

**AMICUS CURIAE BRIEF PRESENTED TO  
THE INTER-AMERICAN COURT ON HUMAN RIGHTS**

**BY**

**THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE LOYOLA LAW SCHOOL LOS ANGELES**

**AND**

**CO-SIGNED BY**

**ELEVEN ACADEMICS AND PRACTITIONERS OF HUMAN RIGHTS AND INTERNATIONAL LAW**

**IN THE CASE OF**

*Gretel Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*

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## **Part I – Introduction**

### **A. Authors of This Amicus Curiae Brief**

1. This amicus curiae brief has been prepared by the International Human Rights Clinic of Loyola Law School Los Angeles. Professor Cesare Romano is the director of the clinic and has supervised the preparation of this brief by four of his students (Karl Durow, Suzanne Furgeson, Inderjot Hundal and Hansen Tong).

2. The list contained in Annex I to this brief contains the names of individuals and organizations that have decided to sign on to this brief because they agree with its content. Thus, this brief should be considered a joint submission of both the authors and the signatories for the purpose of the application of the Court's Rule of Procedures.

### **B. Legal Basis for this Brief**

3. According to the Court's Rules of Procedure Article 44.1: "Any person or institution seeking to act as *amicus curiae* may submit a brief to the Tribunal...". And, according to Article 2.3, "the expression "*amicus curiae*" refers to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing".

### **C. Aim**

4. The authors of this brief, international human rights scholars and practitioners, respectfully offer to this Honorable Court reasoned arguments on some legal aspects of the *Gretel Artavia Murillo et al. ("In Vitro Fertilization")* case. Our considerations are not necessarily in support of any of the parties involved in this case. We approach this Court truly as its *amici* ("friends"), with the preservation and development of the Inter-American human rights legal system as the sole interest in our mind.

5. This is an unprecedented case, both for this Court and in international human rights in general. Article 4.1 of the American Convention 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". In the present case, Costa Rica has taken the unusual position that reproductive technologies, specifically in-vitro fertilization (IVF), must be banned because such a procedure, which might cause human embryos to be discarded and destroyed, would be a violation of the Article 4.1 right to life. Costa Rica has prohibited this type of assisted reproduction since 2000, when the Constitutional Court rendered a decision striking down Decree No. 24029-S on the Regulation of Assisted Reproductive Technologies (3 March 1995).<sup>1</sup> In the decision, the Court justified the ban, *inter alia*, with the need ensure Costa Rica's compliance with its Article 4.1 obligations. In 2010, a new bill to legalize IVF, although with significant and extreme restrictions, was proposed in the Costa Rica legislature but never passed.<sup>2</sup> As a result of the ban, a doctor in Costa Rica who performs the procedure may be held criminally liable.<sup>3</sup>

6. While Article 4.1 has been subject of numerous decisions of this Court,<sup>4</sup> for the first time this Court is facing a particularly unique case where a State is not accused of having violated this right, but rather uses it as a reason to infringe upon several other rights contained in the American Convention and other international human rights instruments.

7. At the core, the dispute between the Inter-American Commission, the victims and Costa Rica stems from the vague language of Article 4.1, which does not specify when exactly the right of life begins. The vagueness of article 4.1 is not accidental or unintentional. It is instead a deliberate choice of the drafters of the Convention to make it possible to accommodate a large spectrum of attitudes amongst States of the Americas.<sup>5</sup>

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<sup>1</sup> Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] Mar. 15, 2000, Sentencia 2000-02306 Expediente 95-001734-007-CO (Costa Rica).

<sup>2</sup> Jared Yee, "Costa Rica given another extension on IVF", BioEdge, [http://www.bioedge.org/index.php/bioethics/bioethics\\_article/9564/](http://www.bioedge.org/index.php/bioethics/bioethics_article/9564/), (site last visited August 21, 2012).

<sup>3</sup> Francisco Jara, "Costa Rica's In-Vitro Fertilization Ban Challenged", Agence France Presse, [http://www.google.com/hostednews/afp/article/ALeqM5hvAlW2kazDhrWF\\_BprAizWqUj7UQ](http://www.google.com/hostednews/afp/article/ALeqM5hvAlW2kazDhrWF_BprAizWqUj7UQ), (site last visited August 21, 2012).

<sup>4</sup> *E.g.*, Hilaire, Constantine et al. v. Trinidad and Tobago, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94 (June 21, 2002); Fermin Ramirex v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 126 (June 20, 2005); Raxcaco Reyes v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 133 (Sept. 15, 2005).

<sup>5</sup> Baby Boy v. United States, Case 2141, Inter-Am Comm'n H.R. Report No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev 1 (1981). (facing the question of whether unborn fetuses are "protected life" under article 4.1 of the American

8. To date, despite significant scientific and technological advancements both globally and in the Americas, there is no consensus, or even a clear majority, on the legal status of the human embryo.<sup>6</sup> Indeed, while the European Court of Human Rights has had, in a few cases and even recently, the occasion of dwelling on the rights of human embryos, it has deliberately refrained from declaring when human life begins for the purposes of being protected by European human rights law, and has instead chosen to defer to States' margin of appreciation on this issue.<sup>7</sup>

9. In this brief, we urge the Court to follow the example of other international courts and steer clear of the debate about when life begins and what the legal status of human embryos is. It is not for the Court, or any international court, to clarify when life, for the purpose of the American Convention, begins. It is an issue that remains better left to the will of States and their practice. However, the Court can and should decide this case because the case turns not on an interpretation of Article 4 and the putative rights of embryos, but rather on the rights of infertile women and men protected by several other articles of the American Convention and numerous other international instruments.

10. We believe the Court is well-advised to carry out its analysis according to the interpretative parameters laid out in Article 29 of the American Convention, which establishes that no provision of the Convention shall be interpreted as: "a) permitting any State Party ... to

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Convention, the Commission concluded that governments negotiating and adopting the Convention deliberately avoided specifying when protection by article 4.1 of a human life begins, leaving States a wide margin of appreciation and accommodating a wide spectrum of national attitudes towards this issue.)

<sup>6</sup> *Case of S.H. and Others v. Austria*, No. 57813/00 Eur. Ct. H.R., Eur. Ct. H.R., 427 at ¶ 96 (2010); *Case of Vo v. France*, 2004-VIII Eur. Ct. H.R., 326 at ¶ 84 (observing that at the European level "there is no consensus on the nature and status of the embryo and/or fetus, although they are beginning to receive some protection in light of scientific progress and... research into... medically assisted procreation").

Worldwide, governments have adopted different frameworks for protecting the "the potential for human life". Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 Geo. Wash. L. Rev. 1468-69 (2008); *Davis v. Davis*, 842 S.W.2d 588 (1992). For example, the United Kingdom's legislative approach to IVF involves a narrowly tailored legal regime and extensive oversight via a regulatory agency – the 'Human Fertilisation and Embryology Authority.' Radhika Rao, *supra* note 2, at 1485. In contrast, IVF treatment is virtually unregulated in the United States, though some states have enacted laws that limit the use of embryos for human stem cell research. *Id.* IVF jurisprudence in the United States reflects a fundamental legal notion that "embryos are neither persons nor property, but occupy an intermediate category that entitles them to special respect because of their potential for human life." L. Bennett Moses, "The Applicability of Property Law in New Contexts: From Cells to Cyberspace", 30 Sydney Law Review, 642 (2008). The Court of Justice of the European Union (ECJ) has taken the same stance in Case C-34/10, *Oliver Brüstle v. Greenpeace e.V.* (2011).

<sup>7</sup> Infra, paras 15-24.

suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b) restricting the enjoyment or exercise of any right or freedom recognized ... by virtue of another convention to which one of the said states is a party; c) precluding other rights or guarantees that are inherent in the human personality ...; or d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have".

11. These are the parameters that States and the Court must follow when interpreting the scope of the obligations in the Convention, including the vague and undefined provision of Article 4.1. In other words, the key question in the present case is, regardless of how "protected life" is defined in international human rights law, to what extent does Costa Rica's IVF ban restrict rights protected in the American Convention to a greater extent than is provided for herein? Furthermore, to what extent does it restrict the enjoyment or exercise of any right or freedom recognized in other human rights treaties to which Costa Rica is a party? And, again, to what extent does it preclude rights or guarantees that are inherent in the human personality? Finally, does it exclude or limit the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have?

12. To assist this Court in its decision-making, this brief will first present an overview of the jurisprudence of the European Court of Human Rights on human embryos to date. We will then review the prevailing practices of other member States of the Organization of American States, showing that Costa Rica's ban is unprecedented and significantly out of line in the Western hemisphere. This overview will show that Costa Rica errs by holding that in banning IVF it is upholding its duties under Article 4.1 because the ban is an excessive measure that results in a restriction of rights contained in the Convention to an unnecessary degree (Art. 29.1.a). Finally, we will demonstrate how Costa Rica's ban of IVF restricts the enjoyment or exercise of rights or freedoms recognized "...in other human rights treaties" to which Costa Rica is a party (Art. 29.1.b), namely the:

- i. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador";<sup>8</sup>
- ii. International Covenant on Economic, Social and Cultural Rights;<sup>9</sup>
- iii. Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities;<sup>10</sup>
- iv. United Nations Convention on the Rights of Persons with Disabilities;<sup>11</sup>
- v. United Nations Convention on the Elimination of Discrimination Against Women;<sup>12</sup> and
- vi. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women "Convention of Belém do Pará".<sup>13</sup>

13. While the Court might not have jurisdiction to adjudicate violations of some of those treaties or their relevant articles, again it is required by Article 29 of the Convention to take them into account when deciding violations of articles of the American Convention, over which it does have jurisdiction.

14. We also urge the Court to consider that the ban precludes other rights or guarantees that are inherent in the human personality (Art. 29.1.c) and excludes or limits the effects of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights (Art. 29.1.d).

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<sup>8</sup> Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), 16 November 1999, A-52. Ratified by Costa Rica on September 29, 1999, with no reservations. It entered into force on November 16, 1999.

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3. Entered into force on January 3, 1976. Ratified by Costa Rica November 29, 1968, with no reservation or declarations.

<sup>10</sup> Organization of American States, Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999, AG/RES. 1608 (XXIX-O/99). Entered into force on September 14, 2001. Ratified by Costa Rica on August 12, 1999, with no reservation or declarations.

<sup>11</sup> International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, December 13, 2006, 2515 UNTS 3; First Optional Protocol to the Int'l Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Dec. 13, 2006, UN Doc. A/61/611. Both entered into force on May 3, 2008. Both ratified by Costa Rica on October 1, 2008, with no reservation or declarations.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 1249 UNTS 13. Entered into force on September 3, 1981. Ratified by Costa Rica on April 4, 1986, with no reservations or declarations. Optional Protocol to CEDAW. Ratified by Costa Rica on 20 September 2001, with no reservations or declarations.

<sup>13</sup> Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), adopted June 9, 1994. Entered into force on March 5, 1995. Costa Rica ratified it on May 7, 1995 with no reservations or declarations.

## **PART II—Jurisprudence of the European Court on Human Embryos**

### **A. European Court of Human Rights**

15. The European Court of Human Rights (ECHR) has not found it necessary to define the status of the embryo in resolving IVF cases that have come before the Court. Article 2 of the European Convention on Human Rights reads: “Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. Unlike Article 4 of the American Convention on Human Rights, Article 2 of the European Convention does not provide that the right to life must be protected, “in general, from the moment of conception.” However, much like the American Convention, the European Convention is silent as to precisely when the right to life begins.<sup>14</sup>

16. The ECHR has deliberately avoided filling this vacuum in the European Convention, consistently holding that “the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.”<sup>15</sup> The ECHR is “convinced that it is neither desirable, nor even possible” to abstractly determine “whether the unborn child is a person for the purposes of Article 2.”<sup>16</sup> Yet, while leaving such a sensitive moral and ethical determination up to the discretion of the Member States, ECHR has always considered the issues “... by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman,” or a mother and father and the unborn child.<sup>17</sup> In particular, it has held that “the ‘life’ of the fetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman.”<sup>18</sup>

17. ECHR jurisprudence has generally taken a uniform approach to IVF-related issues and adheres to commonly recognized human rights principles when analyzing national legislation concerning IVF treatment. In cases dealing with IVF, the ECHR has primarily approached the issue through interpretation of Article 8 of the European Convention, which protects the right

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<sup>14</sup> *Vo v. France*, *supra* note 6, at ¶ 75.

<sup>15</sup> *Id.* at ¶ 82; *Evans v. United Kingdom*, 2007-1, Eur. Ct. H.R. ¶ 54.

<sup>16</sup> *Vo v. France*, *supra* note 6, at ¶ 85.

<sup>17</sup> *Id.* at ¶ 80.

<sup>18</sup> *Id.* at ¶ 77.

to respect for privacy and family life.<sup>19</sup> Indeed, the Court has consistently found Article 8 applicable to IVF legislation because “the right of a couple to conceive a child and make use of medically assisted procreation for that purpose” is a choice that is “clearly an expression of private and family life.”<sup>20</sup> In all the recent IVF cases, the Court has reiterated “the notion of ‘private life’ within the meaning of Article 8 of the Convention [as] a broad concept which encompasses... the right to respect for the decisions both to have and not to have a child.”<sup>21</sup> Substantially, the ECHR has almost exclusively focused on the States’ obligation to strike a ‘fair balance’ between competing private and public interests or Convention rights.<sup>22</sup> The ECHR’s ‘fair balance’ methodology suggests that “its approach should involve ultimately an accommodation of conflicting rights and interests, rather than a decision in favor of one right or interest over others and that this accommodation normally should be found in the context of individual cases, among the interests of the individual applicant and those of the community.”<sup>23</sup> Bright-line legislation is exceptional in the European context and receives strict scrutiny from the Court, which often has held that “blanket bans” and rules applied in a “general, automatic and indiscriminate manner” or “without further enquiry into the existence of competing public-interest considerations” violated the Convention.<sup>24</sup>

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<sup>19</sup> “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

<sup>20</sup> Case of *S.H. and Others v. Austria*, *supra* note 6, at ¶¶ 52, 82.

<sup>21</sup> *Id.* at ¶ 80; *Evans v. United Kingdom*, *supra* note 15, at ¶ 71; *A, B and C v Ireland* App No 25579/05 at ¶ 212 (ECHR, 16 December 2010); *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, ¶ 61.

<sup>22</sup> “Proportionality review and, in particular, ad hoc judicial balancing of competing rights and interests are probably the most celebrated tools propagated by the European Court of Human Rights... and are currently dominant features of the European discourse of rights.” J. Bomhoff, Jacco and L. Zucca, “The Tragedy of Ms. Evans: Conflicts and Incommensurability of Rights”, 2 European Constitutional Law Review, 424 (2006); see also, D. Beatty, “The Ultimate Rule of Law”, Oxford University Press (2004); R. Alexy, “Balancing, Constitutional Review and Representation”, 3 Int. J Constitutional Law, 572-581 (2005); D. Law, “Generic Constitutional Law”, 89 Minnesota Law Review, 652-743 (2005).

<sup>23</sup> Bomhoff et al., *supra* note 22, at 435.

<sup>24</sup> *Id.* See, *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R. 187; *Osman v. United Kingdom*, Eur. Ct. H.R., App. No. 87/1997/871/1083, Judgment, ¶ 151 (Oct. 28, 1998). See, also, generally, *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. 149, ¶ 61 (1981) (“To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved”); *Open Door & Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. 28 (ser. A) ¶ 73 (1992) (“The Court is first struck by the absolute nature of the

18. In its analytical approach to IVF legislation in Europe, the ECHR has considered whether the impugned State measures are “necessary in a democratic society,” as provided by paragraph 2 of Article 8, while taking into account the “relevant margin of appreciation.”<sup>25</sup> The factors taken into account by the ECHR when determining the margin of appreciation afforded States in the IVF context are quite standard. “Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will normally be restricted... Where, however, there is no consensus within the member States... either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.”<sup>26</sup>

19. In *Dickson v. UK* (2007), the applicants alleged that the State’s refusal to allow access to artificial insemination facilities was a breach of their rights under the European Convention – they complained that the refusal of artificial insemination facilities breached their right to respect for private and family life guaranteed by Article 8, and their right to a family under Article 12.<sup>27</sup>

20. The first applicant was a man sentenced to life imprisonment for murder. The second applicant was a woman who met the first applicant via a pen pal network while she was also imprisoned. Applicants wanted to have a child together. Due to the lifetime incarceration of the first applicant, and age of the second applicant, they requested the use of artificial insemination facilities. The Secretary of State refused their request – stating broadly that deprivation of the right to conceive was part and parcel of imprisonment. The ECHR found that Article 8 applied to the applicants because “the refusal of artificial insemination facilities concerned their private and family lives which notions incorporate the right to respect for their decision to become

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Supreme Court injunction ...’); *Shofman v. Russia*, App. No. 74826/01, Eur. Ct. H.R. at ¶ 44 (2005) (‘According to the Court’s case-law, the situation in which a legal presumption is allowed to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective “respect” for private and family life’).

<sup>25</sup> *Case of S.H. and Others v. Austria*, *supra* note 11, at ¶¶ 88-91.

<sup>26</sup> *Id.* at ¶ 94; *Evans v. United Kingdom*, *supra* note 15; *A, B, and C v. Ireland*, *supra* note 21; *Case of Dickson v. United Kingdom*, Judgment, App. No. 44362/04 Eur. Ct. H.R. 1050 (2007).

<sup>27</sup> *Case of Dickson v. United Kingdom*, *supra* note 26.

genetic parents.”<sup>28</sup> The ECHR held that the applicants’ interest in having a child together was a matter of “vital importance.”<sup>29</sup> Consequently, the ECHR found a violation of Article 8 due to the absence of an individualized assessment for IVF treatment, which “regards a matter of significant importance for the applicants.”<sup>30</sup>

21. The most recent ECHR cases on this issue decisively confirm that European States enjoy a wide margin of appreciation when it comes to regulating IVF treatment. Although the rights at issue clearly involve important facets of existence and identity, “since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is not yet clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one.”<sup>31</sup> The Court is explicit in its conclusion that the wide margin afforded is due to the lack of a “settled and long-standing” European consensus regarding the treatment of embryos, yet simultaneously recognizes “that there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilisation, which reflects an emerging European consensus.”<sup>32</sup>

22. In ECHR jurisprudence concerning IVF treatment, the Court never confirms or denies the “right to life” of an *in vitro* embryo, yet indicates that a blanket prohibition on IVF treatment would likely be viewed as “such a general, automatic and indiscriminate restriction on a vitally important Convention right [it] must be seen as falling outside any acceptable margin of appreciation.”<sup>33</sup> In its 2010 Grand Chamber Judgment in the *Case of S.H. and Others v. Austria*, the ECHR determined that certain provisions of Austria’s *Artificial Procreation Act*, prohibiting heterologous IVF (i.e. fertilization where either the sperm or the ovum, or both, have been provided by third-parties), did not violate Article 8 because in that case “a fair balance has been struck between the competing interests of the State and those directly affected by those

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<sup>28</sup> *Id.* ¶ 66.

<sup>29</sup> *Id.* ¶ 72.

<sup>30</sup> *Id.* ¶ 85.

<sup>31</sup> *Case of S.H. and Others v. Austria*, *supra* note 11, at ¶ 97.

<sup>32</sup> *Id.* at ¶ 96.

<sup>33</sup> *Dickson v. United Kingdom*, *supra* note 26, at ¶ 79; *Hirst v. United Kingdom*, *supra* note 24.

legislative choices.”<sup>34</sup> A key component of this assessment was the fact that “the Austrian legislature has not completely ruled out artificial procreation as it allows the use of homologous techniques” (i.e. fertilization in vitro where sperm and ovis are provided by the couple).<sup>35</sup> The ECHR found the “careful and cautious approach adopted by the Austrian legislature” appropriate because it sought to “reconcile social realities with its approach of principle in this field.”<sup>36</sup> Although the ECHR found no breach of Article 8, its concluding statements to the case of *S.H. and Others* the Court urged the Austrian Legislature to thoroughly assess their rules governing artificial procreation, reminding Austria “that this area, in which the law appears to be continuously evolving and which is subject to particularly dynamic development in science and law, needs to be kept under review by the Contracting States.”<sup>37</sup>

23. Finally, IVF and the limitations governments can impose as to when, for what and how it is carried out, came again under the scrutiny of the ECHR in the case *Costa and Pavan v. Italy*.<sup>38</sup> Italy, together with Austria, has one of the most stringent laws regulating IVF in Europe. Albeit it does not prohibit it altogether - as Costa Rica does - Italian Law No. 40 of 19 February 2004 allows it only in some limited circumstances.<sup>39</sup> The case arose when a couple of healthy carriers of cystic fibrosis, a genetic disease, wanted to have a child by IVF, so that the embryo could be genetically screened prior to implantation (pre-implantation diagnosis – “PID”). Law 40 prohibits PID, albeit, in 2008, it was amended to allow IVF for sterile couples or those in which the man has a sexually transmissible disease.<sup>40</sup>

24. The applicants claimed that the only course open to them to avoid having a baby that does not have cystic fibrosis is to start a pregnancy by natural means and medically terminate it every time the fetus tests positive for the disease. This would be an excessive interference with their rights under Article 8 (right to respect for private and family life) of the European Convention of Human Rights. It would also be discrimination, compared with sterile couples or

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<sup>34</sup> *Case of S.H. and Others*, *supra* note 6, ¶ 97.

<sup>35</sup> *Id.* at ¶ 104.

<sup>36</sup> *Id.* at ¶ 114.

<sup>37</sup> *Id.* at ¶ 117.

<sup>38</sup> *Case of Costa and Pavan v. Italy*, No. 54270/10, Chamber judgment, 28 August 2012.

<sup>39</sup> For an overview of Italy’s Law 40, see A. Boggio, *Italy Enacts New Law on Medically Assisted Reproduction*, 20 *Hum. Reprod.* 1153-57 (2005).

<sup>40</sup> Italy, Decree of 11 April 2008.

those where the man had a sexually transmissible disease, amounting to a violation of Article 14 (prohibition of discrimination).

25. The Court stressed that while access to PID, which requires IVF, raises delicate issues of a moral and ethical nature, the legislative choices states make on these matters cannot escape the Court's supervision.<sup>41</sup> It noted that of 32 Council of Europe member states whose legislation it examined, PID was prohibited only in Italy, Austria and Switzerland (and in Switzerland, regulated access to PID was currently being considered).<sup>42</sup> It also observed that the inconsistency in Italian law: prohibiting the implantation of only those embryos which were healthy, but authorizing the abortion of fetuses which showed symptoms of the disease.

26. Italy justifies the prohibition of PID by the need to protect the health of the mother and child and the dignity and freedom of conscience of the medical professions, and to avoid the risk of eugenic abuses. However, the Court observed first of all that the notions of "embryo" and "child" must not be confused.<sup>43</sup> Furthermore, it could not see how, in the event that the fetus proved to have the disease, a medically-assisted abortion could be reconciled with the Government's justifications, considering, among other things, the consequences of such a procedure for both the fetus and the parents, particularly the mother.<sup>44</sup>

27. In the end, the Court concluded that the applicants' desire to resort to medically-assisted procreation and PID in order to have a baby that did not suffer from cystic fibrosis was a form of expression of their private and family life that fell within the scope of Article 8. However, it did not find a violation of Article 14 because where access to PID was concerned, couples in which the man was infected with a sexually transmissible disease were not treated differently than the applicants.

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<sup>41</sup> *Costa and Pavan v. Italy*, supra note 38, para 68, citing *S.H. v. Austria*, supra note 6, at para. 97.

<sup>42</sup> *Costa and Pavan v. Italy*, supra note 38, para 70.

<sup>43</sup> *Ibid.*, para 62.

<sup>44</sup> *Ibidem*

## **B. Court of Justice of the European Union**

28. Recently, in *Oliver Brüstle v Greenpeace e.V.* (2011),<sup>45</sup> the Court of Justice of the European Union (ECJ) was called to interpret Article 6(1) and (2)(c) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.<sup>46</sup> In its Grand Chamber Judgment (18 October 2011), it determined that an invention is excluded from being patented where the process requires either the prior destruction of human embryos or their use as a base material.<sup>47</sup>

29. In defining "human embryo", the ECJ approached the issue narrowly, limiting itself to a legal interpretation of the relevant provisions of the Directive.<sup>48</sup> At the same time it held that "the concept of 'human embryo' must be understood in a wide sense,"<sup>49</sup> and that "...it must be borne in mind, further, that the meaning and scope of terms for which European Union law provides no definition must be determined by considering, *inter alia*, the context in which they occur and the purposes of the rules of which they form part."<sup>50</sup>

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<sup>45</sup> *Oliver Brüstle v. Greenpeace*, *supra* note 6.

<sup>46</sup> Council Directive 98/44/EC, 1998 O.J. (L 213) 13.

<sup>47</sup> The ECJ concluded that Article 6(2)(c) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions must be interpreted as meaning that:

- any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo';

- it is for the referring court to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a 'human embryo' within the meaning of Article 6(2)(c) of Directive 98/44.

It also held that the exclusion from patentability concerning the use of human embryos for industrial or commercial purposes set out in Article 6(2)(c) of Directive 98/44 also covers the use of human embryos for purposes of scientific research, only used for therapeutic or diagnostic purposes and which is applied to the human embryo and is useful to it being patentable, and that it also excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos. *Oliver Brüstle v. Greenpeace e.V.*, *supra* note 6, at ¶ 53.

<sup>48</sup> "... although the definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems, the Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive (*see generally*, Case C-506/06 *Mayr* (2008) ECR I-1017, ¶ 38)." *Ibid.*, at ¶ 30.

<sup>49</sup> *Ibid.*, at ¶ 34,

<sup>50</sup> *Ibid.*, at ¶ 31, citing *inter alia*, Case C-33/03, *EasyCar* (2005) ECR I-1947, ¶ 21; Case C-549/07, *Wallentin-Hermann* (2008) ECR I-11061, ¶ 17; and Case C-151/09, *UGT-FSP* (2010) ECR I-0000, ¶ 39.

**PART III - Costa Rica's Ban of IVF is an Extreme Anomaly Restricting Rights Contained in the Convention to an Unnecessary Degree (Art. 29.1.a)**

30. Costa Rica's ban on IVF is abnormal and out-of-line with prevailing practices among OAS member States. Facts suggest that Costa Rica's ban is an excessive measure to achieve the goals of Article 4 of the Convention, resulting in a restriction of rights contained in the Convention to an unnecessary degree. Indeed, an overwhelming majority of States of the Americas allow practices that result in the destruction of fertilized human eggs, or embryos, or even foetuses.

**A. Availability of Emergency Contraception throughout the Americas**

31. Emergency contraception can prevent pregnancy in various ways.<sup>51</sup> Some act before the egg is fertilized by stopping the release of an egg (ovulation) or preventing union of egg and sperm (fertilization). However, some act by preventing a fertilized egg from attaching to the womb (implantation) and developing further.

32. Many states in the OAS allow the use of and/or provide emergency contraception possibly resulting in the discarding of a fertilized egg. There are multiple forms of emergency contraception, and their widespread availability in the Americas demonstrates that prevailing state practices militate in favor of access to reproductive services. Emergency contraception can be administered as a high dose of regular oral contraceptives (e.g. taking 40 birth control pills) or as pills specifically manufactured as emergency contraception (usually 1 or 2 pills)<sup>52</sup>.

33. The availability of hormonal medication manufactured specifically as emergency contraception varies in the Americas. In some countries, it is widely available and without a prescription, whereas in other states there are restrictions. In Antigua and Barbuda, Bahamas, Belize, Canada, El Salvador, Jamaica, Nicaragua, Puerto Rico, Uruguay, the United States, and

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<sup>51</sup> R. Gold, "The Implications of Defining When a Woman is Pregnant", *The Guttmacher Report on Public Policy*, Vol. 8, No. 2 (May 2005), <<http://www.guttmacher.org/pubs/tgr/08/2/gr080207.pdf>>, (site last visited August 21, 2012).

<sup>52</sup> Pan-American Health Organization, Women, Health and Development Program, "Emergency Contraception in the Americas", Fact Sheet Number 27 (March 2001).

Venezuela, emergency contraception is available in pharmacies without a prescription.<sup>53</sup> In Argentina, Bolivia, Cuba, Dominican Republic, Ecuador, Guatemala, Mexico, Paraguay, and Trinidad & Tobago, emergency contraception is available in pharmacies and also in NGO or other public facilities.<sup>54</sup> Prescriptions are required in Chile, Colombia, and Peru<sup>55</sup>. (See Table 7.)

34. Even where medicines designed as emergency contraception are not available, the availability of regular oral contraception still means that a form of emergency contraception is available. Regular oral contraceptives are available all across the Americas, including in the following countries: Antigua, Argentina, Bahamas, Barbados, Belize, Bermuda, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Suriname, Trinidad and Tobago, and the United States<sup>56</sup>.

35. In Costa Rica, oral contraceptives are available but knowledge about their use as emergency contraception is low.<sup>57</sup> This is no surprise given Costa Rica's poor record in providing reproductive services. In a joint NGO letter to the UN Committee on the Convention on the Elimination of Discrimination against Women (CEDAW), regarding Costa Rica's noncompliance with that convention, a diverse group of signatories addressed "Costa Rica's failure to guarantee access to comprehensive reproductive health services that only women need, such as legal abortion, emergency contraception and in vitro fertilization...<sup>58</sup>".

## **B. Availability of In-Vitro Fertilization throughout the Americas**

36. Most OAS member states either allow IVF, or are silent on the issue, leaving it to the private sector to self-regulate. Costa Rica is the *only* state in the Americas that bans IVF

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<sup>53</sup> International Consortium for Emergency Contraception, "EC Status and Availability Database", <http://www.cecinfo.org/database/pill/pillData.php>, (site last visited August 21, 2012).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Letter RE Supplementary Information on Costa Rica, Scheduled for review by the CEDAW Committee in its 49<sup>th</sup> Session*, (May 25, 2011), at 1, [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/JointNGOReport\\_CostaRica49.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/JointNGOReport_CostaRica49.pdf), (site last visited August 21, 2012).

outright.<sup>59</sup> Even those States in the Americas that constitutionally protect a right to life permit the practice of IVF.<sup>60</sup>

37. There are hundreds of IVF centers in OAS member states, several in the countries of Central America. Many South and Central American states are reported to have IVF clinics, demonstrating that the technology is not merely legal but also available. Four states seem to have at least one fertility center on their territories: El Salvador, Jamaica, Paraguay, and Trinidad and Tobago. Seven have between four and ten centers: Chile, Cuba, Dominican Republic, Ecuador, Panama, and Peru. Colombia and Venezuela are reported to have between 15 and 20. Argentina is reported to have between 20 and 30. The precise number of IVF clinics in Mexico is unclear, but multiple centers are reported to exist. Among OAS member states, IVF is most widely practiced in the United States, with nearly 500 centers.<sup>61</sup> As of 2009, in Latin America a total of 1,135 children were born as the result of IVF.<sup>62</sup> (See Table 1.)

38. Each State has its own approach to regulation of the practice. In some, IVF is regulated by federal statute (e.g. Brazil, Canada), in others by guidelines only (e.g. Chile, Cuba, Mexico, Venezuela).<sup>63</sup> Yet, many OAS states have no biding regulations at all (e.g. Argentina, Colombia, the Dominican Republic, Ecuador, El Salvador, Jamaica, Panama, Paraguay, Peru, Trinidad & Tobago, and Uruguay).<sup>64</sup> (See Table 2.)

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<sup>59</sup> Jara, *supra* note 3.

<sup>60</sup> Chilean Constitution of 1980, Chapter III, Article 19, ¶ 1 (2005); Colombian Constitution of 1991 as amended to Legislative Act No. 6 of 2011, Chapter 1, Article 11 (1991); Ecuadorian Constitution of 1946, Section II, Article 187(1) (1946); Guatemalan Constitution of 1945, Chapter I, Article 23 (1945); Panamanian Constitution of 1946, Chapter 1, ¶ 19 (1946).

<sup>61</sup> American Society for Reproductive Medicine, *International Federation of Fertility Societies Surveillance 2010*, 9 August 2010, at 8-9, [http://www.iffs-reproduction.org/documents/IFFS\\_Surveillance\\_2010.pdf](http://www.iffs-reproduction.org/documents/IFFS_Surveillance_2010.pdf), (site last visited August 21, 2012).

<sup>62</sup> F. Zegers-Hochschild et al. (eds.), REDLARA Annual Report (2009), at 23, <<http://www.redlara.com/images/arg/Registro2009.pdf>>, (site last visited August 21, 2012).

<sup>63</sup> *Id.* at 13-15.

<sup>64</sup> *Ibid.*

39. In sum, nothing seems to suggest that any OAS member State but Costa Rica considers IVF inconsistent with its obligation to protect the right to life. No other State has taken the extreme approach of categorically banning the procedure as Costa Rica has.<sup>65</sup>

### **C. Availability of other Assisted Reproductive Technologies throughout the Americas**

40. Many states in the Americas permit a wide range of assisted reproductive technology, including IVF. As of 2009, in Latin America, a total of 10,701 children were reported to have been born through some form of assisted reproductive technology, including IVF.<sup>66</sup>

41. In the U.S. and Venezuela, assisted reproductive technology is governed by guidelines, in Brazil and Canada by statute, and yet in other states, such technology is not governed at all.<sup>67</sup> States of the Americas regulate the use of these technologies in conformity with their social and political standards. Several states (i.e. Brazil, Canada, Chile, Dominican Republic, Ecuador, El Salvador, Mexico, Uruguay, the U.S., and Venezuela) allow assisted reproductive technology without requiring the sperm and/or egg donors to be married to each other (heterologous fertilization). Jamaica, however, does have such a requirement. Many of these States also permit singles and lesbians to benefit from assisted reproductive technology. (See Table 3).

42. The widespread availability of assisted reproductive technology in the Americas, including IVF, makes it clear that the overwhelming majority of States in the Americas believe that they can permit assisted reproductive technology, including IVF, without violating their Article 4.1 obligations. These States have found a way to reconcile the rights that infertile persons have to form a family, while still respecting the State's interest in protecting life. The balanced approach advanced by these States with similar views on prenatal life highlights the irrationality of Costa Rica's ban on a legitimate and desirable medical cure for infertility.

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<sup>65</sup> T. Margolin, "Abortion as a Human Right", 29 Women's Rights Law Report 77 (Winter/Spring 2007-2008), at 94.

<sup>66</sup> Zegers-Hochschild et al., *supra* note 62, at 23.

<sup>67</sup> *Ibid.*

#### **D. Availability of Abortion throughout the Americas**

43. Many States of the OAS allow abortion (i.e. the termination of pregnancy by the removal or expulsion from the uterus of a foetus or embryo prior to viability), at least in some form. Crucially, those States that allow abortion do not seem to consider themselves, nor seem to be regarded by the international community, as being in violation of their obligation to protect life. Only 7 States in the Americas prohibit abortion altogether, while 30 states permit abortion, at least in some circumstances.<sup>68</sup> Paraguay, Venezuela, and Brazil allow abortion, even if only to preserve the life of the mother.<sup>69</sup> Costa Rica, the Bahamas, Grenada and Peru permit abortion not only where necessary to save a woman's life, but also to preserve her physical health in general.<sup>70</sup> Jamaica, St. Kitts and Nevis, and Trinidad and Tobago also allow it in cases to preserve the woman's mental health.<sup>71</sup> Ecuador, Uruguay, Bolivia, St. Lucia and Argentina allow abortion in the aforementioned circumstances and in cases of rape as well.<sup>72</sup> Colombia and Mexico allow abortion in all the above situations and also in instances of foetal impairment.<sup>73</sup> St. Vincent and Grenadines, Belize, and Barbados expand the circumstances under which abortion is permitted significantly to include socio-economic grounds as well.<sup>74</sup> (See Table 6).

44. It should be noted that while the right to life is protected in multiple human rights instruments, no international instrument, including the American Convention,<sup>75</sup> prohibits abortion, which means that destruction of human life prior to birth is tolerated as a matter of international human rights law. Denial of the right to abortion may even be a human rights violation in and of itself. In 2005, the Human Rights Committee decision in *K.L. v. Peru*<sup>76</sup> was "the first time an international human rights treaty body held a government accountable for

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<sup>68</sup> Guttmacher Institute, "In Brief: Facts on Abortion in Latin America and the Caribbean", January 2012, <[http://www.guttmacher.org/pubs/IB\\_AWW-Latin-America.pdf](http://www.guttmacher.org/pubs/IB_AWW-Latin-America.pdf)>, (site last visited August 21, 2012).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

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

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

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Int. Am. Commission, *Baby Boy v. United States*, supra note 5.

<sup>76</sup> UN HRC, *KL v. Peru*, Comm. No. 1153/2003 ¶ 2.1, Oct. 24. 2005, U.N. Doc. CCPR/C/85/D/1153/2003.

not providing access to legal abortion.”<sup>77</sup> The Committee held “that denying women access to legal abortion violated their most basic human rights and found that forcing K.L. to carry the foetus to term violated her right to be free of cruel, inhumane, and degrading treatment” and also violated not only her right to privacy but also the obligation of special protection of the rights of minors.<sup>78</sup>

**PART IV - Costa Rica’s Ban Restricts Rights or Freedoms Recognized in Other Human Rights Treaties to which Costa Rica is a Party, Precludes Other Rights or Guarantees that are Inherent in the Human Personality, and Excludes or Limits the Effects of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights (Art 29.1.b, c and d).**

45. We invite the Court to consider that by implementing the ban, Costa Rica might be restricting the enjoyment or exercise of rights or freedoms recognized in other human rights treaties to which it is a party (Art. 29.1.b), precluding other rights or guarantees that are inherent in the human personality (Art. 29.1.c), and excluding or limiting the effects of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights (Art. 29.1.d).

**A. Right to Health**

46. Infertility is a disease.<sup>79</sup> It is widespread, affecting both genders.<sup>80</sup> Infertility is a major public health issue, particularly in developing countries.<sup>81</sup> Between 8% and 12% of couples have

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<sup>77</sup> T. Margolin, *supra* note 65, at 87.

<sup>78</sup> *Id.*, citing *KL v. Peru*, *supra* note 79 at ¶¶ 6.3, 6.5.

<sup>79</sup> “Infertility (clinical definition): a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse”. F. Zegers-Hochschild, G.D. Adamson, J. De Mouzon, O. Ishihara, R. Mansour, K. Nygren, E. Sullivan, S. Vanderpoel, “International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology”, 92 *Fertility and Sterility* (2009), 1522.

<sup>80</sup> IVF is a successful treatment available to men who have low quality sperm or other conception issues. In one study, the child bearing success rate rose to 35% when men with infertility problems undertook IVF procedures. H. Tournaye, “Male factor infertility and ART”, *Asian Journal of Andrology* (2012), at 4. Additionally, another study showed that IVF definitively increases the likelihood of having children for men with infertility issues. K. Knez, “The

difficulty conceiving a child, which means infertility affects about 50 to 80 million people worldwide.<sup>82</sup> According to a study conducted by the World Health Organization, approximately 2.1% of women aged 25-49 in developing countries within Latin America are infertile.<sup>83</sup> Putting that into perspective, AIDS afflicts less than 1% of the total population of Latin America, and only about 36% of that are women.<sup>84</sup> At the same time, Costa Rica's fertility rate has never been lower than it is now. In 2007, the Nation's Institute of Statistics and Census (INEC) reported the lowest fertility rate ever recorded in Costa Rica.<sup>85</sup> In 2010, INEC reported that Costa Rica's birth rate had dropped another 5% from the previous year.<sup>86</sup>

47. In-vitro fertilization is a successful treatment option that gives infertile persons both the hope and possibility of having children.<sup>87</sup> Furthermore, IVF treatment gives men and women the opportunity to have children where cruel circumstances, disease, or unfortunate biological conditions may have robbed them of their ability to conceive children.

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IMSI procedure improves poor embryo development in the same infertile couples with poor semen quality: A comparative prospective randomized study", *Reproductive Biology and Endocrinology* (2011), at 7.

<sup>81</sup> E. McDonald Evens, "Global Perspective on Infertility: An Under-Recognized Public Health Issue", 18 *International Health* (2004), 4; S.O. Rutstein, I.H. Shah, "Infecundity, Infertility, and Childlessness in Developing Countries", *DHS Comparative Report No. 9* (2004), at 53.

<sup>82</sup> A.S. Daar, Z. Merali, "Infertility and social suffering: the case of ART in developing countries", in Effy Vayena, et al. eds., "Current Practices and Controversies in Assisted Reproduction, 15 (2002), <http://www.who.int/reproductive-health/infertility/report.pdf> (site last visited August 21, 2012) (official report of the meeting "Medical, Ethical and Social Aspects of Assisted Reproduction," convened by the World Health Organization in Geneva, Switzerland, 17-21 September 2001) [hereinafter "WHO, Current Practices"].

<sup>83</sup> Taking the average of all the Latin American countries listed. WHO, *DHS Comparative Reports No. 9, Infecundity, Infertility, and Childlessness in Developing Countries*,

<http://www.who.int/reproductivehealth/topics/infertility/DHS-CR9.pdf>, (site last visited August 21, 2012).

<sup>84</sup> Avert.org, *HIV and AIDS in Latin America*, <<http://www.avert.org/aidslatinamerica.htm#contentTable>>.

<sup>85</sup> P. Smith, *Lowest Ever Fertility Rate*, <<http://www.costaricaholiday.co.uk/blog/?p=359>>, (site last visited August 21, 2012).

<sup>86</sup> People's Daily Online, *Costa Rica's birth rate drops 5% in 2010 due to economic worry*, <<http://english.people.com.cn/90001/90778/90858/90864/7354586.html>> (site last visited August 21, 2012) (In 2010 INEC reported that "births in the Central American nation fell to 70,922 in 2010 from 75,000 in 2009.")

<sup>87</sup> In-vitro fertilization is a successful treatment option for infertility, with a 55% success rate for fresh donor embryos within the US in 2009. SART CORT Online, *Clinic Summary Report*, <[https://www.sartcorsonline.com/rptCSR\\_PublicMultYear.aspx?ClinicPKID=0](https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0)> (site last visited August 21, 2012).

**i. Right to Health as a Right Inherent in the Human Personality**

48. The right to health is universally recognized. It is recognized worldwide and in all regional human rights instruments.<sup>88</sup> At the global level, it can be found in the Universal Declaration of Human Rights, and in the International Covenant of Economic, Social and Cultural Rights. Essentially the same provisions can be found in the Inter-American system of human rights, specifically in the American Declaration of Human Rights and in the Protocol of San Salvador. It is a right inherent in the human personality.<sup>89</sup> Costa Rica ratified both the International Covenant of Economic, Social and Cultural Rights and the Protocol of San Salvador.

49. The relevant articles of the American Declaration are Article XI, which provides that “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public

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<sup>88</sup> The European Social Charter defines the right to health as placing a burden on state parties, “[w]ith a view to ensuring the effective exercise of the right to protection of health .... to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.” European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89. Such criteria have been interpreted to mean that “States must ensure the best possible state of health for the population according to existing knowledge. Health systems must respond appropriately to avoidable health risks, i.e. ones that can be controlled by human action.” Secretariat of the European Social Charter, “The Right to Health and the European Social Charter” 9 (2009), [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetHealth\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetHealth_en.pdf) (site last visited August 21, 2012). The African Charter of Human and Peoples’ Rights states in regards to the right to health, “(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.” African Charter on Human and Peoples’ Rights, Art. 16, OAU Doc. CAB/LEG/67/3/CAB/LEG/67/3 rev. 5, 21 I.L.M. 59 (1982). The Arab Charter of Human Rights provides: “1. The States parties recognize the right of every member of society to the enjoyment of the highest attainable standard of physical and mental health and the right of the citizen to free basic health-care services and to have access to medical facilities without discrimination of any kind. 2. The measures taken by States parties shall include the following: (a) Development of basic health-care services and the guaranteeing of free and easy access to the centres that provide these services, regardless of geographical location or economic status. (b) efforts to control disease by means of prevention and cure in order to reduce the mortality rate. (c) promotion of health awareness and health education. (d) suppression of traditional practices which are harmful to the health of the individual. (e) provision of the basic nutrition and safe drinking water for all. (f) Combating environmental pollution and providing proper sanitation systems; (g) Combating drugs, psychotropic substances, smoking and substances that are damaging to health.” League of Arab States, *Arab Charter on Human Rights*, 15 September 1994.

<sup>89</sup> Inter-Am. Ct. H.R., *Albán-Cornejo v. Ecuador*, (ser. C) No. 171 (Nov. 22, 2007), at ¶ 117.

and community resources”,<sup>90</sup> and Article I, which provides that “every human being has the right to life, liberty and the security of his person”.<sup>91</sup> Indeed, this Court has held that there is a vital correlation between the right to personal integrity and the rights to life and health, establishing that both are directly and immediately linked to human health care.<sup>92</sup> In *Cornejo v. Ecuador*, the Court stated:

“....the right to life is a fundamental human right, the enjoyment and exercise of which is a prerequisite for the exercise of all other rights. Personal integrity is essential for the enjoyment of human life. In turn, the rights to life and humane treatment are directly and immediately linked to human health care.”<sup>93</sup>

50. Article I and Article XI of the American Declaration may be found, almost verbatim, respectively in Articles 3 and 25.1 of the Universal Declaration of Human Rights.<sup>94</sup>

**ii. Costa Rica’s Ban is a Violation of the Protocol of San Salvador and the International Covenant of Economic, Social and Cultural Rights**

51. The Protocol of San Salvador, however, is more explicit and precise about the right to health, stating: “Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being”(Article 10.1). The Protocol of San Salvador echoes the International Covenant on Economic, Social and Cultural Rights, which contains essentially the same provision: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (Article 12.1). Both treaties regard the right to health as a public good, and further outline that the responsibilities and duties of States in ensuring such right include access to primary health care, extension of the benefits of health services, prevention and treatment of diseases, and satisfaction of the health needs of the highest risk groups.

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<sup>90</sup> American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/ser.L/V./II.23, doc.21 rev.6, Art. 11 (1948).

<sup>91</sup> *Id.* at Art. 1.

<sup>92</sup> *Alban Cornejo et al v. Ecuador*, *supra* note 89, at ¶ 117.

<sup>93</sup> *Id.*

<sup>94</sup> Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. GAOR, 3d Sess., Art. 3 and 25.1, U.N. Doc. A/810 (1948).

52. Not only is the right to health recognized universally, Costa Rica itself also recognizes this right explicitly. Although Costa Rica's Constitution does not expressly recognize the right to health, this void has been remedied by repeated jurisprudence passed by Costa Rica's Constitutional Court. The Constitutional Court of Costa Rica has interpreted Article 21 on the right to life ("Human life is inviolable"), to guarantee the right to protection of health.<sup>95</sup> On this subject the Constitutional Court has stated that "the Political Constitution, in its 21st article, recognizes that human life is inviolable, and from there, the Court has derived the right to health as a fundamental one which, from all standpoints, must be guaranteed by this Jurisdiction."<sup>96</sup> This statement has been interpreted through laws in Costa Rica to mean that "an essential function of the state is to safeguard the health of the population"<sup>97</sup>, "every resident has a right to healthcare provisions (...) and the obligation to contribute with the preservation of health and to maintain the health of his/her family and community,"<sup>98</sup> and "everyone has the right to obtain from the competent authorities all information and adequate instructions on issues, actions and practices apt to promote and conserve personal health and those of the members of the family, particularly with regard to.... sexual education... family planning and on practices and the use of special techniques and technology"<sup>99</sup>.

53. Costa Rica argues that, because IVF is not an emergency medical procedure or cure for a disease, it has no obligation to provide access to it. Therefore it is not in violation of the right to health enshrined in the Protocol of San Salvador and the American Convention on Human Rights.<sup>100</sup>

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<sup>95</sup> Costa Rica, Sala Constitucional de la Corte Suprema de Justicia, Resolution 2002-06166, "Considerando", para. II, (stating: "In this sense, the Constitution in Article 21 recognizes that human life is inviolable....the right to health is fundamental and must be safeguarded from all standpoints within this jurisdiction (translation)").

<<http://200.91.68.20/pj/scij/>> (site last visited August 21, 2012).

<sup>96</sup> Id.

<sup>97</sup> General Health Law of Costa Rica, Art. 2,

<[http://www.pgr.go.cr/Scij/Busqueda/Normativa/Normas/nrm\\_repartidor.asp?param1=NRTC&nValor1=1&nValor2=6581&nValor3=7006&strTipM=TC](http://www.pgr.go.cr/Scij/Busqueda/Normativa/Normas/nrm_repartidor.asp?param1=NRTC&nValor1=1&nValor2=6581&nValor3=7006&strTipM=TC)> (site last visited August 21, 2012).

<sup>98</sup> Ibid., Art. 3.

<sup>99</sup> Ibid., Art. 10.

<sup>100</sup> Inter-American Comm. of Human Rights, *Sanchez Villalobos et al v. Costa Rica*, Report No 25/04, Petition 12.361 Admissibility, 32.

54. However, we believe that Costa Rica errs in not considering infertility a disease, with important physical and psychological consequences, and misconstrues the meaning of the right to health.

55. The experience of infertility causes high incidences of depression and anxiety among men and women. However, the effects are greater on women. Women report that they experience both low self-esteem and feelings of social isolation due to their infertility.<sup>101</sup> In many studies, infertile women frequently express the fear that their husbands are losing interest in them.<sup>102</sup>

56. A study of obese infertile women in Latin America found that 18.4 % of the females surveyed were found to have Major Depressive Disorder.<sup>103</sup> The study also noted a “striking relationship” between depression and childlessness. In the study, scientists observed that as the number of children in a family increased, the scores indicating depression decreased. Additionally, women who were unsuccessful in bearing children were five times more likely to have a score indicating Major Depressive Disorder.<sup>104</sup>

57. A comprehensive study in the United States found that women who are childless reported lower life satisfaction on all measures.<sup>105</sup> Childless women also reported the lowest levels of happiness and the highest levels of loneliness.<sup>106</sup> In another study conducted on childless women in the United States, approximately 30% of those who experienced clinical depression or anxiety attributed it to infertility.<sup>107</sup> The study found that depression in infertile women occurred at higher rates than the normal population.<sup>108</sup>

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<sup>101</sup> K. Schwerdtfeger and K. Shreffler, “Trauma of Pregnancy Loss and Infertility for Mothers and Involuntarily Childless Women in the Contemporary United States”, National Institutes of Health (2011) 2.

<sup>102</sup> H. Ardabili et al, “Prevalence and risk factors for domestic violence against infertile women in an Iranian setting”, International Journal of Gynecology and Obstetrics, 16 (2011); R. Yildizhan et al, “Domestic violence against infertile women in a Turkish setting”, International Journal of Gynecology and Obstetrics, 111 (2009).

<sup>103</sup> P. Segall-Gutierrez, et al, *The Incidence of Depression by Fertility Status in Overweight and Obese Latin Women*, Journal of Immigrant Minority Health (2012) 4.

<sup>104</sup> *Id.*

<sup>105</sup> Schwerdtfeger, *supra* note 101, at 5.

<sup>106</sup> *Id.*

<sup>107</sup> B. Berg and J. Wilson, “Psychological functioning across stages of treatment for infertility”, Journal of Behavioral Medicine, 11 (1990).

<sup>108</sup> *Id.*

58. A similar study in Taiwan concluded that infertile women suffer from higher rates of both depression and anxiety, as compared to the general population.<sup>109</sup> In this study, investigators diagnosed anxiety in 23% of the study population, compared with the 11% identified in a separate study of outpatients seeking general medical care. They also diagnosed major depression in 17% of the women seeking infertility treatment, compared with 6% in the other patients.<sup>110</sup>

59. In a Vietnamese study, infertile women “stated that they experienced feelings such as deep sadness, guilt, loneliness and fear for an insecure future.”<sup>111</sup> This study concluded that at least 1/3 of the participants in the study needed psychological support due to their infertility issues.<sup>112</sup>

60. These studies, covering a wide range of geographic, cultural, and demographic strata across the world, demonstrate that women who are infertile are generally more depressed, experience more marital strife, have more anxiety, and feel less self-worth and more isolation than women who are fertile.

61. Infertility can also be a source of physical and psychological suffering for men. Indeed, infertile men often feel guilt, anxiety and depression due to their inability to conceive.<sup>113</sup>

### **iii. Costa Rica Misconstrues the Meaning of the Right to Health.**

62. Costa Rica misconstrues the meaning of the right to health. As embodied in Article 10.1 of the Protocol of San Salvador, the right to health means “the enjoyment of the *highest level* of physical, mental and social well being” [emphasis added]. This does not mean that Costa Rica must provide the highest level of medical care immediately for all issues; however whenever Costa Rica has an opportunity to, it should strive to provide the best health care possible, and it

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<sup>109</sup> Harvard Mental Health Letter, “The psychological impact of infertility and its treatment”, [http://www.health.harvard.edu/newsletters/Harvard\\_Mental\\_Health\\_Letter/2009/May/The-psychological-impact-of-infertility-and-its-treatment](http://www.health.harvard.edu/newsletters/Harvard_Mental_Health_Letter/2009/May/The-psychological-impact-of-infertility-and-its-treatment) (site last visited August 21, 2012).

<sup>110</sup> Harvard Mental Health Letter, *supra* note 109.

<sup>111</sup> N. Wiersma et al, “Consequences of infertility in developing countries: results of a questionnaire and interview survey in the South of Vietnam”, *Journal of Translational Medicine*, 11 (2006).

<sup>112</sup> *Id.*

<sup>113</sup> S. Esteves, “What every gynecologist should know about male infertility: an update”, *Reproductive Medicine*, 8 (2012).

should make steady advancement in that direction. Prior to the ban in 2000, IVF was available in Costa Rica, but the ban eliminated this possibility. Therefore, Costa Rica's ban on IVF is a retrogressive measure, one that takes a step back from attempting to achieve the "highest level" of healthcare possible.

63. According to Costa Rica, the right to health only requires the provision of life saving health services and cures for disease.<sup>114</sup> Yet, this interpretation of the right to health is narrow in scope and falls well below the agreed upon level of care contained within the Protocol of San Salvador.

64. Additionally, Article 10.2 of the Protocol of San Salvador further outlines the right to health as a public good and the responsibilities of State parties to ensure this right, which includes: access to primary health care, extension of the benefits of health services, prevention and treatment of diseases, and satisfaction of the health needs of the highest risk groups. Costa Rica's ban eliminates the benefit of health services to infertile women and does not meet the health needs of that high-risk group.<sup>115</sup>

65. The World Health Organization has listed four factors that constitute the right to health. These factors, which were first set forth in the UN General Comment on the Right to Health in 2000, include:

1. *Availability.* Functioning public health and health care facilities, goods and services, as well as programmes in sufficient quantity.
2. *Accessibility.* Health facilities, goods and services accessible to everyone, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:
  - a. non-discrimination,
  - b. physical accessibility,
  - c. economical accessibility (affordability),
  - d. information accessibility.

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<sup>114</sup> *Id.*

<sup>115</sup> Studies have shown that infertile women are over 2.5 times more likely to commit suicide, generally have higher risk for depression and anxiety, and are domestically abused at a higher rate than their fertile counterparts. T. Kjaer, "Suicide in Danish women evaluated for fertility problems", *Human Reproduction* Vol. 26, No. 9, 2402 (2011); B. Berg, *supra* note 105, at 11; "Burden of Domestic Violence Amongst Infertile Women Attending Infertility Clinics in Nigeria", *Nigerian Journal of Medicine*, Vol. 16 No. 4, 376 (2007).

3. *Acceptability*: All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, as well as sensitive to gender and life-cycle requirements.
4. *Quality*: Health facilities, goods and services must be scientifically and medically appropriate and of good quality.<sup>116</sup>

66. Costa Rica's ban on IVF causes it to fall short of each of these four dimensions of the right to health. First, IVF treatment for infertile Costa Rican women and men is no longer available. Second, because of the ban there is no physical accessibility to IVF for infertile couples whatsoever. Infertile couples need to seek treatment outside of Costa Rica. Thus, the lack of accessibility disproportionately affects low-income couples that cannot afford to seek treatment abroad. Third, the ban on IVF is unacceptable for infertile women because it does not take into account their gender and life cycle requirements. Fourth, quality of health services is lacking for infertile women, and possibly also for men, because there are no suitable alternative treatments that are equally effective and medically appropriate for them to undertake.

67. Furthermore, according to the WHO, the right to health, like all human rights, imposes three obligations on State Parties, which are:

1. *Respect*: This means simply not to interfere with the enjoyment of the right to health.
2. *Protect*: This means ensuring that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.
3. *Fulfill*: This means taking positive steps to realize the right to health.<sup>117</sup>

68. Costa Rica's ban on IVF runs afoul of these three obligations. First, Costa Rica's ban does not respect the ability of infertile women and men to enjoy their right to health. The ban eliminates any opportunity for infertile couples to produce children through IVF treatment. Second, Costa Rica's ban fails to protect infertile persons in their enjoyment of the right to health. Costa Rica's ban does the opposite, allowing fewer options and imposing restrictions on their already compromised ability to bear children. Finally, rather than fulfilling the directive of the right to health by taking positive steps towards realizing the highest level of health possible

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<sup>116</sup> World Health Organization, "Right to Health", *Fact Sheet No. 323* (August 2007), at 2.

<sup>117</sup> *Id.*

for all its citizens, Costa Rica takes a step backwards by taking away a proven, safe, and successful treatment option for infertility by banning IVF.

## **B. Rights of Persons with Disabilities**

69. Infertility is not just a disease; it is a disability.<sup>118</sup> The World Health Organization defines disability as “a complex phenomenon, reflecting an interaction between features of a person’s body and features of the society in which that person lives.”<sup>119</sup> The disability experience is not solely caused by a person’s physical limitations, but may equally be attributed to social or physical barriers that exist in that person’s environment.<sup>120</sup> Because disability is a “complex multidimensional experience,” it poses several challenges for measurement.<sup>121</sup> Nevertheless, infertility is a disability because it intrinsically limits the major life activity of reproduction.<sup>122</sup> Indeed, the WHO reports that in developing countries, many people experience disability “associated with preventable causes, such as unintentional injuries and infertility.”<sup>123</sup>

70. According to the WHO, the barriers that hinder people with disabilities in their day-to-day lives must be addressed.<sup>124</sup> IVF treatment is an internationally accepted medical technique for the treatment of infertility.<sup>125</sup> The legal recognition of certain reproductive technologies as medical cures for infertility emerged around the 1950s when donor sperm insemination became generally understood as an effective cure for male infertility.<sup>126</sup> In the 1990s, IVF treatment became commonly accepted as a medical cure for female infertility.<sup>127</sup>

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<sup>118</sup> World Health Organization, “World Report on Disability (2011)”, at 296, [http://whqlibdoc.who.int/publications/2011/9789240685215\\_eng.pdf](http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf) (site last visited August 21, 2012) [hereinafter “WHO, World Report”].

<sup>119</sup> World Health Organization Website, “Health Topics: Disabilities”, <http://www.who.int/topics/disabilities/en/> (site last visited August 21, 2012).

<sup>120</sup> WHO, World Report, *supra* note 118, at 4.

<sup>121</sup> *Id.* at 21.

<sup>122</sup> S. Sato, “Note: A Little Bit Disabled: Infertility and the Americans With Disabilities Act”, 5 N.Y.U.J. Legis. & Pub. Pol’y (2002), at 223.

<sup>123</sup> WHO, World Report, *supra* note 118, at 296.

<sup>124</sup> *Id.* at 4.

<sup>125</sup> N. Ben-Asher, “The Curing Law: On the Evolution of Baby-Making Markets”, Pace Law Faculty Publications, Paper 594 (2009), <http://digitalcommons.pace.edu/lawfaculty/594> (site last visited August 21, 2012).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

71. By banning IVF treatment, Costa Rica is effectively denying a group of disabled persons access to a treatment that would enable them to overcome a biological disadvantage that interferes with their right to reproduce and form a family. Costa Rica's current IVF legislation violates international standards on disability rights because the blanket prohibition of IVF treatment adversely affects infertile people more than anyone else. The right to be free from discrimination based on disability flows from (preamble) "the inherent dignity and equality of each person" [emphasis added]. Although the outright ban of IVF in Costa Rica applies to everyone equally, it disproportionately disadvantages the rights of persons with limited reproductive capacities. Consequently, Costa Rica's current IVF legislation violates international standards on disability because it arbitrarily interferes with the fundamental rights of persons and couples who suffer from this disability.

**i. Costa Rica's Prohibition of IVF Treatment Violates the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities**

72. The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities (hereinafter Inter-American Disability Convention) was adopted on June 7, 1999. It was signed and ratified by Costa Rica shortly thereafter, on 12 August 1999. It entered into force on September 14, 2001.

73. The objectives of this treaty are to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society (Art. 2). To achieve these objectives, States Parties undertake (Art. 3) "...[t]o adopt the legislative, social, educational, labor-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society, including, but not limited to .... [m]easures to eliminate discrimination gradually and to promote integration by government authorities and/or private entities in providing or making available goods, services, facilities, programs, and activities such as employment, transportation, communications, housing, recreation, education, sports, law enforcement and administration of justice, and political and administrative activities..."

74. The Inter-American Disability Convention defines “disability” as (Art. 1.1): “a physical, mental or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.” There is no doubt that conceiving and raising children of one’s own is an activity of essential importance. The ability to have children is even more fundamental than most daily activities; it is a life-defining process.<sup>128</sup> The European Court of Human Rights has recognized in its IVF jurisprudence that: “In the case of a woman, the ability to give birth to a child gives many women a supreme sense of fulfillment and purpose in life. It goes to their sense of identity and to their dignity.”<sup>129</sup>

75. The female role in Latin American society, for better or worse, has historically been associated with motherhood and fertility.<sup>130</sup> The resulting social stigma surrounding infertility makes Costa Rican women even more vulnerable to the social consequences of their biological inability to bear children.<sup>131</sup> IVF is an internationally accepted medical technique that can alleviate the disability experience for persons with limited reproductive capacities.

76. In Costa Rica, the great personal distress experienced by couples that suffer from infertility is further aggravated by the State’s arbitrary interference with access to treatment for their disability. The Inter-American Disability Convention defines “discrimination against persons with disabilities” as (Art. 2.2): “any distinction, exclusion, or restriction based on a disability... which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.” In its jurisprudence, this Court has considered “discrimination” to mean “arbitrary differences that are detrimental to human rights.”<sup>132</sup> These “arbitrary differences” violate

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<sup>128</sup> “[T]he ability to give birth to a child gives many women a supreme sense of fulfillment and purpose in life. It goes to their sense of identity and to their dignity.” –Lady Justice Arden from UK Court of Appeal in a judgment delivered on 25 June 2004 (*Evans v. Amicus Healthcare Ltd* [2004] EWCA Civ 727) as cited by the ECHR in *Evans v. UK* (10 April 2007) at ¶ 26.

<sup>129</sup> *Evans v. United Kingdom*, *supra* note 15, ¶ 26, citing Lady Justice Arden in *Evans v. Amicus Healthcare Ltd.*, [2003] EWHC 2161 (Civ) 727.

<sup>130</sup> WHO, Current Practice, *supra* note 82, at 38.

<sup>131</sup> *Id.*

<sup>132</sup> Inter-Am Ct. H.R., *Castañeda Gutman v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, (ser. C) No. 184, ¶ 211 (Aug 6, 2008) (citing *Juridical Conditions and Rights of the Undocumented Migrants*).

human rights because they lead to unjust, unpredictable and unreasonable results.<sup>133</sup> IVF treatment is medically recognized as a legitimate and desirable cure for infertility.<sup>134</sup> For Costa Rica citizens and couples who suffer from infertility, the prohibition of IVF treatment violates their right to equality and non-discrimination, their right to privacy, their right to access medical care, and their right to found a family.<sup>135</sup> By indiscriminately denying everyone access to IVF treatment, those who can only reproduce through the use of this particular technique are being accorded unequal treatment. For the vast majority of infertility problems, IVF treatment is necessary, and for many couples it is the only possible means to conceive.<sup>136</sup> Because Costa Rica's ban on IVF arbitrarily discriminates against persons and couples who suffer from a disability, it fails to comport with the norms and objectives of that Convention.

## **ii. Costa Rica's Prohibition of IVF Treatment Violates the United Nations Convention on the Rights of Persons with Disabilities**

77. The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2007 and entered into force on May 3, 2008. Costa Rica ratified it, along with its optional protocol, on January 10, 2008.

78. Unlike the Inter-American Disability Convention, the CRPD does not define "disability." Rather, the CRPD defines "persons with disabilities" as (Art. 1) "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." The CRPD adopts a broad categorization of persons with disabilities by fundamentally recognizing that (preamble) "disability is an evolving concept" that "results from the interaction between

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<sup>133</sup> Inter-Am. Comm'n H.R., *X and Y v. Argentina*, Case 10.506, Report No. 38/96, OEA/Ser.L/V/II.95 Doc. 7 rev. ¶ 92 (1997).

<sup>134</sup> Ben-Asher, *supra* note 125, at 1899.

<sup>135</sup> Inter-Am. Comm'n H.R., *Gretel Artavia Murillo et al. v. Costa Rica* ("In Vitro Fertilization"), Case No. 12.361, Report 85/10, 29 July 2011, ¶ 62 ("Currently, only homologous insemination is allowed in Costa Rica; in other words, insemination to treat cases of minor infertility. However, these techniques are not useful for the vast majority of infertility problems, such as cases that involve tubal blockage, damaged fallopian tubes and severe endometriosis, as well as cases of male infertility. In such cases, the patient will have to resort to in vitro fertilization.").

<sup>136</sup> IACtHR, *Ana Victoria Sánchez Villalobos et al. v. Costa Rica*, Case No. 12.361, Report No. 25/04, Admissibility, March 11, 2004.

persons with impairments and attitudinal and environmental barriers” that hinder their participation in life activities. Under this expansive definition of disability, persons who suffer from medical infertility intuitively fall within the scope of individuals who face a physical impairment that hinders their participation in society on an equal basis with others.<sup>137</sup>

79. The stated purpose of the CRPD is to equalize the rights of people with disabilities by overcoming stigma and prejudice through reasonable accommodation and the use of new technologies.<sup>138</sup> State Parties to the CRPD have a general obligation to (Art. 4) promote “the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.” This obligation requires State Parties to “take all appropriate measures.... to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.” (Art. 4.a).

80. The CRPD defines “discrimination on the basis of disability” as: “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms.” (Art. 2). This definition includes *all* forms of discrimination, such as “denial of reasonable accommodation.”<sup>139</sup> A “reasonable accommodation” is any necessary and appropriate modification “not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>140</sup> According to the WHO, “barriers” that tend to exacerbate the disability experience include “factors in a person’s environment that through their absence or presence, limit functioning and create disability – for example... a lack of appropriate assistive technology.”<sup>141</sup>

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<sup>137</sup> M. Sabatello, “Who’s Got Parental Rights? The Intersection Between Infertility, Reproductive Technologies, and Disability Rights Law”, *Journal of Health & Biomedical Law*, VI (2010), at 256.

<sup>138</sup> *Id.* at 229.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> WHO, *World Report*, *supra* note 118, at 302.

81. “A failure to afford a person reasonable accommodation amounts to discrimination on the basis of disability.”<sup>142</sup> Reproductive rights are fundamental rights that must be afforded to all persons with disabilities on a basis of equality with others. IVF treatment is a “reasonable accommodation” that allows infertile couples to overcome their biological disadvantages in having children. By denying access to IVF treatment, Costa Rica denies disabled persons a “reasonable accommodation” that minimizes physical limitations and allows infertile persons the opportunity to enjoy their right to reproduce on an equal basis with others. Ultimately, the CRPD articulates Costa Rica’s international obligation to ensure that, in light of advancing scientific developments, “prejudices and stigmas do not stand as the barriers to one’s exercise of his or her internationally recognized right to found a family.”<sup>143</sup>

82. Contrary to the terse provisions of the Inter-American Disability Convention, the CRPD is much more explicit about the rights of persons with disabilities. Arguably, Costa Rica’s ban on IVF treatment violates several specific provisions of the CRPD, particularly in regards to Article 23 (Respect for Home and Family) and Article 25 (Health).

83. Under Article 23 of the CRPD, the States Parties must take all “appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships.” The stated purpose of Article 23 is to ensure “the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children.... and the means necessary to enable them to exercise these rights.” Article 23 is also designed to ensure that “persons with disabilities... retain their fertility on an equal basis with others.” (para. c). State Parties to the CRPD have a legal responsibility to meet the reproductive needs of persons with disabilities.

84. Furthermore, disability rights incorporate the fundamental notion of “substantive equality”. As a State Party to the CRPD, Costa Rica has an obligation to critically examine the discriminatory impact that its current laws and policies have on persons with disabilities.<sup>144</sup>

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<sup>142</sup> R. de Silva de Alwis, “Disability Rights, Gender, and Development: A Resource Tool for Action (2008)”, at 1-57. (“A publication developed by the Wellesley Center for Women, in collaboration with the Secretariat for the Convention on the Rights of Persons with Disabilities of the Department of Economic and Social Affairs/United Nations and the United Nations Population Fund”).

<sup>143</sup> M. Sabatello, *supra* note 137, at 259.

<sup>144</sup> R. de Silva de Alwis, *supra* note 142, at 1-56.

Discrimination results directly from arbitrary differences in treatment. Discrimination can also result indirectly from the disproportionate impact of legislative measures and policies that may appear neutral, but affect certain groups differently. Although Costa Rica's IVF legislation applies to everyone equally, it has a disproportionate impact on persons who suffer from infertility, resulting in discrimination against persons with disabilities. By constitutionally banning IVF treatment, Costa Rica effectively denies thousands of disabled persons access to a medical treatment that could allow them to "retain their fertility on an equal basis with others".

85. Article 25 of the CRPD recognizes that "persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability." Costa Rica's ban on IVF treatment violates this provision because it discriminates against infertile persons on the basis of their disability. Article 25 of the CRPD explicitly requires State Parties to provide "those health services needed by persons with disabilities specifically because of their disabilities, including.... services designed to minimize and prevent further disabilities." Disability is both a cause and a consequence of poor reproductive health.<sup>145</sup> IVF treatment is designed to minimize the disabling effects of infertility. There is a compelling unmet need for access to infertility treatments, particularly in developing countries.<sup>146</sup> Infertility is a disability that can be treated through the use of IVF technology. By denying access to such a widely accepted medical technique, Costa Rica denies disabled persons the health services they need "specifically because of their disabilities."

86. Article 25 requires State Parties to "prevent discriminatory denial of health care or health services.... on the basis of disability." Costa Rica's current IVF legislation violates this provision of the CRPD because it denies disabled persons access to health services on the basis of their disability. Costa Rica's IVF legislation thus categorically denies a "reasonable accommodation" that would allow disabled persons the opportunity to overcome biological disadvantages they have in regards to bearing children.

87. Further, the CRPD and international health organizations recognize that women with disabilities are doubly disadvantaged because they are subject to discrimination on account of

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<sup>145</sup> R. de Silva de Alwis, *supra* note 142, at 2-19.

<sup>146</sup> WHO, Current Practices, *supra* note 82, at 20.

both their gender and their disability.<sup>147</sup> Women with disabilities are also particularly vulnerable to abuse.<sup>148</sup> The international importance of this issue is evident in recent United Nations panel discussions concerning gender perspectives on disability and the situation of women with disabilities.<sup>149</sup> One human rights concern highlighted in these discussions is that the double discrimination experienced by women with disabilities “places them at a higher risk of gender-violence, sexual abuse, neglect, maltreatment and exploitation.”<sup>150</sup> Women with disabilities face multiple levels of discrimination because they have historically experienced inequality on the basis of gender. The disability experience of women who suffer from infertility is evidently aggravated by a history of unequal access to health care, education and political participation. Although Costa Rica is recognized as an international forerunner when it comes to the rights of disabled persons, according to CEDAW’s most recent country report (2003), “care for women with disabilities continues to be marginal” in Costa Rica.<sup>151</sup>

### **C. Prohibition of Discrimination against Women**

88. Costa Rica’s absolute ban on IVF treatment violates international standards of equality and non-discrimination because it disproportionately impacts women. The United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) entered into force on September 3, 1981. Costa Rica signed and ratified it on April 4, 1986, without reservations. Moreover, Costa Rica ratified the CEDAW’s Optional Protocol on September 20, 2001, with the stated aim of strengthening its commitment to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of

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<sup>147</sup> *Id.*, Article 6; WHO, World Report, *supra* note 118, at 8.

<sup>148</sup> United Nations, “Some Facts about Persons with Disabilities (2006)”, [www.un.org/disabilities/convention/pdfs/factsheet.pdf](http://www.un.org/disabilities/convention/pdfs/factsheet.pdf) (site last visited August 21, 2012).

<sup>149</sup> United Nations, “Panel Discussion: Rural Women and Girls with Disabilities – Economic Empowerment and Political Participation” (United Nations Headquarters, Conference Room 6, 28 February 2012, 1:15 to 2:30 p.m.), <http://www.un.org/disabilities/default.asp?id=1594> (site last visited August 21, 2012).

<sup>150</sup> *Id.*

<sup>151</sup> United Nations Committee on the Elimination of All Forms of Discrimination Against Women, Fourth Periodic Report of States Parties, “Report of the State of Costa Rica on Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women”, ¶ 77, CEDAW/C/CRI/4, 26 March 2003 (corresponding to the period 1 April 1998 to 31 March 2002).

guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

### **i. Costa Rica’s current IVF legislation violates the United Nations Convention on the Elimination of Discrimination Against Women**

89. Costa Rica’s current IVF legislation violates CEDAW because it disproportionately interferes with the reproductive capacities and rights of women. The Inter-American Commission recognizes that because women have historically faced discrimination, they “are more likely to suffer adverse effects with respect to their right to physical, mental and moral integrity in terms of their access to maternal health services as a result of some barriers limiting their access to these services.”<sup>152</sup> According to the Commission, the limitations posed by these barriers relate to “the absence or inadequacy of a gender perspective in public policies addressing women’s health needs.”<sup>153</sup> Costa Rica’s blanket prohibition of IVF treatment violates CEDAW because it disproportionately impedes women’s access to maternal health services, and because it effectively creates the experience of forced sterility for thousands of Costa Rican women.

90. CEDAW defines discrimination against women as (Article 1) “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise” of human rights and fundamental freedoms of women. This includes any difference in treatment based on gender that: (1) intentionally or unintentionally disadvantages women, (2) prevents recognition by society as a whole of the rights of women in the public and private spheres, or (3) prevents women from exercising their rights.<sup>154</sup> CEDAW affirms the reproductive rights of women by recognizing that discrimination

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<sup>152</sup> Inter-American Commission on Human Rights, “Access to Maternal Health Services from a Human Rights Perspective”, ¶¶ 4-5, OEA/Ser.L/V/II, Doc. No. 69, 7 June 2010, <<http://cidh.org/women/SaludMaterna10Eng/MaternalHealth2010.pdf>> (site last visited August 21, 2012) [hereinafter “OAS Report, Access to Maternal Health Services”]; Pan American Health Organization, “Health in the Americas 2007”, Regional, Scientific and Technical Publication No. 622, Vol. I (2007), 366-367, <<http://www.paho.org/hia/vol1regionalcap4.html>> (site last visited August 21, 2012).

<sup>153</sup> OAS Report, Access to Maternal Health Services, *supra* note 152, at ¶ 5.

<sup>154</sup> Id., at ¶ 60; IACtHR, *Report of the Inter-American Commission of Human Rights on the Status of Women in the Americas*, OEA/Ser.L/V/II.100, Doc. No 17, 13 October 1998, Chap. IV.

against women in the area of procreation violates principles of equality and respect for human dignity (preamble). CEDAW further advances equal protection for the reproductive rights of women through the fundamental notion that “the role of women in procreation should not be a basis for discrimination.” (preamble).

91. Costa Rica’s prohibition of IVF treatment discriminates against women because women are more likely to suffer the adverse impacts of infertility, particularly in Latin American societies.<sup>155</sup> The purpose of IVF treatment is to implant an embryo in a woman’s uterus.<sup>156</sup> Thus, the IVF technique of medically assisted reproduction is a procedure that primarily concerns a woman’s body and her decision to bear children. According to the Pan American Health Organization, there is a gender gap in illnesses relating to sexual and reproductive health, which affect 20% of women but only 14% of men in Latin America and the Caribbean.<sup>157</sup> Similar studies agree that women are statistically more likely to suffer from infertility.<sup>158</sup> The inability to have children is a tragedy for many couples that “brings a sense of loss, failure, and exclusion.”<sup>159</sup> In addition to causing mental distress and strained relationships, the experience of infertility can be a source of “economic hardship, social stigma and blame, social isolation and alienation, guilt, fear, loss of social status, helplessness and, in some cases, violence.”<sup>160</sup> Although infertility is a condition that affects both men and women, statistics show that women tend to be blamed for a couple’s inability to conceive disproportionately more than men.<sup>161</sup> Also, relevant studies have also found that “women reacted more strongly to infertility than men.”<sup>162</sup> Particularly in Latin America, infertility has been detrimentally linked to a women’s

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<sup>155</sup> E. Hardy and M.Y. Makuch, “Gender, Infertility and ART”, in WHO, Current Practices, *supra* note 82; Z.A. Trindade and S.R.F. Enumo, “Triste e incomplete: um aviso feminina da mulher infértil”, 13 PSICOLOGIA USP 151 (2002), <http://www.scielo.br> (site last visited August 21, 2012); F. Luna, “Assisted reproductive technology in Latin America: some ethical and sociocultural issues”, in WHO, Current Practices, *supra* note 82, at 31 (describing infertility’s special impact on women in Latin American societies).

<sup>156</sup> Inter-American Commission, *Gretel Artavia Murillo et al. v. Costa Rica*, Case No. 12.361, 29 July 2011, 28.

<sup>157</sup> OAS Report, *Access to Maternal Health Services*, *supra* note 152, at ¶ 3; Pan American Health Organization, *supra* note 152, at 366-367.

<sup>158</sup> S.O. Rutstein and I.H. Shah, “Infecundity, Infertility, and Childlessness in Developing Countries”, DHS Comparative Report No. 9 (2004).

<sup>159</sup> *Id.* at xiii.

<sup>160</sup> WHO, Current Practices, *supra* note 82, at 16.

<sup>161</sup> Rutstein and Shah, *supra* note 158, at 43; WHO, Current Practices, *supra* note 82, at 273.

<sup>162</sup> WHO, Current Practices, *supra* note 82, at 273 (Emotional reactions described include “depression, anxiety, cognitive disturbance, lower self-esteem, guilt, blame, hopelessness and hostility”).

marital status, as childless women tend to be abandoned or divorced.<sup>163</sup> Moreover, the use of artificial reproductive techniques places greater demands on the woman's body, even when it is her male counterpart who suffers from infertility. Consequently, Costa Rica's current IVF legislation discriminates against women because it directly interferes with a woman's free will in regards to her body, and because women disproportionately bear the physical, social and mental brunt of infertility.

## **ii. Costa Rica's Ban of IVF Violates Article 12 of CEDAW**

92. Costa Rica's prohibition of IVF treatment violates several important CEDAW provisions, particularly in regards to health and family life. Article 12 of CEDAW (Health) provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

93. According to the CEDAW Committee, "the obligation to respect rights requires States Parties to refrain from obstructing action taken by women in pursuit of their health goals."<sup>164</sup> In its general recommendations concerning Article 12, the CEDAW Committee encourages State Parties to consider the biological differences between men and women when adopting reproductive healthcare legislation. Specifically, the CEDAW Committee found that measures to eliminate discrimination against women are "inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women."<sup>165</sup> Moreover, "it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women."<sup>166</sup> Costa Rica's prohibition of IVF treatment consequently violates Article 12 of CEDAW because it limits women's "ability to access health care services that only they require."<sup>167</sup>

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<sup>163</sup> Rutstein and Shah, *supra* note 158, at 43; WHO, Current Practices, *supra* note 82, at 274.

<sup>164</sup> United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Women and Health (20th session, 1999), ¶ 14.

<sup>165</sup> *Id.*, at ¶ 11.

<sup>166</sup> *Ibid.*

<sup>167</sup> OAS Report, Access to Maternal Health Services, *supra* note 152, at ¶ 53.

94. The Inter-American Commission of Human Rights has similarly recognized that protecting women's right to a family fundamentally requires unobstructed access "to the health services they require according to their particular needs as they relate to pregnancy."<sup>168</sup> According to the terms of Article 12 of CEDAW, discrimination against women in the area of health results from "the failure to provide adequate services to meet their biological needs related to their reproductive function."<sup>169</sup> In order to ensure respect for women's right to access maternal health services and form a family, the CEDAW Committee encourages States to focus their efforts on "diseases or conditions hazardous to health that affect women or certain groups of women differently from men, as well as information on possible intervention in this regard."<sup>170</sup> In order to ensure equal access, state policies regarding reproductive rights should primarily reflect "women's needs and interests," while addressing "distinctive features and factors which differ for women in comparison to men."<sup>171</sup> In a recent OAS Report concerning access to justice for women who are subject to violence in the Americas, the Inter-American Commission on Human Rights indicated that "the Inter-American system is moving toward a concept of material or structural equality based on the recognition that certain sectors of the population require the adoption of special equalizing measures."<sup>172</sup>

95. Finally, the CEDAW Committee's 2003 report on Costa Rica's compliance with the Convention in the area of reproductive health revealed "extremely poor practices in the application of current norms and standards, which... reflect a longstanding biological paradigm."<sup>173</sup> According to the Committee, when it comes to maternal health issues, Costa Rica remains a conservative society with a "patriarchal medical care model" that reveals a "male-centered view of health and healthcare."<sup>174</sup> In its report, the CEDAW Committee expressed

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<sup>168</sup> *Id.* at ¶ 3.

<sup>169</sup> *Id.* at ¶ 53.

<sup>170</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 21: Equality in Marriage and Family Relations (13<sup>th</sup> session, 1994), at ¶ 22, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (site last visited 19 August 2012).

<sup>171</sup> *Ibid.* ), at ¶ 12.

<sup>172</sup> *Id.* at ¶ 70.

<sup>173</sup> United Nations Committee on the Elimination of All Forms of Discrimination Against Women, report of 26 March 2003, *supra* note 151.

<sup>174</sup> *Id.* at ¶ 703.

concern that Costa Rica's current reproductive healthcare policies "continue to impede women's access to comprehensive health."<sup>175</sup> The CEDAW Committee found that in the area of female reproductive health in Costa Rica, "resistances to change persist, which result in a limited vision of women's health... compounded by practices that infringe human rights."<sup>176</sup> In its conclusions, the CEDAW Committee advised Costa Rica to upgrade its norms and technical standards on sexual and reproductive health by embracing "an integrated view of... reproductive health and reproductive rights."<sup>177</sup> In order to address the profound biological differences that exist between men and women, the CEDAW Committee further instructed Costa Rica to adopt norms that embrace scientific and medical advancements in reproductive technology.<sup>178</sup>

### **iii. Costa's Rica's Ban of IVF Violates Article 16 of CEDAW**

96. Article 16 of CEDAW (Marriage and Family Life) further ensures equal reproductive rights by requiring that State Parties "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations," particularly when protecting the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."

97. The CEDAW Committee has elaborated on the scope of Article 16 in several of its recommendations. In its general recommendation concerning "equality in marriage and family relations," the CEDAW Committee spelled out that "decisions to have children or not," [emphasis added] must never "be limited by spouse, parent, partner or Government."<sup>179</sup> In regards to equality of access to reproductive health services, "there is general agreement that where there are freely available appropriate measures for the voluntary regulation of fertility,

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Id.* at ¶ 78.

<sup>177</sup> *Id.* at ¶ 436.

<sup>178</sup> *Id.*

<sup>179</sup> United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21: Equality in marriage and family relations (13th session, 1994), ¶ 22.

the health, development and well-being of all members of the family improves.”<sup>180</sup> Both stable families and stable societies are founded on principles of equity, justice and individual fulfillment for each member.<sup>181</sup> Thus, CEDAW advances the notion that equal access to reproductive care improves the general quality of life and health for the entire population.

98. The CEDAW Committee’s guiding interpretations of Article 16 emphasize the fundamental interdependence of access to maternal health services and the protection of family rights. Hence the determination that in order to enjoy the rights protected under Article 16, “women must have information... and guaranteed access to sex education and family planning services.”<sup>182</sup> To protect women’s right to a family on a basis of equality with men, the CEDAW Committee recommends that State Parties “ensure the removal of all barriers to women’s access to health services, education and information,” particularly “in the area of sexual and reproductive health.”<sup>183</sup> Explicit examples of Article 16 violations are referenced in the published views of the CEDAW Committee: “Compulsory sterilization or abortion adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children.”<sup>184</sup> Accordingly, in its specific recommendations for government action to eliminate discrimination against women, the CEDAW Committee encourages State Parties to “ensure that measures are taken to prevent coercion in regard to fertility and reproduction.”<sup>185</sup>

99. Granted, the present case is not about forced sterilization or abortion. It concerns Costa Rica’s ban of a medical procedure that is proven to have a fairly high degree of success in making it possible for infertile women to procreate. However, the result of both is the same: denying women the free decision of when to have or not to have children.

100. In *A.S. v. Hungary* (2006) the CEDAW Committee definitively concluded that the coerced sterilization of women expressly violates Article 16 of the Convention. This case involved the

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<sup>180</sup> *Id.* at ¶ 23.

<sup>181</sup> *Id.* at ¶ 24.

<sup>182</sup> *Id.* at ¶ 22.

<sup>183</sup> CEDAW Committee, General Recommendation No. 24, *supra* note 164, at ¶ 31(b).

<sup>184</sup> United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence against women (11th session, 1992), ¶ 22.

<sup>185</sup> *Id.* at ¶ 31(m).

forced sterilization of a Roma woman at a Hungarian hospital.<sup>186</sup> The CEDAW Committee concluded that by sterilizing the Roma woman “without her full and informed consent,” the State Party had “permanently deprived her of her natural reproductive capacity,” in violation of her rights under Article 16(e) of CEDAW. In its decision, the CEDAW Committee recognized that “coercion presents itself in various forms – from physical force to pressure from and/or negligence on the part of medical personnel.”<sup>187</sup> The victim successfully proved that her reproductive capacity had been “taken away by State actors” in violation of multiple human rights because “informed consent is based on a patient’s ability to make an informed choice.”<sup>188</sup> Well-considered and voluntary reproductive health decisions require the provision of “thorough information in accordance with international human rights and medical standards.”<sup>189</sup> Thus, State Parties to CEDAW violate Article 16(e) when they deny women access to comprehensive information and education about reproductive health matters that uniquely affect them. They also violate it when they interfere with the means to decide freely and responsibly on the number and spacing of their children. Costa Rica’s prohibition of IVF interferes with women’s access to maternal health services. Moreover, it creates a vacuum of knowledge about advancements in reproductive medicine and technology that could benefit Costa Rican women. Costa Rica’s IVF ban hinders women’s right to reproduce, and it does so without their informed consent.

101. Again, although the present case does not involve the invasive medical procedures at issue in the forced sterilization case of *A.S. v. Hungary*, discrimination analysis focuses on the *effect* of State actions and not its intended purpose. Both women who are subject to forced sterilization and women who are denied their right to IVF treatment suffer the same physical and emotional consequences of infertility as a direct result of the State’s intervention with their right to reproduce.

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<sup>186</sup> United Nations, Committee on the Elimination of Discrimination Against Women, *A.S. v. Hungary*, Views, Communication No. 4/2004, CEDAW/C/36/D/4/2004, 29 August 2006, ¶ 1.1.

<sup>187</sup> *Id.* at ¶ 3.2.

<sup>188</sup> *Id.* at ¶ 5.3-5.8.

<sup>189</sup> CEDAW Committee, *A.S. v. Hungary*, *supra* note 186, at ¶ 9.9.

102. International and regional human rights standards on women’s right to a family life expressly require States to eliminate barriers that discriminate against women in the area of reproductive health. Costa Rica’s current IVF legislation violates Article 16 of CEDAW because prohibiting access to IVF treatment “adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children.” IVF treatment is the only viable medical option for thousands of women who suffer from biological or environmental sterility. As a result, Costa Rica’s outright ban on this particular medical technique substantially restricts women’s right to “decide on the number and spacing of their children” by interfering with their ability to make informed decisions about their reproductive health.

103. Costa Rica is the only State of the OAS that constitutionally bans IVF treatment despite “enormous international pressure” to modify its legislation on this issue.<sup>190</sup> The Inter-American Commission has expressed concern about the “various barriers women in the Americas face in their access to information on family-planning services despite a high unmet need for such services.”<sup>191</sup> The Inter-American Commission further reports that these barriers include “distortions in the information in reproductive matters provided by public servants for the purposes of dissuasion.”<sup>192</sup> In some cases, according to the Commission, “the barriers are of such a magnitude that they may constitute violations of women’s rights to personal integrity, privacy, and family life, and the right to be free from violence and discrimination in contravention of the obligations the States of the Americas have assumed in the area of human rights.”<sup>193</sup> In regards to reproductive matters, coercion can result from misinformation about available treatment options. Coercion can also result from social and political pressures that inhibit voluntary decision-making. In its 2003 assessment of healthcare in Costa Rica, the

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<sup>190</sup> P.B. Craine, “Costa Rica ignores enormous international pressure and keeps IVF ban”, 21 June 2011, LifeSiteNews.com Website, <<http://www.lifesitenews.com/news/costa-rica-ignores-enormous-international-pressure-and-keeps-ivf-ban/>> (site last visited August 21, 2012).

<sup>191</sup> Inter-American Commission on Human Rights, *Access to Information on Reproductive Health from a Human Rights Perspective*, ¶ 6, OEA/Ser.L/V/II, Doc. No. 61, 22 November 2011, <<http://www.oas.org/en/iachr/women/docs/pdf/ACCESS%20TO%20INFORMATION%20WOMEN.pdf>> (site last visited August 21, 2012).

<sup>192</sup> *Ibid.*

<sup>193</sup> *Id.* at ¶ 7.

CEDAW Committee reported that, “many myths and prejudices still persist in relation to maternity and women’s bodies;”<sup>194</sup> Costa Rica needs to “control culturally-driven gender biases that stigmatize certain traditionally female ailments.”<sup>195</sup> In its conclusions, the CEDAW Committee stated that the most important action that Costa Rica needs to take right now to eliminate gender discrimination is “the development of a policy of education for sexuality that respects women’s human rights.”<sup>196</sup>

#### **D. Right of Women to be Free from Violence**

104. We believe that Costa Rica’s ban of IVF also constitutes a violation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará. This Convention entered into force on March 5, 1995, and Costa Rica ratified it on May 7, 1995. It defines violence against women as “...any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere” (Art. 2). Overall, it establishes that women have a right to a life free of violence and that violence against women constitutes a violation of human rights and fundamental freedoms.

105. Costa Rica’s ban on IVF constitutes a violation of the Belem Do Para Convention due to the psychological and physical violence that women suffer as a result of the State blocking their ability to conceive a child through IVF. In particular, we believe the facts of this case suggest a violation of Articles 3, 4(b) (c) and (e), 6, 7(a), 7 (c), 7 (e) and 8(b).

106. Before explaining why the ban is a form of violence against women, we need to stress that the Belem Do Para Convention further defines violence as including (Art. 2) “physical, sexual and psychological violence: (a) that occurs within the family or domestic unit or within any other interpersonal relationship... and, (c) that is perpetrated or condoned by the State or its agents...” In Costa Rica, infertile women are exposed to heightened risks of physical and psychological domestic violence as a consequence of the State-sanctioned IVF ban.

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<sup>194</sup> CEDAW Committee: 26 March 2003 Report, *supra* note 151, at ¶ 78.

<sup>195</sup> *Id.* at ¶ 705.

<sup>196</sup> *Id.* at ¶ 728.

### i. Infertility and Physical Domestic Violence

107. Women who are infertile are at a high risk for domestic violence from their spouses and relatives. A study conducted in Iran found that a staggering 28% of infertile women were found to be victims of physical or sexual abuse.<sup>197</sup> Additionally, a study conducted in Turkey in 2009 found that 12.8% of infertile women were physically or sexually abused by their husbands.<sup>198</sup> Significantly, 78% of these women reported that the physical violence by their spouses occurred only after their husbands discovered that they were infertile.<sup>199</sup>

108. A South African study found that 14.5% of infertile women suffered from physical abuse, and although this number may seem low compared to the Middle Eastern studies, 44.4% of women within the study reported some type of abuse, be it physical, emotional or verbal.<sup>200</sup> A similar study in Nigeria found that 9.8%<sup>201</sup> of the infertile women surveyed were victims of physical abuse, while 41.6% of the total population polled reported suffering some type of abuse from their spouse or female in-laws.<sup>202</sup> This 41.6% is over double the rate of the 20% estimate of domestic abuse occurring towards all married females in Nigeria.<sup>203</sup>

109. Granted, the test population for some of the Middle Eastern and African studies numbered only in the tens or hundreds of women. Still, these studies reveal a startling trend of infertile women reporting very high incidences of physical and sexual abuse from their spouses or

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<sup>197</sup> H. Ardabili et al, "Prevalence and risk factors for domestic violence against infertile women in an Iranian setting", International Journal of Gynecology and Obstetrics (2011) 16, <<http://lib.scnu.edu.cn/ngw/ngw/xwbk/Prevalence%20and%20risk%20factors%20for%20domestic%20violence%20against%20infertile%20women%20in%20an%20Iranian%20setting.pdf>> (site last visited August 21, 2012).

<sup>198</sup> Taking the physical abuse percentage and adding the sexual abuse percentage. R. Yildizhan et al, "Domestic violence against infertile women in a Turkish setting", International Journal of Gynecology and Obstetrics (2009) 111.

<sup>199</sup> *Id.*

<sup>200</sup> S. Dyer et al, "Psychological distress among women suffering from couple infertility in South Africa: a quantitative assessment", Human Reproduction Vol. 20, No. 7 (2005), <<http://humrep.oxfordjournals.org/content/20/7/1938.full.pdf+html>> (site last visited August 21, 2012).

<sup>201</sup> The number is derived from the addition of physical beating, slapping, and depravation of basic needs and multiplying it by the percentage of abused women. N. Ameh et al, "Burden of Domestic Violence Amongst Infertile Women Attending Infertility Clinics in Nigeria", Nigerian Journal of Medicine, Vol. 16 No. 4, (2007) 376.

<sup>202</sup> *Id.*

<sup>203</sup> UNHCR, *Nigeria: Domestic violence; recourse and protection available to victims of domestic violence (2005-2007)*, <<http://www.unhcr.org/refworld/docid/46fa536f17.html>> (site last visited August 21, 2012) (under introductory section).

other in-laws. The physical violence reported in these studies included sexual violence, assault, and battery.

110. Moreover, in a comprehensive study conducted in India, with a survey population of 33,362 married women, it was found that a whopping 77.8% of infertile women had experienced physical or sexual violence within the past year.<sup>204</sup> In this study, the scientists documented that the abuse came in many forms, such as ostracism from family celebrations, taunting and stigmatization, negative attitudes, physical beatings, sexual assault, and even withholding of food and health care.

111. Furthermore, all the studies indicated that much the abuse suffered by infertile women goes largely unnoticed and unaddressed by the general population. Some of the studies noted that many of the women were hesitant to come forward and report abuse. Despite obvious geographic, cultural and socio-economic factors that divide the women surveyed, almost all the studies conclusively found that infertility negatively affects women's lives and family relationships.

112. While none of these studies specifically focused on Costa Rica, there is nothing to suggest that women who suffer from infertility in Costa Rican might buck global trends by being less subject to physical violence than their peers around the world.<sup>205</sup>

## **ii. Infertility and Domestic Psychological Abuse**

113. The psychological suffering of infertile women is by no means limited to feelings of depression and anxiety about their inability to bear children. Women suffer severe emotional and mental consequences as a direct result of their infertility, as well as social stigma, isolation, and violence.<sup>206</sup> In many cases, this suffering is also caused by psychological abuse from spouses and extended family members.

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<sup>204</sup> A. Pasi et al, "Infertility and Domestic Violence: Cause, Consequence and Management in Indian Scenario", *Biomedical Research* 22(2) (2011) 256.

<sup>205</sup> CEDAW Committee: 26 March 2003 Report, *supra* note 151, at ¶ 435 (In regards to maternal health issues, the CEDAW Committee concludes that Costa Rica remains a conservative society with a "patriarchal medical care model" that reveals a "male-centred view of health and healthcare").

<sup>206</sup> WHO, *Progress in Reproductive Health No. 63*, (2003) 2, <<http://www.who.int/reproductivehealth/publications/infertility/progress63.pdf>> (site last visited August 21, 2012).

114. In Iran, a study found that 33.8% of infertile women reported psychological abuse by their husbands. A study in Turkey found that 20.8%<sup>207</sup> of infertile women were psychologically abused. In Nigeria, 41.6% of infertile women were subject to domestic abuse; 31.8% of those women were being psychologically abused.<sup>208</sup> In South Africa, 24.8% of women reported that either their husbands or their in-laws have verbally or emotionally abused them because of their infertility. Finally, in India, 73.3% of infertile women suffered emotional violence within the past year.<sup>209</sup>

115. In a large-scale study in Denmark it was noted that women who are infertile are at a much higher risk for suicide than fertile women.<sup>210</sup> This comprehensive study evaluated 51,221 women with fertility issues within Denmark. These women had no history of psychological issues before the occurrence of their infertility. The study found that women who suffered from primary infertility were 2.43 times more likely to commit suicide than fertile women.<sup>211</sup> Additionally, it found that women who suffered from secondary infertility were 1.63 times more likely to commit suicide than fertile women.<sup>212</sup> Additionally, this study stated that for “some women, the emotional suffering associated with infertility may be very real and may have fatal consequences when a child fails to arrive.”<sup>213</sup> The study also noted that after the introduction of IVF and other fertility techniques, the “treatment outcomes were greatly improved resulting in more children being born and this may stress the possibility of a link between the inability of having children and emotional suffering leading to suicide.”<sup>214</sup>

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<sup>207</sup> Adding the sum of abuse including domestic violence reported, economic deprivation, threat of violence. R. Yildizhan et al, “Domestic violence against infertile women in a Turkish setting”, International Journal of Gynecology and Obstetrics (2009) 111.

<sup>208</sup> Adding together the percentages of psychological torture, frequent verbal abuse, and ridicule. Ameh, *supra* note 201, at 376.

<sup>209</sup> Pasi, *supra* note 204, at “Table 3”.

<sup>210</sup> Kjaer, *supra* note 115, at 2401.

<sup>211</sup> Primary infertility refers to women who have not been able to conceive any children. Kjaer, *supra* note 115, at 2402.

<sup>212</sup> Secondary infertility refers to women who cannot conceive after having at least one child. *Id.*

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

### **iii. Costa Rica's Ban on IVF Treatment is a Violation of the Belem do Para Convention**

116. Article 3 of the Belem Do Para Convention reads: "Every woman has the right to be free from violence in both the public and private sphere." It also adds, at article 4, "Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others, under Article 4 .... (b) The right to have their physical, mental and moral integrity respected; (c) the right to personal liberty and security; (e) the right to have the inherent dignity of her person respected and her family protected" [Emphasis added].

117. The facts above reveal that the IVF ban exposes women to a heightened risk of physical and psychological abuse, which contradicts every woman's right to have her physical and mental integrity respected. Costa Rica has clearly deviated from its duty to protect the women of its country. The IVF ban restricts the reproductive autonomy of women, thus violating their right to personal liberty. The ban further affects the right of all persons to have the inherent dignity of their families protected. Indeed, the UN Office of the High Commissioner of Human Rights reports that Costa Rica's ban on IVF has "imposed stress on relationships, and some couples have separated as a consequence of being denied the possibility to try to have their own children."<sup>215</sup>

118. Article 4 says that every woman has the right "... to be free from violence... [including] ... (a) the right of women to be free from all forms of discrimination". The Belem Do Para Convention (Preamble) identifies the case of violence against women as "...the historically unequal power relations between women and men." In other words, violence against women ultimately stems from gender inequality. Under this particular Convention, violence against women is interpreted as gender-based violence, a type of violence that is socially and culturally constructed, and therefore eminently susceptible to eradication.<sup>216</sup> Costa Rica's ban of IVF discriminates against women because it denies access to medical treatment for a uniquely female

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<sup>215</sup> UN Office of the High Commissioner for Human Rights, "Re: Supplementary Information on Costa Rica Scheduled for review by the CEDAW Committee in its 49<sup>th</sup> Session", (2011) 10, <[http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/JointNGOReport\\_CostaRica49.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/JointNGOReport_CostaRica49.pdf)> (site last visited August 21, 2012).

<sup>216</sup> *Id.*

ailment. This discriminatory effect is exacerbated by traditional expectations about motherhood and the childbearing role of women in society. Consequently, women who are biologically unable to bear children suffer higher rates of abuse and violence. Costa Rica can easily alleviate this gender-based violence by repealing its ban on IVF. A repeal would move Costa Rica one step closer towards eradicating violence against women in their country, which is a stated goal of the Belem Do Para Convention.

119. Under Article 7 of the Belem Do Para Convention, States Parties have an obligation to “.... pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: (a) refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;.... (c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt administrative measures where necessary; .... (e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women...”.

120. As explained above, infertile women are subject to a heightened risk of domestic physical and psychological abuse; they are also subject to a heightened risk of suicide. These are risks that Costa Rica has deliberately decided to impose on infertile women, and these are risks that could be easily avoided by repealing the ban. Costa Rica has a duty to protect its infertile women from abuse by their spouses and families by allowing them to seek alternative methods of reproduction. Costa Rica also has an affirmative duty to uphold and protect the mental health of Costa Rican women who suffer from infertility. Given the high rates of depression associated with infertility, the Costa Rican government must repeal this law to relieve the psychological harm perpetuated by the IVF ban. Although Costa Rica does not directly commit acts of violence against infertile women, the ban on IVF treatment is tantamount to an implicit acknowledgement that if violence against infertile women occurs, it is not a State’s preoccupation. The effect would be similar if Costa Rica had no laws legislating domestic violence against women. Under Article 2(c) Costa Rica may not condone violence against

women. If the Court believes that Costa Rica is not directly responsible for the acts of violence committed by husbands against their infertile wives, the law banning IVF facilitates, or at least condones, the actions of violent husbands and leaves infertile women as susceptible victims.

#### **E. Right to Benefit from Scientific and Technological Progress**

121. Costa Rica's ban on IVF constitutes a violation of the right to benefit from scientific advancements found in Article 14 of the Protocol of San Salvador, and Article 15(b) of the International Covenant on Economic, Social, and Cultural Rights. Costa Rica is a party to both treaties.

122. Both treaties contain virtually identical provisions on the right of persons to benefit from scientific and technological progress. Article 15 of the ICESCR provides: "1. The States Parties to the present Covenant recognize the right of everyone: ... (b) To enjoy the benefits of scientific progress and its applications; ... 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science .... 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research ..."'

123. Article 14 of the Protocol of San Salvador echoes: "1. The States Parties to this Protocol recognize the right of everyone...b. To enjoy the benefits of scientific and technological progress... 2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science... 3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research..."'

124. The same right is also described by the Universal Declaration of Human Rights (Art. 27.1): "Everyone has the right ...to share in scientific advancement and its benefits", and Article 13 of the American Declaration of Human Rights: "Every person has the right ...to participate in the benefits that result from intellectual progress, especially scientific discoveries."

125. These articles speak of a straightforward right, yet one that has been admittedly neglected and marginalized in international human rights jurisprudence.<sup>217</sup> Most of the

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<sup>217</sup> Y. Donders, "The Right to Enjoy the Benefits of Scientific Progress: in Search of State Obligations in relation to

elaboration to date has been scholarly. This case is a unique opportunity for this Court to finally put some authoritative flesh around the bare bones of this key human right.

126. There is an intrinsic connection between the right to benefit from scientific advancements and the general right to health. Indeed, Yvonne Donders, Professor of International Human Rights and Cultural Diversity at the University of Amsterdam, intones: “The freedom to conduct science and the right to enjoy the benefits of science and its applications are crucial for the implementation of the right to health.”<sup>218</sup>

127. The UN Committee on Economic, Social, and Cultural Rights, the body in charge of monitoring compliance with the ICESCR, specifically cites reproductive health as a crucial aspect of the right to health, “The Committee further identified several other key obligations of the right to health: to ensure reproductive, maternal and child health care.”<sup>219</sup> By banning IVF, Costa Rica violates the right to enjoy scientific advancements, which in turn engenders a violation of the right to health, and specifically a pivotal and sensitive aspect of the right to health, to wit, reproductive health. Such interconnected infringements are impermissible, as the infringement on the right to enjoy scientific advancements should not, “...limit or violate other human rights.”<sup>220</sup>

128. The right to health creates a positive obligation on states to provide for health services. The right to enjoy scientific benefits facilitates this obligation. Indeed, States must provide for health services: “In relation to health, obligations to fulfill include, for example, providing immunization programmes against major infectious diseases, providing sexual and reproductive health services, and promoting health education.”<sup>221</sup> [emphasis added].

129. Ensuring the right to enjoyment of scientific advancements is a State obligation. Specifically, “...the State has a legal obligation, for instance, not to interfere with choices and priorities decided by scientists and not to impose a certain topic or method of research on the academic community.”<sup>222</sup> In the context of Costa Rica, the State’s ban on IVF egregiously

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Health”, in: *Medicine, Health Care and Philosophy*, Volume 14, Issue 4 (2011), pp. 371-381, at 371.

<sup>218</sup> *Id.* at 374.

<sup>219</sup> *Id.* at 377.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.* [emphasis added].

<sup>222</sup> *Id.* at 376.

interferes with the doctor's choice to utilize a particular procedure. Indeed, Professor Donders also expounds further on this point by describing the fact that States have an "obligation to respect", meaning "that States should refrain from interfering with the enjoyment of the right, in other words, the State should itself not violate the right."<sup>223</sup> Here, Costa Rica does not refrain from interference with the right to enjoy the scientific benefits of IVF; rather, it takes active steps to interfere with individuals' enjoyment. Indeed, the argument is simple because the right, "... implies that States should not unjustifiably interfere in science."<sup>224</sup>

130. By banning IVF, Costa Rica is also clearly hampering research into a growing scientific field. It stymies scientific progress, as Costa Rican doctors are not able to contribute to new developments. This runs afoul of the obligation contained in paragraph 3 of Article 15 of the ICESCR and 14 of the Protocol of San Salvador: "The States Parties .... undertake to respect the freedom indispensable for scientific research."

131. Under the Protocol of San Salvador the only circumstances in which a State may derogate from this obligation is (Art. 5) by promulgating laws "...for the purpose of preserving the general welfare in a democratic society" but "...only to the extent that they are not incompatible with the purpose and reason underlying those rights." Essentially the same provision is to be found in Article 4 of the ICESCR.<sup>225</sup>

132. Costa Rica bears the burden of proving that the IVF ban is a measure necessary to preserve the general welfare of its society. More importantly, the burden is on Costa Rica to prove that the ban is not incompatible with the purpose and reason underlying the rights protected in the ICESCR and Protocol of San Salvador. Yet, again, prevailing international human rights standards require an analysis that takes into consideration the whole of individuals affected, all relevant rights, and whether the ban is both necessary and proportional to defend the welfare of the society.

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<sup>223</sup> *Ibid.*

<sup>224</sup> *Id.* at 376-377.

<sup>225</sup> "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

133. It should also be kept in mind that States have an unconditioned duty to not discriminate. The right to health is a core human right, and when synthesized with the right to enjoy scientific advancements, the two create a duty to "...ensure the right of access to health facilities, goods and services on a non-discriminatory basis; to ensure equitable distribution of all health facilities, goods and services..."<sup>226</sup> When a State bans a particular medical procedure that is helpful only to a particular group of individuals, the State discriminates against those persons by curtailing their access to the full realization of their right to health and the right to enjoyment of scientific advances. Again, in discriminating by medical condition, the State denies equal access to health services, and this amounts to a violation of both the right to health and sciences.

134. Recently, the Inter-American Commission on Human Rights has focused on non-discrimination being particularly crucial for vulnerable groups. It has recognized that the "... central tenets of the right include ... ensuring equitable access to the benefits of scientific progress, with particular focus on vulnerable and marginalized groups."<sup>227</sup> The United Nations Economic Social and Cultural Organization (UNESCO) echoes this stance when it declares that the right to enjoy scientific advancement "...[f]ocus[es] on the rights of marginalized and vulnerable populations: The right of everyone to enjoy the benefits of scientific and technological progress is an individual and a collective right."<sup>228</sup> Those persons who need access to IVF are a vulnerable and marginalized group because they are stigmatized for having reproductive difficulties.<sup>229</sup>

135. It is patent that Costa Rica's ban of IVF violates the right to benefit from scientific advancements. It denies Costa Ricans a proven procedure to correct a medical condition that is offered in all states of the Americas. Although the right to benefit from scientific advancements

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<sup>226</sup> *Id.*

<sup>227</sup> Inter-American Commission on Human Rights Hearing, *Right to Enjoy the Benefits of Scientific and Technological Progress*, 25 October 2011, 2:00-3:00pm, [http://shr.aaas.org/article15/Reference\\_Materials/IACMR\\_Briefing%20Paper.pdf](http://shr.aaas.org/article15/Reference_Materials/IACMR_Briefing%20Paper.pdf) (site last visited August 21, 2012).

<sup>228</sup> J. Wyndham, "Breathing Life into a Neglected Human Right", The UNESCO Courier, 12 August 2011, [http://www.unesco.org/new/en/unesco-courier/single-view/news/breathing\\_life\\_into\\_a\\_neglected\\_human\\_right/](http://www.unesco.org/new/en/unesco-courier/single-view/news/breathing_life_into_a_neglected_human_right/) (site last visited August 21, 2012).

<sup>229</sup> WHO, "Progress in Reproductive Health No. 63", *supra* note 235.

seems an obscure, dormant, and esoteric human right, its actual importance stems from its very inclusion in important human rights instruments, such as the ICESCR and the Protocol of San Salvador. No article in a human rights instrument is a nullity, and no human right should be read out of an instrument for lack of jurisprudence. Furthermore, its application in the instant case would benefit the progressive expansion of human rights and would help delineate its application for future use. This is particularly important in the contemporary world where scientific advancements abound prodigiously and where this particular right will thus become increasingly practical and vital.

## **Conclusions**

136. The Authors of this brief believe that the Court can and should decide the present case by focusing on the rights of infertile women and men protected by several other articles of the American Convention and numerous other international instruments. We believe the Court is well-advised to carry out its analysis according to the interpretative parameters laid out in Article 29 of the American Convention. Those are the parameters that States and the Court must follow when interpreting the scope of the obligations in the Convention, including the vague and undefined provision of Article 4.1.

137. We believe that this brief provided ample reason to conclude that Costa Rica's Ban of IVF is an extreme anomaly restricting rights contained in the Convention to an unnecessary degree (Art. 29.1.a of the American Convention) and that first Costa Rica's ban restricts rights or freedoms recognized in other human rights treaties to which Costa Rica is a party, including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador"; the International Covenant on Economic, Social and Cultural Rights; the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities; the United Nations Convention on the Rights of Persons with Disabilities; the United Nations Convention on the Elimination of Discrimination Against Women; and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. Second, the ban precludes other rights or guarantees

that are inherent in the human personality. Third, it excludes or limits the effects of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights (Art 29.1.b, c and d of the American Convention).

Tabla 1: Número de Instalaciones de Fecundidad

Country	# de Centros
Argentina	23 á 25
Brasil	150
Canadá	26 á 27
Chile	8 á 9
Colombia	19 á 21
Cuba	7 á 11
República Dominicana	4
Ecuador	6 á 8
El Salvador	1 á 4
Jamaica	1
México	Incierto
Panama	7
Paraguay	1 á 3
Perú	5 á 7
Trinidad & ábago	1 á 2
Uruguay	4
EE.UU.	450 á 480
Venezuela	17 á 18

Adaptado de "International Federation of Fertility Societies Surveillance 2010." [Control del año 2010 de la Federación Internacional de Sociedades de Fertilización] Tabla 1.1 (pp. 8-9). Derechos de Autor 2010 American Society for Reproductive Medicine [Sociedad Americana para la Medicina Reproductiva], Publicado por Elsevier Inc.

Tabla 2: Reglamentación de la Tecnología Reproductiva Asistida

País	Clase de reglamentación
Argentina	Ninguna
Brasil	Legislación; Organismo de licencias
Canad'a	Legislación (incl. Práctica con embriones en laboratorios); Organismo de licencias
Chile	Estándares (incl. Práctica con embriones en laboratorios) Organismo de licencias
Colombia	Ninguna
Cuba	Estándares (incl. Práctica con embriones en laboratorios)
República Dominicana	Ninguna
Ecuador	Ninguna
El Salvador	Ninguna
Jamaica	Ninguna
México	Estándares (incl. Práctica con embriones en laboratorios)
Panamá	Ninguna
Paraguay	Ninguna
Perú	Ninguna
Trinidad & Tobago	Ninguna
Uruguay	Ninguna
EE.UU.	Estándares (incl. Práctica con embriones en laboratorios)
Venezuela	Estándares (incl. Práctica con embriones en laboratorios)

Adaptado de "International Federation of Fertility Societies Surveillance 2010." [Control del año 2010 de la Federación Internacional de Sociedades de Fertilización] Tabla 2.1 (pp. 13-15). Derechos de Autor 2010 American Society for Reproductive Medicine [Sociedad Americana para la Medicina Reproductiva], Publicado por Elsevier Inc.

Table 3: Requisitos de relación para la tecnología de reproducción asistida

Country	Matrimonio no requerido	Solteros aceptados	Lesbianas aceptadas	Cómo se reglamenta la TRA
Brasil	X			Legislación
Canadá	X	X	X	Legislación
Chile	X			Ninguna
República Dominicana	X	X		Ninguna
Ecuador	X			Ninguna
El Salvador	X			Ninguna
Jamaica		X	X	Ninguna
México	X	X	X	Ninguna
Uruguay	X	X		Ninguna
EE.UU.	X	X	X	Estándares
Venezuela	X	X	X	Estándares

Adaptado de "International Federation of Fertility Societies Surveillance 2010." [Control del año 2010 de la Federación Internacional de Sociedades de Fertilización] Tabla 4.1 (p. 23). Derechos de Autor 2010 American Society for Reproductive Medicine [Sociedad Americana para la Medicina Reproductiva], Publicado por Elsevier Inc.

Tabla 4: ¿Cuántos embriones pueden transferirse?

País	Límites de # en la transferencia
Argentina	2 de buena calidad $\geq 35$ y; más si la calidad es más pobre o el paciente es mayor
Brasil	2 si $<35$ años; 3 si $36+$ años; máximo de 4 a cualquier edad
Canadá	Sujeto a normas publicadas
Chile	2 si $<40$ años; 3 si $>40$ años; varía ocasionalmente
Cuba	2; 3 si 38 o más
Ecuador	2-3 depending on age and embryo quality
El Salvador	2-3 si $<35$ años; 3-4 si $>35$ años
Jamaica	2, Normas HFEA, máximo de 3
Trinidad & Tobago	2 $<30$ años; 2-3 en base a la edad y la calidad del embrión
Uruguay	1-2 si $<30$ años; 2-3 si 31-38 años; 4 si $>39$ años
EE.UU.	Sujeto a normas publicadas
Venezuela	1-2 embriones en el 60% de los pacientes

*Adapted from "International Federation of Fertility Societies Surveillance 2010." Table 5.1 (p. 27).Copyright 2010 American Society for Reproductive Medicine, Published by Elsevier Inc.*

Tabla 5: Condición de Conceptos

País	Tiempo reconocido, si hay alguno	Comentario
Argentina	De singamía	Código Civil Art. 70. La existencia de la persona comienza en la concepción
Brasil	Más de 500 g	Ley
Canadá		
Chile	Después de la fertilización	Ley y decreto religioso
Colombia	Al momento de la fertilización	Prevalece el decreto religioso
Cuba		
República Dominicana		En motivo de una ley recientemente modificada, se considera que el desarrollo humano comienza desde la concepción
Ecuador	Desde el momento de la fertilización ("momento de la concepción")	Por ley y la religión prevaleciente católico romana
El Salvador	De la fecundación (pre-embrión)	Religión católica
Jamaica		
Mexico	El momento de la concepción	Por decreto religioso; por ley
Panama	Tan pronto como suceda la fertilización	Práctica religiosa y cultural; legalmente no vinculante
Paraguay	Tras la fertilización	Práctica cultural reconocida y decreto religioso prevaleciente
Perú	Fertilización	Por la constitución de la República
Trinidad & Tobago		
Uruguay		
EE.UU.	Viabilidad	<u>Roe v. Wade</u> y jurisprudencia posterior
Venezuela	Concepción	Ley

Adaptado de "International Federation of Fertility Societies Surveillance 2010." [Control del año 2010 de la Federación Internacional de Sociedades de Fertilización] Tabla 19.1 (p. 122 - 126). Derechos de Autor 2010 American Society for Reproductive Medicine [Sociedad Americana para la Medicina Reproductiva], Publicado por Elsevier Inc.

Tabla 5: Condición de Conceptos

**Tabla 6: Legalidad del Aborto en países de Latinoamérica y el Caribe**

(En base a seis categorías de legalidad)

<b>País</b>	<b>Legalidad/Razón</b>
Antigua/Barbuda	Para salvar la vida de una mujer
Argentina	Para salvar la vida de una mujer; para conservar la salud física; también en casos de violación de mujeres con discapacidad mental
Bahamas	Para salvar la vida de una mujer; para conservar la salud física
Barbados	Para salvar la vida de una mujer; para conservar la salud física o mental; por motivos socioeconómicos; en casos de violación, incesto o problemas del feto; ciertas restricciones en motivo de autorización paterna
Belice	Para salvar la vida de una mujer; para conservar la salud física o mental; por motivos socioeconómicos; también en casos de problemas del feto
Bolivia	Para salvar la vida de una mujer; para conservar la salud física; también en casos de violación, incesto
Brasil	Para salvar la vida de una mujer; también, en casos de violación
Chile	Prohibición absoluta, o ninguna excepción legal explícita; Para salvar la vida de una mujer
Colombia	Para salvar la vida de una mujer; para conservar la salud física o mental; en casos de violación, incesto or fetal impairment
Costa Rica	Para salvar la vida de una mujer; para conservar la salud física
Dominica	Para salvar la vida de una mujer
República Dominicana	Prohibición absoluta, o ninguna excepción legal explícita; Para salvar la vida de una mujer
Ecuador	Para salvar la vida de una mujer; para conservar la salud física; también en casos de violación

Tabla 6: Legalidad del Aborto en países de Latinoamérica y el Caribe

En base a seis categorías de legalidad)

El Salvador	Prohibición absoluta, o ninguna excepción legal explícita; Para salvar la vida de una mujer
Grenada	Para salvar la vida de una mujer; para conservar la salud física
Guatemala	Para salvar la vida de una mujer
Haití	Prohibición absoluta, o ninguna excepción legal explícita; Para salvar la vida de una mujer
Honduras	Prohibición absoluta, o ninguna excepción legal explícita; Para salvar la vida de una mujer
Jamaica	Para salvar la vida de una mujer; para conservar la salud física o mental; ciertas restricciones en motivo de autorización paterna
México	Para salvar la vida de una mujer; también, en casos de violación or fetal impairment. Legality of abortion is determined at the state level, and the legal categorization listed here reflects the status for majority of women.
Nicaragua	Prohibición absoluta, o ninguna excepción legal explícita; Para salvar la vida de una mujer
Panama	Para salvar la vida de una mujer; también, en casos de violación, fetal impairment; ciertas restricciones en motivo de autorización paterna
Paraguay	Para salvar la vida de una mujer
Perú	Para salvar la vida de una mujer; para conservar la salud física
St. Kitts and Nevis	Para salvar la vida de una mujer; to preserve physical or mental health
St. Lucia	Para salvar la vida de una mujer; para conservar la salud física o mental; en casos de violación or incesto

Tabla 6: Legalidad del Aborto en países de Latinoamérica y el Caribe

(En base a seis categorías de legalidad)

St. Vincent and Grenadines	Para salvar la vida de una mujer; para conservar la salud física o mental; por motivos socioeconómicos; en casos de violación, incesto or fetal impairment
Suriname	Prohibición absoluta, o ninguna excepción legal explícita; Para salvar la vida de una mujer
Trinidad and Tobago	Para salvar la vida de una mujer; para conservar la salud física o mental
Uruguay	Para salvar la vida de una mujer; para conservar la salud física; también en casos de violación
Venezuela	Para salvar la vida de una mujer

Adaptado de "En breve. Datos del aborto en América Latina y el Caribe".  
Guttmacher Institute. enero 2012.

Tabla 7: Disponibilidad de Anticoncepción de Emergencia (AE) en las Américas

País	Información de País	Donde está disponible la AE
<b>Antigua and Barbuda</b>		Farmacias sin receta médica
<b>Argentina</b>	Incluido en las normas de salud pública en 1999 en la provincia de Mendoza. Una ley nacional se estableció en 2003 que implementó un programa nacional de salud reproductiva, que incluye todos los anticonceptivos aprobados. AC está incluido en el protocolo sala de emergencia para víctimas de asalto sexual. No hay restricciones en las leyes, pero se prefiere el consentimiento paterno para los menores de 14 años.	Disponible en entornos privados y públicos en farmacias solamente.
<b>Bahamas</b>	La FDA aprobó un uso sin necesidad de receta médica de AE en el año 2006 ( <i>Over-the-Counter</i> ).	La marca Optinor (AE) está disponible sin receta médica y en clínicas de planificación familiar sin prescripción.
<b>Barbados</b>	No hay una política poblacional documentada, pero un producto dedicado se ha registrado.	
<b>Belice</b>	No hay información disponible	Disponible en farmacias sin receta médica
<b>Bermuda</b>	No hay información disponible	No hay información disponible
<b>Bolivia</b>	Incluido en normas del Ministerio de Salud. Información de Sondeos Demográficos y Salud (DHS) del año 2008 indica que entre todas las mujeres, 28,3% tienen conocimiento de AE, y el 1,6% lo usaron. Entre mujeres sexualmente activas y solteras, el uso de AE incrementó a 9,7%.	Disponible en farmacias. Available in pharmacies. AE no está disponible en el sector público (no hay anticonceptivos disponibles en el sector público). AE no está disponible en mercadeo social / instalaciones ONG.
<b>Brasil</b>	No hay información disponible	profesionales de la salud, las farmacias con receta médica, de forma gratuita a las mujeres en el sector público.

Tabla 7: Disponibilidad de Anticoncepción de Emergencia (AE) en las Américas

<b>Canadá</b>	Producto de AE dedicado registrado	Las farmacias sin receta médica. El 14 de mayo de 2008, la Asociación Nacional de Autoridades Regulatorias de la Farmacia (NAPRA) aceptó la recomendación de expertos para cambiar el estado de la AE, lo que le permite ser vendido en una zona de libre elección de la farmacia, cerca del dispensario donde la consulta por un farmacéutico se encuentra disponible.
<b>Chile</b>	Incluido en las normas de planificación familiar a partir de 2006, incluidas en las Normas violencia sexual en 2004.	En abril de 2008, el Tribunal Constitucional falló a favor de una moción para prohibir la distribución gratuita de la AE en la planificación familiar público programas y servicios. La AE todavía está disponible sin embargo, y se puede comprar en farmacias y con receta médica. La AE también está disponible en las clínicas de atención primaria de salud (según lo permitido por la legislación local), en los hospitales públicos y privados, y clínicas de atención de emergencia para sobrevivientes de agresión sexual. Levonorgestrel (Marca AE) fue incluido en la "Lista de Medicamentos Esenciales" para la Pastoral de la Salud en 2006.

Tabla 7: Disponibilidad de Anticoncepción de Emergencia (AE) en las Américas

<b>Colombia</b>	<p>Se incluyen en la planificación familiar y las normas de violencia sexual, los productos dedicados registrados en 2005. Datos DHS 2005: El conocimiento de la AE 40,8%, nunca usa AE- 3,2% (todas las mujeres), el 10,1% (mujeres no casadas sexualmente activas).</p>	<p>Farmacias con receta médica. AE no está disponible en el sector público. AE socialmente comercializado por PROFAMILIA.</p>
<b>Costa Rica</b>	<p>Ningún producto aprobado por la AE. AE no incluido en las normas y políticas. Total Prevalencia Anticoncepción: 80% (1999, OMS)</p>	<p>AE están disponibles y se podrían utilizar para el método de Yuzpe, pero el conocimiento es bajo.</p>
<b>Cuba</b>	<p>Included in FP norms, Postinor-2 registered. Total Contraceptive Prevalence: 73.3% (2000, OMS)</p>	<p>Public health clinics free of charge</p>
<b>Dominica</b>	<p>No hay información disponible</p>	<p>No hay información disponible</p>
<b>República Dominicana</b>	<p>Incluido en las Directrices Nacionales de salud reproductiva en 1999. Datos DHS 2007: el conocimiento de la AE 45,3% nunca usa AE: 2,7% (todas las mujeres), el 6,5%</p>	<p>Filial de la IPPF en las farmacias por \$ 5. CE no está disponible en el sector público. AE no está disponible en mercadeo social / instalaciones ONG.</p>
<b>Ecuador</b>	<p>Registrado en 2004. Incluido en las normas nacionales de PF y las normas de violencia sexual. Caso del Tribunal Constitucional se pronunció en contra de la AE en mayo de 2006. Los productos registrados figuran en esta lista no están disponibles en el mercado en este momento. La prevalencia anticonceptiva total: 65,9% (1997, OMS)</p>	<p>Disponible en las farmacias a partir de febrero 2007</p>

Tabla 7: Disponibilidad de Anticoncepción de Emergencia (AE) en las Américas

<b>El Salvador</b>	AE está incluido en las normas de salud sexual y reproductiva, pero no en las normas de violencia sexual. El marco regulatorio asegura el acceso libre, pero todavía hay problemas críticos de disponibilidad.	Disponible de una farmacia sin receta médica. No hay acceso al sector público.
<b>Guatemala</b>	Incluido en normas de salud reproductiva, Postinor (Marca AE) registrada en 2007. La prevalencia total de anticonceptivos: 43,3% (2002, OMS). AE está socialmente comercializado por La Asociación Pro Bienestar de la Familia de Guatemala (APROFAM).	AE está disponible en el sector público. AE está disponible en instalaciones de mercadeo social / ONGs.
<b>Guyana</b>	Prevalencia Total de Antoconceptivo: 37,3% (2000, OMS)	No hay información disponible
<b>Haití</b>	Incluido en las normas nacionales de PF. De acuerdo con datos de la EDS 2005-06, el conocimiento de la AE fue de 13,2% de todas las mujeres, sólo el 0,3% de las mujeres habían usado AE, mientras que el 1,1% de las mujeres no casadas sexualmente activas lo habían usado	Pronto tendrá condición de no necesitar receta médica. AE no está disponible en el sector público. AE no está disponible en mercadeo social / instalaciones de ONG.
<b>Honduras</b>	AE fue prohibida por un decreto presidencial en Honduras en octubre de 2009. La ley actual prohíbe la venta y el uso de la AE. Sin embargo, los datos de DHS de 2005-06: indican que el 34,9% de todas las mujeres tienen conocimiento de la AE, el 1,2% de las mujeres había utilizado, y el 5,2% mujeres solteras sexualmente activas habían usado AE.	La ley actual prohíbe la venta y el uso de AE.
<b>Jamaica</b>	Incluida en las normas de planificación familiar. La prevalencia anticonceptiva total: 65,9% (1997, OMS)	AE Disponible en farmacias sin receta médica

**Tabla 7: Disponibilidad de Anticoncepción de Emergencia (AE) en las Américas**

<b>México</b>	Incluido en las normas de planificación familiar oct 2004, incorporado a las directrices médicas básicas en 2005. Productos dedicados registrados. La prevalencia anticonceptiva total: 68,4% (1997, OMS). AE socialmente comercializado por DKT International.	Disponible en la International Planned Parenthood Federation (IPPF), clínicas, farmacias, afiliación deben estar en stock en instalaciones públicas, que pueden adquirirse sin receta médica por menores de edad
<b>Nicaragua</b>	Incluido en las normas nacionales de FP en 1997. DHS datos de 2001 indican que el 21,4% de todas las mujeres tenían conocimiento de la AE, el 1,2% había utilizado el AE alguna vez, el 5,8% de las mujeres no casadas sexualmente activas la habían utilizado alguna vez.	Pocos proveedores, disponibles en farmacias. AE no está disponible en el sector público. AE no está disponible en mercadeo social / instalaciones ONG.
<b>Panamá</b>	Ningún producto registrados disponible, sin embargo la AE está incluida en las normas de salud sexual y reproductiva. El marco regulatorio asegura el acceso, pero todavía no hay producto disponible.	No hay información disponible
<b>Paraguay</b>	Incluido en las normas nacionales de planificación familiar en 1998. La prevalencia total de anticonceptivos: 72,8% (2004, OMS). AE es socialmente comercializada por Population Services International.	Farmacias con una receta; proveedores privados. AE está disponible de forma gratuita para las mujeres en el sector público. AE está disponible en mercadeo social / instalaciones de ONGs
<b>Perú</b>	Se incluye en la planificación familiar (2001) y las normas de violencia sexuales (fecha desconocida). Los Datos DHS 2004-08 indican que el conocimiento de la CE entre las mujeres fue del 41,2%, sólo el 1,1% de las mujeres habían usado CE, pero un 2,2% de las mujeres no casadas sexualmente activas.	Disponible con receta médica. No disponible en el sector público. CE socialmente comercializado por APPRENDE (ONG de salud sexual y reproductiva). Muchas marcas de la CE disponible en las farmacias.
<b>Puerto Rico</b>	No hay información disponible	Disponible de una farmacia sin receta médica.
<b>St. Kitts and Nevis</b>	No hay información disponible	No hay información disponible

Tabla 7: Disponibilidad de Anticoncepción de Emergencia (AE) en las Américas

<b>St. Lucía</b>	No hay información disponible	No hay información disponible
<b>Suriname</b>	La prevalencia total de anticonceptivos: 42,1% (2000, OMS)	Dos tipos de AE disponible, información específica desconocida.
<b>Trinidad &amp; Tobago</b>	Marca Postinor-2 (Marca AE) registrada. Prevalencia total de anticonceptivos: 38,2% (2000, OMS)	Disponible en clínicas de PF & la mayoría de farmacias.
<b>United States</b>	Dedicado producto registrado. La prevalencia total de anticonceptivos: 72,9% (2002, OMS)	Plan B One-Step y Next Choice están disponibles en farmacias sin receta médica para aquellos de 17 años y mayores. Los odos están disponibles con receta médica para aquellos de 16 años y menores.
<b>Uruguay</b>	No existen normas formales de PF	Disponible sin receta médica. NO disponible en el sector público.
<b>Venezuela</b>	AE comercializado socialmente por PROSALUD.	Disponible en farmacias sin necesidad de receta médica.

Adaptado de "EC Status and Availability Database." [Condición de AE y base de datos de disponibilidad] International Consortium for Emergency Contraception [Consorcio Internacional para la Anticoncepción de Emergencia]  
<http://www.cecinfo.org/database/pill/pillData.php>, última visita 26 de agosto de 2012.

**ANNEX I: List of co-signers of this Amicus Curiae brief and signatures**

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