.<sup>17</sup> Accordingly, to prohibit IVF on grounds of the selected sacrifice of embryos is

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<sup>13</sup> Admissibility Report, *supra* note 6, para. 32.

<sup>14</sup> *Ibid.* para. 37.

<sup>15</sup> World Health Organization, *Preamble to the Constitution of the World Health Organization* as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization).

<sup>16</sup> Bernard M. Dickens and Rebecca J. Cook, Multiple Pregnancy: Legal and Ethical Issues, *Int’l J of Gynecology and Obstetrics*, 103: 270-274 (2008).

<sup>17</sup> British Fertility Society and Association of Clinical Embryologists, Elective Single Embryo Transfer: Guidelines for Practice, *Human Fertility*, 11(3): 1-16 (2008).

unjustified, in light of developments in IVF technology, application and the evolving standard of practice.

II. By prohibiting IVF, Costa Rica is violating Convention Article 11 protecting the right to be free from arbitrary interference with private and family life, and is in breach of Article 12 by the arbitrary imposition of a particular religious viewpoint on its citizens.

A. The right to private and family life, protected by Article 11 of the Convention, requires Costa Rica to respect families and individuals in making autonomous decisions to raise families.

1. Article 11(2) of the Convention requires State protection of individuals from arbitrary actions of state institutions that infringe family life.<sup>18</sup> The decision of the Supreme Court of Costa Rica to annul the Decree that regulated IVF constitutes an arbitrary intervention of State authority that infringes individuals' private reproductive choices and does not comport with the norms or objectives of the Convention. Nevertheless, this does not mean that the State meets its treaty obligations by merely refraining from such interference.

2. By its Executive Decree, the State proposed regulations consistent with respect for private and family life, but now endorses the grounds on which the State's Supreme Court annulled the Decree. The State claims that the practice of IVF does not constitute a "private matter, or one that implies no offense to society," considering this medical technique contrary to public order, morals and customs. Because this technique is claimed to be inconsistent with the right to life, the State asserts that it has "a legitimate interest in intervening."<sup>19</sup> However, Article 11(3) of the Convention imposes on States the duty to provide the protection of the law against those interferences. Consequently, the State has an obligation to guarantee the right to privacy through positive actions.

3. There are various means within a State to determine the boundaries between private and public sectors of activities, and what is consistent with or offensive to public order, morals and customs. The Executive Decree of 1995 regulated IVF in Costa Rica under conditions the government of the day considered not to offend public order, morals or customs. The progress of medical science shown in the development of IVF understandably triggers conflicts between supporters and opponents of the use of new scientific technologies. This conflict is resolved in democracies by political means. The Executive Decree was a legitimate exercise of political governmental authority for which the government was democratically accountable. By entering this arena with a draconian Constitutional

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<sup>18</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, para. 158 (Feb. 24, 2012); see also, *inter alia*, *Rosendo Cantú et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, para. 119 (Aug. 31, 2010); *Fernández Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, para. 129 (Aug. 30, 2010); *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, para. 190 (July 1, 2006); *Fontevicchia and D'Amico v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, paras. 48-49 (Nov. 29, 2011); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

<sup>19</sup> Admissibility Report, *supra* note 6, para. 37.

prohibition, foreclosing future democratic legislative reform, the Supreme Court has unjustifiably entered into the political arena. The Supreme Court's ruling subverts Costa Rica's democratic customs and intrudes impermissibly into Costa Rican nationals' private and family life and their ability to develop their law according to their democratically expressed political preferences.

4. The Court's restrictive, anti-democratic ruling further contradicts the jurisprudence generated by international human rights tribunals. For instance, the European Court of Human Rights observed in a 2007 case that it "reiterates that there is no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights ... based purely on what might offend public opinion."<sup>20</sup>

5. There is a sphere in the life of all individuals, and through them of all families, in which the State cannot intervene without a legitimate purpose. Such sphere comprehends the most private decisions married couples make regarding the creation of their families. The State has a legitimate public interest in applications of medical technology, for instance to ensure appropriate qualifications of personnel, and suitability, including safety and effectiveness, of medical techniques. The clinical delivery of services, however, is protected by the most ancient of medical principles, the duty of confidentiality in the physician-patient relationship. This does not preclude appropriate scrutiny by public, law enforcement agencies, for instance regarding incest and sexual exploitation but the claim that couples' and their physicians' pursuit of having children to build families endangers public order and morals contradicts values that states and human rights conventions customarily protect.

6. Article 11 covers a variety of factors respecting the dignity of the individual, including the aspiration to have and raise one's biologically descended children, and to constitute such aspirations as part of one's own privacy. The Court has declared repeatedly that the right to privacy protected by Article 11 "prohibits all arbitrary or abusive interference in a person's private life, and encompasses various spheres of the intimate realm as well as the private lives of their families. In that regard, the Court has held that the realm of privacy is exempt and immune from abusive or arbitrary intrusion or aggression by third parties or by the public authorities."<sup>21</sup> The Court has specified that "although this provision is titled "Protection of Honor and Dignity" (in Spanish) its content includes, among others, the protection of privacy. Privacy is an ample concept that is not subject to exhaustive definitions..."<sup>22</sup>

7. The State of Costa Rica cannot interfere in such aspirations or destroy couples' identities as prospective parents. The State is not required to assume positive obligations to facilitate the aspirations of infertile couples to bear biologically descended children, by allocating resources or implementing public programs of IVF. However, it is required to maintain its negative obligation of not interfering with the steps taken or techniques chosen between reproductively disabled couples and their physicians to overcome their disability.

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<sup>20</sup> *Dickson v. United Kingdom*, supra note 4, para. 75.

<sup>21</sup> *Atala Riffo and Daughters v. Chile*, supra note 18, para. 161.

<sup>22</sup> *Ibid.* para. 162; see also *Rosendo Cantú et al. v. Mexico*, supra note 18, para. 119.

B. The right to freedom of religion, protected by Article 12 of the Convention, requires Costa Rica to show tolerance and respect for the varying religions and beliefs of all of its citizens.

1. The State is not justified in asserting legal power to limit the right to found and raise a family by its prohibition of IVF, because this privileges one religious viewpoint over others, in violation of freedom of conscience and religion protected by Article 12 of the Convention.

2. Although Costa Rica appoints the Roman Catholic and Apostolic Religion to be the religion of the State,<sup>23</sup> it cannot compel obedience to the doctrines of that denomination of Christianity on those who do not voluntarily adhere to them, or any set of their different interpretations. That is, this constitutional provision does not prevent the free exercise of other religious beliefs. Article 75 of the Constitution of Costa Rica provides that recognition of the Catholic religion as the religion of the State “should not prevent the free exercise in the Republic of other forms of worship ...”<sup>24</sup>

Consistent with this value, the law of the State does not prohibit but expressly allows divorce,<sup>25</sup> despite prohibition of divorce by the Catholic Church. The Constitution expressly prohibits the use of religious motives or the use of religious beliefs in order to promote a political view or propaganda.<sup>26</sup> The Supreme Court has, unfortunately, entered the political sphere, to serve a religious motive. (See also Part III below)

3. The State adopts the Supreme Court’s perception that the Constitution, inspired by religious values, requires prohibition of IVF. It is not clear, however, that Roman Catholicism requires prohibition of conscientious resort to IVF. Pope John Paul II, addressing the role of conscience in society and the world, required that “each individual’s conscience be respected by everyone else: people must not attempt to impose their own ‘truth’ on others ... To deny an individual complete freedom of conscience ... or to attempt to impose a particular way of seeing the truth, constitutes a violation of that individual’s most personal rights.”<sup>27</sup> The State is accordingly violating such personal rights, notably conscientiously to employ internationally acceptable means to found and raise a family, in seeking endorsement of the absolute prohibition of IVF on which infertile couples depend.

4. Arguing that every right has limits set by other rights, the State asserts that the right to life places an absolute limit on “couples seeking to have children ... with [*in vitro*] embryos.”<sup>28</sup> According to the same logic, the right of reproductively disabled couples

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<sup>23</sup> Constitución, supra note 10, Article 75.

<sup>24</sup> *Ibid.*

<sup>25</sup> See, Código de Familia, República de Costa Rica, published 5 Feb 1974, at Capítulo VII “Del Divorcio.”

<sup>26</sup> Constitución, supra note 10, Article 28.

<sup>27</sup> Message of His Holiness Pope John Paul II for the XXIV World Day of Peace, “If You Want Peace, Respect the Conscience of Every Person” Vatican City, 1 January 1991.

<sup>28</sup> Admissibility Report, supra note 6, para. 36.

to found and raise their families may place a limit on the right of the State to assert a right based on a religious viewpoint and enforce obedience to it.

5. The State argues that from a “biological” and “legislative” point of view, there is a duty to protect life “at the moment that life is determined to exist.” That life, according to the State, does not need to be incorporated in a visible human being, but protection should be given to that life at the earliest moment of its existence.<sup>29</sup> The State claims justification to intervene, however, before the earliest moment of existence of embryonic life, by prohibition of the means from which that moment would arise. Accordingly, the protection of life from the earliest moment of its existence presupposes that such moment will occur, but does not justify the complete, incoherent prohibition of creation of embryos that would exist only by IVF.

6. The State further argues that although its Executive Decree required all fertilized embryos to be implanted in the maternal uterus, prohibiting their elimination or preservation, the mere manipulation of embryos “so that only one will survive means the death of other embryos.” The State relies upon a distinction between the loss of embryos due to “natural causes” that occur within the uterus and the loss of embryos due to “human manipulation,”<sup>30</sup> but this distinction is contrived and unconvincing. The State accepts that a couple infertile due to chronic spontaneous abortion may initiate innumerable implantations of embryos that are lost by natural means, and the State does not intervene in this loss of embryonic lives. The State prohibits IVF and embryo selection to achieve successful implantation, pregnancy and childbirth, however, which would spare a succession of embryos lost by spontaneous abortion. The prohibition denies the couple their right to take means to found a family while avoiding repeated spontaneous miscarriage of embryos, and contradicts the State’s claim to be protecting the lives of embryos. The State does not intervene in the predictable loss of innumerable embryos by chance,<sup>31</sup> but prohibits their survival by choice.

7. The State claims that if it were to authorize IVF, it would be in violation of the right to life recognized in the Convention and other instruments.<sup>32</sup> The jurisprudence of the Commission, however, is to the contrary. Article 4(1) of the Convention has been interpreted by the Commission to accommodate lawful abortion in certain circumstances,<sup>33</sup> and there is no international human rights jurisprudence supporting the State’s claim of a general right to life that requires prohibition of IVF. International experience shows the increasing prevalence in the world, including in countries predominantly adhering to Roman Catholicism, of centers reporting results of assisted reproductive techniques, including IVF.<sup>34</sup> Such legislation is enacted to respect the

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<sup>29</sup> *Ibid.* para. 29.

<sup>30</sup> *Ibid.* para. 30.

<sup>31</sup> Raj Rai and Lesley Regan, Recurrent Miscarriage, *Lancet* 368: 601 (2006).

<sup>32</sup> Admissibility Report, *supra* note 6, para. 33.

<sup>33</sup> *Case 2141*, Inter-American Commission on Human Rights, 25, OEA/ser. L/V/1154, Doc. 9 rev 1 (1981).

<sup>34</sup> For example, 135 centers from 11 Latin American countries reported results of assisted reproductive technology for treatments initiated during 2009, <[http://www.redlara.com/aa\\_ingles/registro\\_anual.asp?categoria=Annual Reports&cadastroid=318](http://www.redlara.com/aa_ingles/registro_anual.asp?categoria=Annual Reports&cadastroid=318)>, last visited 6 Sept. 2012.

human right to found and raise families, and illustrates the excessive, disproportionate and incoherent nature of the claim the State of Costa Rica presents to defend its prohibition of IVF.

III. By applying a religious denominational understanding of the right to life protected by Convention Article 4(1), Costa Rica is violating Convention Article 12(3), which limits manifestation of religion or beliefs when necessary to protect the rights or freedoms of others.

1. Article 75 of the Constitution of Costa Rica appoints the Roman Catholic and Apostolic Religion to be the religion of the State. From 1869, Catholic doctrine has regarded human life to begin at conception. “Conception” was taken as synonymous with “fertilization”, since at that time the only evidence of either was that a woman was pregnant. With the emergence of IVF, however, fertilization in a petrie dish (“test tube”) was clearly seen to precede a woman’s conception. In response, the Catholic Church adopted the view that human life should be considered sacrosanct from fertilization (even *in vitro*), consistently with its condemnation of IVF as contrary to nature.

2. In declaring the Executive Decree of 1995 on IVF unconstitutional, the Supreme Court of Costa Rica is applying this religious ruling in an extreme form, and in supporting the Supreme Court, the State is departing from the law and practice elsewhere among other Catholic countries in Latin America, where IVF is generally allowed under conditions comparable to and often more accommodating than those of the 1995 Executive Decree.

3. The Supreme Court and the State fail to appreciate and respect the significance of Convention Article 4(1). This protects the right to life, and provides that “This right shall be protected by law and, *in general*, from the moment of conception” (italics added). The words *in general* imply that the right is not necessarily protected in every particular circumstance. For instance, there is no duty to protect the lives of embryos conceived and lost in natural, unassisted human reproduction. In asserting that the prohibition of IVF protects the right to life of embryos in particular, when they would exist only by application of IVF, the State fails to explain why this does not justify an exception to the protection of life in general, or explain why it claims to protect embryonic life by prohibiting its existence.

4. The State’s right to profess a religion must be considered under Convention Article 12(1). This provides that “Everyone has the right of freedom of ... religion.” The question whether a state is included in the term “everyone” is not addressed here. The right to hold a religious belief is protected by Article 12(1) of the Convention, but the right *to manifest* that belief is subject to limitations under Article 12(3). Article 12(3) provides that:

Freedom to manifest one’s religion or beliefs may be subject only to the limitations prescribed by law that are necessary to protect ... the rights or freedoms of others.

The law that limits the manifestation of “religion or beliefs” includes respect for the rights and freedoms of others protected by the Convention. Accordingly, the State cannot manifest its religious belief by absolutely prohibiting individuals’ rights under the Convention to found a family by IVF (Article 17), to freedom from interference with private and family life (Article 11), to freedom of religion (Article 12), to equal protection of the law (Article 24), and to non-discrimination (Article 1) on grounds of disability, such as health status and infertility. That is, the State’s prohibition of IVF is an illegitimate manifestation of religion.

IV. By prohibiting access to IVF, Costa Rica is discriminating on grounds of disability, health status, sex and gender, in violation of Articles 1 and 24 of the Convention.

A. By prohibiting access to IVF, Costa Rica is discriminating on grounds of disability and health status, in violation of Articles 1 and 24 of the Convention.

1. Article 1 requires Costa Rica “to ensure to all persons ... the free and full exercise of [the Convention’s] rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” Involuntary childlessness due to infertility is a social condition, which is a prohibited ground of discrimination, and when couples lack resources to travel to other countries for IVF amounts to discrimination against them on grounds of economic status. The State discriminates against infertile individuals and couples by denying them free and full exercise of the Convention’s rights and freedoms, including the right to found and raise a family protected by Article 17, the right to privacy protected by Article 11, and the right to freedom of religion protected by Article 12.

2. In addition, reproductively disabled individuals and couples are denied equal protection of the law to which they are entitled under Article 24 of the Convention because the State’s prohibitory intervention denies them access to IVF that can relieve childlessness and allow them the ability to have and raise children, like reproductively able couples.

3. Worldwide, 8%-12% of couples have difficulty conceiving a child, thus constituting a significant proportion of the world’s population.<sup>35</sup> Infertility causing involuntary childlessness is a form of disability. According to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, “the term ‘disability’ summarizes a great number of different functional limitations.”<sup>36</sup>

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<sup>35</sup> Abdallah S. Daar, Zara Merali, “Infertility and social suffering: the case of ART in developing countries” in E. Vayena et al. eds. *Current Practices and Controversies in Assisted Reproduction*, at 15 (hereinafter Daar and Merali, *The case of ART in developing countries*).

<sup>36</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to U.N. General Assembly resolution 48/96 of 20 December 1993, para. 17.

4. The *Convention on the Rights of Persons with Disabilities* (the Disability Convention),<sup>37</sup> to which Costa Rica is a State Party,<sup>38</sup> considers the term “disability” as an “evolving concept,” and that disability results from

the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>39</sup>

5. According to the Disability Convention, discrimination on the basis of disability means “any distinction, exclusion or restriction on the basis of disability which has the purpose or the effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others of all human rights and fundamental freedoms ....”<sup>40</sup>

6. The Costa Rican Act No 7600, *Igualdad de oportunidades para las personas con discapacidad* (Equal Opportunities for People with Disability) (Costa Rican Disability Act), defines disability as “any physical, mental or sensorial impairment that substantially limits one or more of the main activities of an individual.”<sup>41</sup>

Reproduction is a main choice of activity of an individual, and to suffer a physical impairment that hinders reproductive ability is, accordingly, a disability. Moreover, Article 31 of the Costa Rican Disability Act explains that health care services should be provided under equal conditions to every person who requires them. The State’s refusal to permit IVF to reproductively impaired patients denies them equality, however, and imposes discrimination on the ground of disability.<sup>42</sup> This Act implements the Costa Rican Constitution, which declares that the State has a duty to “procure the greatest wellbeing of all inhabitants of the country,”<sup>43</sup> which should include the well-being of infertile inhabitants.

7. The obligation to protect and promote health therefore involves not only preventing or treating diseases, illnesses or infirmities, but must also involve an integral well-being that takes into consideration social and psychological aspects of individual well-being.

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<sup>37</sup> *Convention on the Rights of Persons with Disabilities*, Dec. 13, 2006 (entered into force May 3, 2008), G.A. Res. 61/106, U.N. Doc. A/61/611 (2006) (hereinafter Disability Convention).

<sup>38</sup> Costa Rica ratified the Disability Convention on October 1, 2008, available at <http://www.un.org/disabilities/default.asp?id=257>, last visited 28 Sept. 2009.

<sup>39</sup> Disability Convention, supra note 37, Preamble (e).

<sup>40</sup> *Ibid.* Article 2. Committee on Economic, Social and Cultural Rights, General Comment 14: *The right to the highest attainable standard of health.*, Twenty-second session, Geneva 25 April- 12 May 2000, E/C.12/2000/4, reaffirmed in para. 34 in their General Comment 5, *Persons with disabilities*, Eleventh session, Geneva 1994, E/1995/22, that the public and the private sector have to ensure nondiscriminatory access to health care services for people with disabilities. Costa Rica ratified the International Covenant on Economic, Social and Cultural Rights on November 29, 1968, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en), last visited 28 Sept. 2009.

<sup>41</sup> Ley 7600 sobre “Igualdad de Oportunidades para las Personas con Discapacidad,” passed by the Costa Rican Parliament in 1996, Article 2 [*free translation to English*].

<sup>42</sup> *Ibid.* Article 31.

<sup>43</sup> Constitución, supra note 10, Article 50.

8. The World Medical Association recognizes that reproductive technology

... differs from the treatment of illness in that inability to become a parent without medical intervention is not always regarded as an illness. While it may have profound psychosocial, and thus medical, consequences, it is not in itself life limiting. It is, however, a significant cause of major psychological illness and its treatment is clearly medical.<sup>44</sup> [*Emphasis added*]

9. The State justifies prohibition of IVF by maintaining that it “is not an emergency treatment nor a cure for a disease, [but] ... an artificial recourse that seeks to overcome that biological condition”<sup>45</sup> of infertility. However, many medical procedures not subject to state prohibition, and indeed often actively facilitated and funded by states, only overcome without curing adverse biological conditions. Examples include provision of prosthetic devices to replace missing limbs, implantation of cardiac pacemakers to reduce effects of heart disease, and artificial insemination when natural insemination cannot be achieved. Disabled people affected by such biological conditions are not subject to the intervention of state prohibitions of medically assisted relief.

10. The prohibition of IVF discriminates against infertile individuals on the grounds of disability and health status. The prohibition of medical treatment to alleviate the consequences of this medical condition is a denial of equal access to necessary health care services, and a denial of the opportunity to enjoy social and psychological well-being on the basis of equality with reproductively able individuals.

B. In upholding the decision of the Supreme Court of Costa Rica to annul the Executive Decree, the State stigmatizes infertile individuals and couples, thus preventing them from being equal in dignity.

1. Articles 1, 11 and 24 of the Convention have to be read consistently with each other, and with the State’s commitments under the American Declaration of the Rights and Duties of Man,<sup>46</sup> the Universal Declaration of Human Rights,<sup>47</sup> and the Convention on the Elimination of All Forms of Discrimination against Women<sup>48</sup> (the Women’s Convention), to ensure that everyone is equal in dignity.

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<sup>44</sup> The World Medical Association, *Statement on Assisted Reproductive Technologies*, adopted by the WMA General Assembly, Pilanesberg, South Africa, October 2006, para. 6, available at <http://www.wma.net/e/policy/r3.htm>.

<sup>45</sup> Admissibility Report, supra note 6, para. 32.

<sup>46</sup> *American Declaration of the Rights and Duties of Man*, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, Preamble, para. 1.

<sup>47</sup> *Universal Declaration of Human Rights*, adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948, Preamble, paras. 1 & 5 and Article 1.

<sup>48</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 18, 1979 (entered into force Sept. 3, 1981), 1249 U.N.T.S. 13, reprinted in 19 *I.L.M.* 33 (1980), Preamble, paras. 1 & 7; Costa Rica ratified the Women’s Convention on April 4, 1986, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en), last visited 28 Sept. 2009.

2. Infertility may not be considered a public health priority; however, it is a matter of dignity in the lives of individuals who suffer from its consequences. Childlessness stigmatizes the infertile who want to have and raise families, imposing on them the label of being barren, and denying them moral, social and, in the perception of some, divine approval to reproduce.<sup>49</sup> It is seen as a judgment upon their moral character and social worth. Inability to bear and rear children constitutes a tragedy for many couples who experience a sense of loss, failure and exclusion.<sup>50</sup> The experience of being unable to have a child due to impairment:

causes harsh, poignant and unique difficulties: economic hardship, social stigma and blame, social isolation and alienation, guilt, fear, loss of social status, helplessness and, in some cases, violence.<sup>51</sup>

3. Stigma is defined as an “attribute that is deeply discrediting”, reducing the stigmatized person “from a whole and usual person to a tainted, discounted one.”<sup>52</sup> The infertile are able to be discounted as lesser in dignity because they are not able to bear children, contrary to prevailing social norms.<sup>53</sup>

4. By denying infertile individuals and couples the hope and benefit of IVF treatment, the State stereotypes them as unentitled to the dignity of conscientious parenthood, and discriminates against them in their enjoyment of private and family life. By prohibiting IVF, the State is contributing to the social stigma placed on individuals and couples unable to bear children, denying their right to be equal in dignity in violation of Articles 1, 11, and 24 of the Convention.

C. By prohibiting women’s access to IVF, Costa Rica is discriminating against them on grounds on sex and gender in their enjoyment of family life and denying them equal protection of the law.

1. Infertility and childlessness impact women disproportionately, exacerbating their systemic disadvantage in society. The psychological and social burden of infertility is predominantly borne by women.<sup>54</sup> Their status in society and the family is often identified with their capability to bear children, and their failure to give birth can be seen as a social disgrace.<sup>55</sup> Women are often disproportionately blamed when couples do not have children to constitute their families’ next generation. Infertile women are often ostracized from their own and their husbands’ families, and not infrequently divorced because they cannot fulfill the role of mothers. The frustration of infertility

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<sup>49</sup> Shea O. Rutstein and Iqbal H Shah, *Infecundity, Infertility and Childlessness in Developing Countries*. DHS Comparative Report No. 9, at 1 (Calverton, Maryland, USA: ORC Macro and the World health Organization, 2004).

<sup>50</sup> *Ibid.* at xiii and 1.

<sup>51</sup> Daar and Merali, The case of ART in developing countries, *supra* note 35, at 16.

<sup>52</sup> Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, at 3 (New Jersey: Prentice-Hall, 1963).

<sup>53</sup> M C Stanford and R R Scott, “Stigma deviance and social control: some conceptual issues” in S C Ainlay *et. al.* eds. *The Dilemma of Difference*, at 80 (New York: Plenum, 1986).

<sup>54</sup> Mahmoud Fathalla, “Current challenges in assisted conception” in E. Vayena *et al.* eds. *Current Practices and Controversies in Assisted Reproduction*, at 10.

<sup>55</sup> *Ibid.*

can trigger matrimonial disharmony and conflict, resulting in marital breakdown, which in many communities reduces women to poverty.<sup>56</sup>

2. When the State prohibits a medical treatment that would in a significant number of cases alleviate the social and psychological distress of a medical condition from which women suffer in disproportionate ways, the State is hindering women's exercise not only of their right to found and raise families, but also of their right to enjoy mental and social well-being. IVF can increasingly overcome childlessness, and thereby alleviate the social and psychological distress women experience because of their inability to conceive children. The State claims that the suffering it recognizes due to infertility "has no causal link to the Costa Rican State."<sup>57</sup> However, the suffering experienced particularly by women due to childlessness that IVF might remedy is directly linked to the State's prohibition of IVF, which is increasingly successful in achieving childbirth in couples unable to conceive by natural means.<sup>58</sup> The State is directly preventing women from achieving motherhood that would be possible through IVF, and is similarly implicated in the preventable social, psychological and familial distress that women suffer through childlessness that could be overcome.

3. The State is obligated under Articles 1, 17 and 24 of the Convention, and equally under Articles 5(a), 12 and 16(e) of the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention),<sup>59</sup> to ensure that there is no direct or indirect discrimination against women in its laws, or the application of its laws.<sup>60</sup> In particular, where public officials, including judges, apply laws in a manner that adversely impacts women, a form of gender discrimination arises that the State is obligated to prevent or remedy. A court in Argentina relied on Article 12 of the Women's Convention to hold that exclusion of infertility treatment constituted discrimination against infertile women.<sup>61</sup>

4. The prohibition of IVF not only impedes women from overcoming a disability that adversely affects their social and psychological well-being, but also constitutes a form of indirect discrimination due to the disproportionate social burden infertility places on women.<sup>62</sup> Although the prohibition of IVF may be considered neutral on its face, in that this potentially remedial medical technique is prohibited to women and men, its effect can disproportionately impair, nullify and violate the recognition, enjoyment or

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<sup>56</sup> Daar and Merali, *The case of ART in developing countries*, supra note 35, at 19; Anjali Widge, "Sociocultural attitudes towards infertility and assisted reproduction" in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, at 63; Ellen Hardy and Maria Yolanda Makuch, "Gender, Infertility and ART" in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, at 273.

<sup>57</sup> Admissibility Report, supra note 6, para. 40.

<sup>58</sup> Beth Malizia, Michele Hacker, Alan Penzias, Cumulative Live-Birth Rates after in Vitro Fertilization, *New England Journal of Medicine* 360(3): 236-243 (2009).

<sup>59</sup> *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, para. 7, U.N. Doc. A/59/38 (2004).

<sup>60</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, para. 55 (Jan. 19, 1984).

<sup>61</sup> Cámara Segunda de Apelaciones en lo Civil, Sala Primera, Provincia de Entre Rios (I.O.S.P.E.R.) s/Acción de Amparo (02/06/2009), para. II.2.

<sup>62</sup> *General Recommendation No. 24: Women and Health (Article 12)*, para. 19, U.N. Doc. A/54/38/Rev.1 (1999).

exercise by women of their rights under Articles 1, 17 and 24 of the Convention, and Articles 5(a) and 12 and 16(e) of the Women's Convention.

D. The prohibition of access to IVF is differential treatment, constituting discrimination on the grounds of disability, health status, sex and gender, which cannot be justified in a free and democratic society.

1. National legislation, consistently with Articles 1 and 25 of the Convention, is required to provide protection without discrimination. The Court has ruled that only a distinction based on "reasonable" and "objective" criteria can be considered a legitimate State interest within Article 24.<sup>63</sup> A criterion on which to base a distinction is reasonable and objective only when it "(1) pursues a legitimate aim and (2) employs means which are proportional to the end sought."<sup>64</sup>

2. The State spuriously invokes the legitimate aim of protection of human life while it is incoherently "protecting" lives by preventing them from coming into being, and sacrificing the lives of children who could be conceived and born through IVF. The prevention of conception falls outside the scope of protection of life under the Convention, but discriminates on grounds of the health status and disability of infertility, by which women are more gravely affected, in violation of Articles 1 and 24 of the Convention.

3. The State is unable to justify an absolute prohibition when reasonable regulation of IVF, such as by the 1995 Executive Decree, would provide protection against the unnecessary loss of embryos. The State deliberately rejects less invasive means of protecting life compatibly with its duty to protect the rights of individuals, as required by Article 1(1) of the Convention.

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<sup>63</sup> *Vélez Loor v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, para. 248 (Nov. 23, 2010); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 119 (Sept. 17, 2003).

<sup>64</sup> IACHR, CONSIDERATIONS REGARDING THE COMPATIBILITY OF AFFIRMATIVE ACTION MEASURES DESIGNED TO PROMOTE THE POLITICAL PARTICIPATION OF WOMEN WITH THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION, Chapter III, Section B, <http://www.cidh.oas.org/annualrep/99eng/Chapter6.htm>.