

**APPLICATION BEFORE THE INTER-AMERICAN COMMISSION
ON HUMAN RIGHTS**

Ana Victoria Sanchez Villalobos and Others

against

COSTA RICA

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**Amicus Brief Prepared by
The International Reproductive and Sexual Health Law Programme
Faculty of Law, University of Toronto**

Rebecca J. Cook

Professor and Faculty Chair, International
Human Rights
Co-Director, International Reproductive and
Sexual Health Law Programme
rebecca.cook@utoronto.ca

Bernard M. Dickens

Professor Emeritus of Health Law
and Policy,
Co-Director, International Reproductive and
Sexual Health Law Programme
bernard.dickens@utoronto.ca

Sandra Dughman

Reproductive Health Law Scholar
International Reproductive and Sexual Health Law Programme
Faculty of Law, University of Toronto
sandra.dughman@utoronto.ca



International Reproductive and Sexual Health Law Programme

Faculty of Law, University of Toronto
84 Queen's Park Crescent
Toronto ON Canada M5S 2C5
Tel: 416-978-1751, Fax: 416-978-7899
<http://www.law.utoronto.ca/programs/reprohealth.html>

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Interests of *Amicus Curiae*

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

Summary of Argument

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

Argument

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

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

1. The Inter-American Commission on Human Rights (the Commission) has interpreted Article 17(1) of the Convention, which recognizes that "The family is the natural and fundamental group unit of society", as creating a family entitlement to appropriate protection. Although the right to marry and found a family is subject to the conditions set forth in national law, such as regarding bigamous and incestuous unions, the limitations and restrictions introduced by national laws may not be so restrictive as to affect and impair the essence of the right to found a family.¹

2. An essence of the right to found a family is the ability to have biologically/genetically descended children.² When such ability is impaired through a biological or physical

¹ *Maria Eugenia Morales de Sierra v. Guatemala*, Report N° 4/01, Case 11.625, January 19, 2001 at para. 40.

² See *Dickson v. United Kingdom*, Application (44362/04 [2007] 3 F.C.R. 877, at para. 78.

condition that creates infertility, medical advances may now relieve a couple's childlessness.³ The State of Costa Rica (the State), in upholding the annulment of the Executive Decree No. 24029-S of February 3, 1995 (the Executive Decree) by the Supreme Court of Costa Rica, denies access to medical means available to overcome childlessness. In so doing, the State impairs the right to found and raise a family, and thus violates the rights and protections accorded by the Convention's Article 17(1).

3. Legitimate means of protection of life may require that IVF be regulated, but do not justify complete prohibition. There is no rational connection between protecting life, and preventing assisted creation of life. Through the prohibition of IVF, the State is not protecting life that has been conceived, but rather is preventing conception from occurring. Protection of life can be provided by means of regulation of IVF that reduce embryo loss. The Supreme Court of Costa Rica departed from its own declared purpose of protecting life from conception, and from the State's obligation to observe the Convention, by annulling the norm that provided regulation of the practice of IVF.

4. The State recognizes under Article 17(2) of the Convention the human right to have children and raise a family, but claims to subordinate that right to "higher values such as the right of all human beings, without distinction, to have their life protected."⁴ The State declares that the principles of "indivisibility" and "interdependence" of human rights show that some rights "cannot be sacrificed for the sake of other rights."⁵ The State therefore claims an entitlement to prohibit a right of access to IVF, which is known to be liable to result in some loss of embryonic life, because a legitimate exercise of a right should not entail "depriving other human beings of their life."⁶ By involving the risk of loss of embryonic life, however, IVF replicates natural medically unassisted reproduction. Spontaneous loss has been found to affect over 60% of naturally conceived embryos, although the figure may be much higher because most embryo loss occurs before pregnancy has been detected, and is absorbed in regular menstruation.⁷ By its prohibition of IVF, the State's professed "protection" of human lives, by ensuring that they do not come into being, imposes loss of the prospect of life of children who, through IVF, would come into being, and denies infertile couples the opportunity to raise them in their families, in violation of Article 17(2) of the Convention.

5. By its own Constitution, the State recognizes the family as a natural element and foundation of society entitled to State protection.⁸ Such protection should include the accommodation, under appropriate regulation, of medical means towards this choice that may overcome childlessness due to infertility.

³ E. Vayenna, P. Rowe & P. D. Griffin eds, *Current Practices and Controversies in Assisted Reproduction - Report of a WHO Meeting*, (Geneva: World Health Organization, 2002).

⁴ Report No 25/04, Petition 12.361, Admissibility, *Ana Victoria Sanchez Villalobos and Others v. Costa Rica*, March 11, 2004 (hereinafter Admissibility Report) at para. 35.

⁵ *Ibid.*

⁶ *Ibid.*

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

⁸ *Constitución Política de la República de Costa Rica de 1949*, at article 51 (hereinafter *Constitución*) [*free translation to English*]

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

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

2. By prohibiting IVF, Costa Rica is offending the principle of nondiscrimination, because the State is denying infertile couples access to medical assistance available to couples

who, without or with medical assistance such as artificial insemination, can conceive children without IVF. The State claims that adoption is a legitimate alternative for some infertile families. The State’s claim is contradicted by a series of judgments of the European Court of Human Rights, where the Grand Chamber observed in 2007 that it was dealing with a case “where a particular facet of an individual’s existence or identity is at stake (such as the choice to become a genetic parent).”⁹ Further, the choice of adoption is not always available. Adoption often requires satisfaction of demanding screening criteria, for instance concerning family income level, personal physical and mental health, age of partners, personal history and life style, that distinguish eligible adoptive parents from natural parents.¹⁰

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

⁹ *Dickson v. United Kingdom*, supra note 2, at para. 78.

¹⁰ To determine their competence and suitability the couple wanting to adopt has to show, among other matters, a criminal record certificate, and income record certificate, a marriage certificate, a health status report and go through a social evaluation and a psychological evaluation. Both evaluations have to take into consideration, among other matters, the couple’s motivation to adopt, which has to be considered healthy and not harmful to the child; Patronato Nacional de la Infancia, *Guía de Información básica sobre requisitos y trámites para la adopción de personas menores de edad mayores de cinco años, con necesidades especiales y grupos de hermanos por parte de familias con residencia habitual en Costa Rica (Guía)*, at VI. 1) 1.c & d; <http://www.pani.go.cr/adopciones.php>. In the case of infertile couples, it is important to assess how they have confronted their infertility problem. Patronato Nacional de la Infancia, *Guía* at VI. 1) 1.c & d. The examinations have to explore myths, fantasies, adequacies and overall the life plan that the couple intends to implement with their new addition to the family; *Guía* at VI. 1) 1.c & d. After this first administrative stage is completed, the couple has to make an application before the judiciary and once the judge has established they met all the required conditions they have to register the decision; Patronato Nacional de la Infancia, *Guía* at VI. 2).

its implication that responsibility for the relief of children's homelessness should fall specifically on such couples rather than on the general community.

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

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

1. The State claims that infertility "should not be considered a disease, because it does not involve an alteration of a person's health"¹¹, and that "the current technique of *in vitro fertilization*" is inconsistent with the right to life.¹² Neither claim is justifiable.

2. The State is a member of the World Health Organization, whose Constitution treats "health" as a state of "physical, mental and social well-being, and not merely the absence of disease or infirmity."¹³ As adolescents grow into adulthood, and prepare themselves for parenthood, the realization of infertility alters their perception of themselves as healthy, "normal" people, and, in altering their sense of mental and social well-being, alters their health. Accordingly, even when infertility is unrelated to disease, it nevertheless impairs and denies health. The refusal to acknowledge the torment and despair of those who suffer reproductive disability and are unable to have the children they legitimately crave, speaks poorly of the compassion and human understanding of any State or Court that invokes a narrow, medically restricted concept of health to justify prohibition of means to relieve involuntary childlessness.

3. The State further seeks to justify prohibition of IVF, as originally allowed in its Executive Decree of 1995, on the ground that "the current technique of *in vitro fertilization* is ... inconsistent with the right to life". This ignores the history of developments in IVF, which is now understood generically to cover a variety of assisted reproductive techniques. Of several relevant developments, most significant is the move from exposing many ova to sperm in order to create multiple embryos (biologically often referred to as zygotes or blastocysts) and rejection of those which are morphologically non-viable, to intracytoplasmic sperm injection (ICSI) of ova, which is now more common in modern IVF clinics than earlier IVF techniques.¹⁴ ICSI, allied with single

¹¹ Admissibility Report, *supra* note 4, at para. 32.

¹² *Ibid.* at para. 37.

¹³ World Health Organization, *Preamble to the Constitution of the World Health Organization* as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization).

¹⁴ Bernard M. Dickens and Rebecca J. Cook, Multiple Pregnancy: Legal and Ethical Issues, *Int'l J of Gynecology and Obstetrics*, 103: 270-274 (2008).

embryo transfer, can avoid discarding of embryos, because it selects particular sperm to be injected, by microscopic means, into selected ova. Fusion of their cellular material constitutes conception of an embryo, which is then implanted into a women's uterus for natural gestation. Modern practice favors single embryo transfer, since multiple pregnancies are contra-indicated on grounds of fetal and maternal health.¹⁵ Accordingly, to prohibit IVF on grounds of the selected sacrifice of embryos is unjustified, in light of developments in IVF technology, application and the evolving standard of practice.

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

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

1. Article 11 of the Convention requires State protection of individuals from arbitrary actions of state institutions that infringe family life.¹⁶ The decision of the Supreme Court of Costa Rica to annul the Decree that regulated IVF constitutes an arbitrary intervention of State authority that infringes individuals' private reproductive choices and does not comport with the norms or objectives of the Convention.

2. The Commission has observed that the object of Article 11, and indeed of the entire Convention, is in essence to "protect the individual against arbitrary interference by public officials."¹⁷ The Commission required the State to "adopt all necessary legislation in order to ensure this provision's effectiveness."¹⁸ By its Executive Decree, the State proposed regulations consistent with respect for private and family life, but now endorses the grounds on which the State's Supreme Court annulled the Decree. The State claims that the practice of IVF does not constitute a "private matter, or one that implies no offense to society," considering this medical technique contrary to public order, morals and customs. Because this technique is claimed to be inconsistent with the right to life, the State asserts that it has "a legitimate interest in intervening"¹⁹

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

¹⁵ British Fertility Society and Association of Clinical Embryologists, *Elective Single Embryo Transfer: Guidelines for Practice*, *Human Fertility*, 11(3): 1-16 (2008).

¹⁶ *Maria Eugenia Morales de Sierra v. Guatemala*, supra note 1, at para. 47.

¹⁷ *X and Y v. Argentina*, Case No 10.506, October 15, 1996 at para. 91.

¹⁸ *Ibid.*

¹⁹ Admissibility Report, supra note 4, at para. 37.

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

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

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

6. The Commission has declared repeatedly that the right to privacy "guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one's own."²¹ According to the Commission, Article 11 covers a variety of factors respecting the dignity of the individual including, for example, "the ability to pursue the development of one's personality and aspirations, determine one's identity, and define one's personal relationships."²² The aspiration to have and raise one's biologically descended children, and to constitute such aspirations as part of one's own identity, is protected by Article 11.

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

²⁰ *Dickson v. United Kingdom*, supra note 2, para. 75.

²¹ *X and Y v. Argentina*, supra note 17, at para. 91.

²² *Maria Eugenia Morales de Sierra v. Guatemala*, supra note 1 at para. 46.

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

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

2. Although Costa Rica appoints the Roman Catholic and Apostolic Religion to be the religion of the State,²³ it cannot compel obedience to the doctrines of that denomination of Christianity on those who do not voluntarily adhere to them, or any set of their different interpretations. That is, this constitutional provision does not prevent the free and conscientious exercise of other religious beliefs. Article 75 of the Constitution of Costa Rica provides that recognition of the Catholic religion as the religion of the State “should not prevent the free exercise in the Republic of other forms of worship ...”²⁴ Consistent with this value, the law of the State does not prohibit but expressly allows divorce.²⁵ The Constitution expressly prohibits the use of religious motives or the use of religious beliefs in order to promote a political view or propaganda.²⁶ The Supreme Court has, unfortunately, entered the political sphere, to serve a religious motive.

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

4. Arguing that every right has limits set by other rights, the State asserts that the right to life places a limit on “couples seeking to have children and scientists seeking to experiment with embryos.”²⁸ According to the same logic, the right of reproductively disabled couples to found and raise their families may place a limit on the right of the State to assert a right based on a moral viewpoint and enforce obedience to it.

²³ Constitución de Costa Rica, supra note 8, at Article 75.

²⁴ *Ibid.*

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

²⁶ Constitución de Costa Rica, supra note 8, at Article 28.

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

²⁸ Admissibility Report, supra note 4, at para. 36.

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

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

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

²⁹ *Ibid.* at para. 29.

³⁰ *Ibid.* at para. 30.

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

³² Admissibility Report, *supra* note 4, at para. 33.

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

³⁴ For example, 130 centers from 12 Latin American countries reported results of assisted reproductive technology for treatments initiated during 2006, http://www.redlara.com/ing/reg_2006.asp, last visited 27 Sept 2009.

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

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

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

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

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

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

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

³⁵ Abdallah S. Daar, Zara Merali, “Infertility and social suffering: the case of ART in developing countries” in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, supra note 3 at 15.

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

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

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

³⁹ Disability Convention, supra note 37, Preamble (e).

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

6. The Costa Rican Act No 7600, *Igualdad de oportunidades para las personas con discapacidad* (Equal Opportunities for People with Disability) (Costa Rican Disability Act), defines disability as “any physical, mental or sensorial impairment that substantially limits one or more of the main activities of an individual.”⁴¹ Reproduction is a main choice of activity of an individual and to suffer a physical impairment that hinders reproductive ability is, accordingly, a disability. Moreover, Article 31 of the Costa Rican Disability Act explains that health care services should be provided under equal conditions to every person who requires them, but the State’s refusal to permit IVF to reproductively impaired patients denies them equality and imposes discrimination on the ground of disability.⁴² This Act implements the Costa Rican Constitution, which declares that the State has a duty to “procure the greatest wellbeing of all inhabitants of the country,”⁴³ which should include the well-being of infertile inhabitants.

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

8. The World Medical Association recognizes that reproductive technology

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

9. The State justifies prohibition of IVF by maintaining that “it is not an emergency treatment nor a cure for a disease, [but] ... an artificial recourse that seeks to overcome

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

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

⁴² *Ibid* at Article 31.

⁴³ Constitución de Costa Rica, *supra* note 8, at Article 50.

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

that biological condition”⁴⁵ of infertility. However, many medical procedures not subject to state prohibition, and indeed often actively facilitated and funded by states, only overcome without curing adverse biological conditions. Examples include provision of prosthetic devices to replace missing limbs, implantation of cardiac pacemakers to reduce effects of heart disease, and artificial insemination when natural insemination cannot be achieved. Disabled people affected by such biological conditions are not subject to the intervention of state prohibitions of medically assisted relief.

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

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

1. Articles 1, 11 and 24 of the Convention have to be read consistently with each other, and with the State’s commitments under the American Declaration of the Rights and Duties of Man,⁴⁶ the Universal Declaration of Human Rights,⁴⁷ and the Convention on the Elimination of All Forms of Discrimination against Women⁴⁸ (the Women’s Convention), to ensure that everyone is equal in dignity.

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

⁴⁵ Admissibility Report, *supra* note 4, at para. 32.

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

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

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

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

⁵⁰ *Ibid.* at xiii and 1.

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

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

4. By denying infertile individuals and couples the hope and benefit of IVF treatment, the State stereotypes them as unentitled to the dignity of conscientious parenthood, and discriminates against them in their enjoyment of private and family life.⁵⁴ By prohibiting IVF, the State is contributing to the social stigma placed on individuals and couples unable to bear children, denying their right to be equal in dignity in violation of Articles 1, 11, and 24 of the Convention.

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

1. Infertility and childlessness impact women disproportionately, exacerbating their systemic disadvantage in society.⁵⁵ The psychological and social burden of infertility is predominantly borne by women.⁵⁶ Their status in society and the family is often identified with their capability to bear children, and their failure to give birth can be seen as a social disgrace.⁵⁷ Women are often disproportionately blamed when couples do not have children. Infertile women are often ostracized from their own and their husbands’ families, and not infrequently divorced because they cannot fulfill the role of mothers. The frustration of infertility can trigger matrimonial disharmony and conflict, resulting in marital breakdown, which in many communities reduces women to poverty.⁵⁸

2. When the State prohibits a medical treatment that would in a significant number of cases alleviate the social and psychological distress of a medical condition from which

⁵¹ Abdallah S. Daar and Zara Merali, “Infertility and social suffering: the case of ART in developing countries” in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, supra note 3 at 16.

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

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

⁵⁴ *Maria Eugenia Morales de Sierra v. Guatemala*, supra note 1 at paras. 44 & 52.

⁵⁵ *Maria Eugenia Morales de Sierra v. Guatemala*, supra note 1 at para 32.

⁵⁶ Mahmoud Fathalla, “Current challenges in assisted conception” in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, supra note 3 at 10.

⁵⁷ *Ibid.*

⁵⁸ See Abdallah S. Daar and Zara Merali, “Infertility and social suffering: the case of ART in developing countries” in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, supra note 3 at 19; Anjali Widge, “Sociocultural attitudes towards infertility and assisted reproduction” in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, supra note 3, at 63; Ellen Hardy and Maria Yolanda Makuch, “Gender, Infertility and ART” in E. Vayena et al. eds *Current Practices and Controversies in Assisted Reproduction*, supra note 3, at 273.

women suffer in disproportionate ways, the State is hindering women's exercise of their right to found and raise families, and to enjoy mental and social well-being. IVF can increasingly overcome childlessness, and thereby alleviate the social and psychological distress women experience because of their inability to conceive children. The State claims that the suffering it recognizes due to infertility "has no causal link to the Costa Rican State."⁵⁹ However, the suffering experienced particularly by women due to childlessness is directly linked to the State's prohibition of IVF, which is increasingly successful in achieving childbirth in couples unable to conceive by natural means.⁶⁰ The State is directly preventing the ability of women to achieve motherhood that would be possible through IVF, and is similarly implicated in the preventable social, psychological and familial distress that women suffer through childlessness that could be overcome.

3. The State is obligated under Articles 1, 17 and 24 of the Convention,⁶¹ and equally under Articles 5(a), 12 and 16(e) of the Convention on the Elimination of All Forms of Discrimination against Women,⁶² to ensure that there is no direct or indirect discrimination against women in its laws, or the application of its laws. In particular, where public officials, including judges, apply laws in a manner that adversely impacts women, a form of gender discrimination arises that the State is obligated to prevent or remedy.

4. The prohibition of IVF not only impedes women from overcoming a disability that adversely affects their social and psychological well-being, but also constitutes a form of indirect discrimination due to the disproportionate social burden infertility places on women.⁶³ Although the prohibition of IVF may be considered neutral on its face, in that this potentially remedial medical technique is prohibited to women and men, its effect can disproportionately impair, nullify and violate the recognition, enjoyment or exercise by women of their rights under Articles 1, 17 and 24 of the Convention, and Articles 5(a) and 12 and 16(e) of the Women's Convention.

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

1. National legislation, consistently with Articles 1 and 25 of the Convention, is required to provide protection without discrimination. The Commission has ruled that only a distinction based on "reasonable and objective criteria" can be considered a legitimate State interest within Article 24.⁶⁴ A criterion on which to base a distinction is reasonable and

⁵⁹ Admissibility Report, *supra* note 4, at para. 40.

⁶⁰ Beth Malizia, Michele Hacker, Alan Penzias, Cumulative Live-Birth Rates after in Vitro Fertilization, *New England Journal of Medicine* 360(3): 236-243 (2009).

⁶¹ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion, OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), at para. 55.

⁶² *General Recommendation No. 25: Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, U.N. Doc. A/59/38 (2004) at para 7.

⁶³ *General Recommendation No. 24: Women and Health (Article 12)*, U.N. Doc. A/54/38/Rev.1 (1999) at para. 19.

⁶⁴ *Maria Eugenia Morales de Sierra v. Guatemala*, *supra* note 1, at para 31.

objective only when it “(1) pursues a legitimate aim and (2) employs means which are proportional to the end sought.”⁶⁵

2. The State spuriously invokes the legitimate aim of protection of human life while it is actually “protecting” lives that do not exist, and sacrificing the lives of children that could be conceived through IVF. The prevention of conception falls outside the scope of protection of life under the Convention, but discriminates on grounds of the health status and disability of infertility, by which women are more gravely affected, in violation of Articles 1 and 24 of the Convention.

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

⁶⁵ *Ibid.*