

**Inter-American Court of Human Rights**

**Case No: 12.361**

**Gretel Artavia Murillo et al (“*In Vitro Fertilization*”)**

**v.**

**Costa Rica**

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***Amicus Curiae* on the Discriminatory Impact of the *In Vitro Fertilization* Ban on  
Women and Infertile Individuals**

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**Presented by:**

**The Human Rights Clinic**

**at**

**The University of Texas School of Law**

**and**

**The Equal Rights Trust**

**Honorable Inter-American Court of Human Rights:**

The Human Rights Clinic at the University of Texas School of Law, 727 E Dean Keeton Street, Austin, Texas 78705, United States and the Equal Rights Trust, 126 North End Road, London, W14 9PP, UK respectfully submit to this Honorable Court the following

*amicus curiae* brief in the case of *Gretel Artavia Murillo et al. v. Costa Rica* for its consideration.

## **I. Request to be Considered *Amicus Curiae***

1. Pursuant to Article 44 of the Rules of Procedure of this Honourable Court<sup>1</sup>, the Human Rights Clinic at the University of Texas School of Law (HRC) and the Equal Rights Trust (ERT) respectfully request to be considered *amicus curiae* in this matter and ask this Honourable Court to take into account the issues addressed in this brief.

## **II. Statement of Identity and Interest of *Amicus Curiae***

2. *Amicus* has substantial organizational interest in the issues addressed in this brief, and these issues fall within *amicus*' areas of expertise.
3. *Amicus* - The HRC brings together an interdisciplinary group of human rights advocates who work to promote and protect human rights worldwide. Under the supervision of director Ariel Dulitzky, the HRC has supported human rights claims in domestic and international fora, investigated and documented human rights violations internationally, developed and participated in advocacy initiatives before international, regional, and national human rights bodies, and engaged with global and local human rights campaigns. Currently, the HRC has collaborated with the Equal Rights Trust<sup>2</sup>, an independent, international organization working to combat discrimination and to promote and advocate for equality as a fundamental human right. Governed by an international Board of Trustees, the ERT achieves its mission through advocacy, documentation of abuses of equality rights, strategic litigation and legal and policy research. The Declaration of Principles on Equality,<sup>3</sup> a pillar of the collaboration

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<sup>1</sup> Rules of Procedure of the Inter-American Court of Human Rights, Art. 44 (December 2009); *Case of Kimel v. Argentina. Merits, Reparations, Costs, and Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 177, Para. 16 (2 May 2008).

<sup>2</sup> The Equal Rights Trust works from an integrated human rights framework on equality which seeks more effective implementation of the right to equality through reliance on overarching aspects of the different varieties of discrimination.

<sup>3</sup> The Declaration of Principles on Equality was adopted in 2008, as a collaborative effort of 128 international experts. The process was facilitated by ERT. See Declaration of principles on Equality, published by The Equal Rights Trust,

between the HRC and ERT, is a comprehensive document regarding equality and discrimination within a human rights framework.

4. This brief seeks to emphasize the discriminatory impact the *in vitro* fertilization ban has on women and infertile individuals with no recourse to alternative assisted reproductive techniques (ART) in Costa Rica. Specifically, this brief argues that the current ban violates the rights to equality and non-discrimination, both as rights guaranteed in themselves by the American Convention and with respect to the right to privacy and the right to a family enshrined in the Convention. The ban on the practice of *in vitro* fertilization disproportionately affects women and infertile individuals and permits discriminatory interference into the right to a family.

### **III. Statement of Facts**

5. *Amicus* adopts the factual summaries presented by the Commission and presents only those facts most relevant to the particular issues addressed in this brief.
6. Infertility affects both men and women and, according to a World Health Organization (WHO) report, is experienced by approximately 10% of couples worldwide.<sup>4</sup> The WHO also reported infertility “caus[es] considerable personal suffering and disruption of family life.”<sup>5</sup> In light of this, various ART exist today to help combat infertility.<sup>6</sup> For some individuals, ART are the only viable way to conceive.<sup>7</sup> *In vitro* fertilization (IVF) is an assisted reproductive technique that involves fertilizing ova with sperm outside of the mother’s body.<sup>8</sup> The procedure is used for cases of both male and female infertility.<sup>9</sup>

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London 2008, available at

<http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>

<sup>4</sup> World Health Organization, RECENT ADVANCES IN MEDICALLY ASSISTED CONCEPTION, 1992, WHO para. 2.1.

<sup>5</sup> *See id.*

<sup>6</sup> *Id.*

<sup>7</sup> IACHR, *Gretel Artavia Murillo et al. v Costa Rica*, Merits Report hereinafter “Merits Report”) No. 85/10, Case 12.361, July 14, 2010, para. 13.

<sup>8</sup> World Health Organization, International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO), *Revised Glossary of ART Terminology*, 2009, in FERTILITY AND STERILITY, November 2009.

<sup>9</sup> Merits Report, *supra* note 7, paras. 16, 64.

7. On February 3, 1995, then Costa Rican President J.M. Figueres, along with his Minister of Health, signed a Presidential Decree authorizing IVF for married couples and regulating its practice.<sup>10</sup> The Decree defined IVF as “all those artificial techniques in which the egg and the sperm are united through a form of direct manipulation of the reproductive cells in the laboratory.”<sup>11</sup> IVF was practiced in Costa Rica from 1995 – 2000; 15 *in vitro* babies were born during this time.<sup>12</sup>
8. On March 15, 2000, the Constitutional Chamber of the Costa Rican Supreme Court held that the practice of *in vitro* fertilization was unconstitutional, and issued a court order banning all IVF practices.<sup>13</sup> The Court objected to the practice primarily because it includes a high ‘embryo loss rate,’ and therefore violates the right to life as enshrined in the American Convention on Human Rights (“the Convention”).<sup>14</sup>
9. Other reproductive techniques, such as sperm donation and artificial insemination remain permitted within the State<sup>15</sup> while egg donation and IVF techniques are prohibited. Costa Rica is the only Latin American state to have banned IVF.<sup>16</sup>
10. At the filing of the original petition, the alleged victims were married couples suffering from severe infertility. The couples were on the waitlist to receive IVF when the Constitutional Court ruled that the practice was unconstitutional, therefore preventing them from receiving treatment.<sup>17</sup>

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<sup>10</sup> *Id.*, para. 12.

<sup>11</sup> *Id.* at para. 40.

<sup>12</sup> *Id.* at para. 42.

<sup>13</sup> *Id.* at para. 41; Sala Constitucional de la Corte Suprema de Justicia de Costa Rica. Sentencia No. 2306-00 de las 15:21 horas del 15 de marzo del 2002, available at [http://200.91.68.20/scij/index\\_pj.asp?url=busqueda/jurisprudencia/jur\\_ficha\\_completa\\_sentencia.asp?nBaseDato=1&nSentencia=128218](http://200.91.68.20/scij/index_pj.asp?url=busqueda/jurisprudencia/jur_ficha_completa_sentencia.asp?nBaseDato=1&nSentencia=128218) (website of Sistema Costarricense de Información Jurídica, last visited April 13, 2012)

<sup>14</sup> *Id.* at para. 43; American Convention on Human Rights, art. 4, O.A.S.T.S. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

<sup>15</sup> *Id.*, at para. 31.

<sup>16</sup> Patrick B. Craine, Costa Rica ignores enormous international pressure and keeps IVF ban, *available at*: [www.lifesitenews.com/news/costa-rica-ignores-enormous-international-pressure-and-keeps-ivf-ban](http://www.lifesitenews.com/news/costa-rica-ignores-enormous-international-pressure-and-keeps-ivf-ban); Merits Report, *supra* note 7, para. 16.

<sup>17</sup> *Id.* at para. 15

11. Because of the ban, some of these victims have chosen to pursue treatment abroad. One witness, Andrea Bianchi Bruno, resigned from her job in order to take the necessary time off to undergo the procedure in Colombia. She spent \$30,000 USD for a procedure that would have cost \$3,000 USD had it been permissible in Costa Rica.<sup>18</sup>
12. For those that could not pursue this option of seeking treatment abroad, no treatment was available to them in Costa Rica. One witness testified before the Commission that “[t]he ban not only denied [her] the health treatment [she] was seeking, but also compounded the suffering that an infertile couple experiences.”<sup>19</sup>
13. The ban following the Constitutional Court’s ruling is currently in effect in Costa Rica.<sup>20</sup> The Commission submitted the case to the jurisdiction of this Honorable Court on July 29, 2011.

#### **IV. Summary of Argument**

14. Costa Rica’s absolute ban on IVF procedures is an impermissible measure due to the discriminatory impact it has on women and infertile individuals. Article 24 of the Convention protects the right to equality and non-discrimination of all individuals, while Article 1 (1) requires non-discrimination in the guarantee of the rights enshrined in the Convention. Discrimination is prohibited in the Convention and other international legal documents when it is on one of various enumerated grounds, including gender and other social conditions. Infertility as a medical condition with serious social consequences should be considered a social condition for purposes of protection under the Convention. Discrimination can arise when arbitrary distinctions are made concerning one of the protected groups, or when legislation and other measures have a discriminatory impact on one of the protected groups. A distinction need not be unintentional to be arbitrary. The absolute ban on IVF procedures in

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<sup>18</sup> *Id.* at paras. 15, 50.

<sup>19</sup> *Id.*, at para. 15.

<sup>20</sup> *Id.*, at para. 49

Costa Rica is a discriminatory measure because it arbitrarily and disproportionately affects women and infertile individuals and violates their exercise of the right to privacy and the right to a family under the American Convention.

## V. Argument

### *a. Introduction*

15. The absolute ban on IVF procedures in Costa Rica, as ordered by the Constitutional Court, has a discriminatory impact on women and infertile individuals and is impermissible under the Convention. Typically resulting from a medical condition, infertility is recognized as resulting in “physical and psychological suffering for the couples.”<sup>21</sup> IVF is one kind of assisted reproductive technique, designed to overcome infertility, and for couples where both individuals face infertility conditions, IVF may be the only viable method of having a biological child.<sup>22</sup>

16. As a result of the ban on IVF procedures in Costa Rica, couples in need of the treatment submitted a petition to the Commission alleging that the ban is impermissible under the Convention.<sup>23</sup> The Commission found that the absolute ban on IVF constituted “arbitrary interference in the right to private and family life and the right to found a family”,<sup>24</sup> it “violated the victim’s right to equality and the principal of non-discrimination”,<sup>25</sup> and it had a “disproportionate impact on women.”<sup>26</sup> The brief of *amicus curiae* HRC and ERT supports the Commission’s findings and argues that (i) the ban violates the principles of equal protection and non-discrimination enshrined in article 24 of the Convention, disproportionately

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<sup>21</sup> Merits Report, *supra* note 7, paras. 52, 55.

<sup>22</sup> *Id.* at para. 13.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, at para. 111.

<sup>25</sup> *Id.*, at para. 134

<sup>26</sup> *Id.*, at para. 128.

affecting women and infertile individuals; and (ii) discriminates against women and infertile individuals in their exercise of the right to private and family life, including the right to found a family, as enshrined in the Convention, giving rise to violations of Art. 1(1), 11, and 17.

*b. Costa Rica's ban on in vitro fertilization has a disproportionate impact on women and infertile individuals, giving rise to a violation of Article 24 of the American Convention*

17. Article 1(1) of the Convention requires States to respect and ensure the enshrined rights, without discrimination regarding “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”<sup>27</sup> While this protection extends to specific rights enumerated in the Convention, Article 24, the right to equal protection, entitles all persons to “equal protection before the law.”<sup>28</sup> The Inter-American Court for Human Rights (“the Court”) has repeatedly established that Article 24 “prohibits any type of discrimination, not only with regard to the rights embodied therein, but also with regard to all the laws that the State adopts, and to their application.”<sup>29</sup> In contrast to Article 1(1), which prohibits discrimination specifically with regards to enumerated rights, Article 24 prohibits discrimination generally.

18. The Commission and the Court have frequently held that non-discrimination is a fundamental principle of the human rights system. Although the Convention does not define discrimination, various international bodies have defined the term. The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (“Inter-American Convention”) is the only Inter-American instrument that defines discrimination as any “distinction, exclusion or restriction,” based on enumerated grounds, “which has the effect or objective of impairing or

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<sup>27</sup> American Convention *supra* note 14, art. 1(1).

<sup>28</sup> *Id.*, art. 24.

<sup>29</sup> IACtHR, *Case of YATAMA v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, June 23 2005, para. 186.

nullifying the recognition, enjoyment or exercise” by a person...”of all his or her human rights and fundamental freedoms.”<sup>30</sup>

19. The Declaration on Principles of Equality, a consensual reaffirmation of the right to equality by human rights and equality experts of diverse backgrounds, similarly defines discrimination, adding to the enumerated grounds “disability, health status, genetic or other predisposition toward illness” or “characteristics associated with any of these grounds.”<sup>31</sup> This expansion of the definition of discrimination reflects well-established concepts and jurisprudence from international, regional, and national contexts.<sup>32</sup> The scope of discrimination established by both this definition and that of the Inter-American Convention emphasizes a trend in current human rights scholarship toward a broad understanding of non-discrimination and the right to equality.

20. Laws and policies can be discriminatory when distinctions among social groups arise and lack “objective and reasonable justification.”<sup>33</sup> A determination of reasonableness is done on a case-by-case basis, but involves a determination of legality, suitability, the existence of a legitimate aim and/or less restrictive means, and a proportional balancing of public and private interests.<sup>34</sup> The Court has also required relationship of proportionality between the restriction and the objectives, which may not be “unreasonable.” Unreasonable restrictions are those restrictions whose objectives are “arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”<sup>35</sup> Both the Court and Commission have required measures to be the

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<sup>30</sup> IACtHR, *Juridical Condition and Rights of the Undocumented Migrants* (hereinafter Rights of the Undocumented Migrants), Advisory Opinion, OC-18/03, Sept. 17, 2003, para. 85

<sup>31</sup> Declaration on Principles of Equality, *supra* note 3, Art. 5.

<sup>32</sup> *Id.*, Introduction.

<sup>33</sup> *YATAMA*, *supra* note 29, para. 184.

<sup>34</sup> IACtHR, *Escher et al v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of July 6, 2009, Series C No. 199, para. 129; IACtHR, *Tristan-Donoso v. Panama*, Preliminary Objection, Merits, Reparations and Costs, Judgment of January 27, 2009, Series C No. 193, para. 76.

<sup>35</sup> IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, para. 91.



least restrictive of a protected right in order to comply with the above-stated requirements.<sup>36</sup>

21. However, when discrimination results from distinctions based on one of the enumerated categories included in non-discrimination provisions of human rights treaties, such as Article 1(1) of the American Convention, thereby giving rise to what the Commission has termed “suspect categories,” a higher standard of analysis than “objective and reasonable” should be employed.<sup>37</sup> The Commission, when scrutinizing provisions that discriminate against “suspect categories,” examines the existence of an “overriding or urgent” objective, whether the restriction is proportional, and whether it is “least restrictive of the protected right.”<sup>38</sup>
22. Indirect discrimination may arise when a law or policy that may appear neutral has a disproportionate impact on certain sectors of the population in exercising their rights under the Convention on the basis of prohibited grounds.<sup>39</sup> A law or policy may have a disproportionate and therefore discriminatory effect when its objective or impact disadvantages certain groups in society.<sup>40</sup>
23. In order to comply with standards of non-discrimination, the Court has held that States are obliged not to “introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual.”<sup>41</sup>

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<sup>36</sup> *Access to Justice for Women Victims*, *supra* note 38, para. 82-83; IACtHR., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85, November 13, 1985, Series A No. 5, para. 46.

<sup>37</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, para. 80.

<sup>38</sup> *Id.* para. 83.

<sup>39</sup> United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights), July 2, 2009; Declaration on Principles of Equality, *supra* note 3, art. 5; IACtHR, *Case of the Girls Yean and Bosico*, Series C No. 130, Judgment of September 8, 2005, para. 141; *Rights of Undocumented Migrants*, *supra* note 33, para. 88.

<sup>40</sup> *Access to Justice for Women Victims*, *supra* note 36, para. 93; *Yean and Bosico*, *supra* note 35, para. 141.

<sup>41</sup> *YATAMA*, *supra* note 29, para. 184.

(i) *In vitro Ban and the arbitrary and disproportionate impact on women*

24. Traditionally, discrimination is impermissible on the basis of sex or gender, and women are a protected group.<sup>42</sup> Therefore, laws that have a negative disproportionate impact on women will be considered discriminatory.
25. While the IVF ban does not specifically target women, and therefore may appear neutral, it does have a negative disproportionate impact on women. As the Commission found, the process of IVF uniquely affects a woman's body and the choices she makes concerning her body.<sup>43</sup> Because it is a woman who physically carries the embryo through development until birth, a woman's body is clearly more intimately affected by the decision to have, or not to have, a child. Therefore, the actual process of IVF has a very direct impact on women's bodies that it does not have on a man's body, namely, more severely restricting a woman's reproductive decisions. While infertility can affect both men and women, the technique of IVF more directly affects a woman's body, and specifically impacts her exercise of rights, including that of equality before the law as well as privacy and to found a family (discussed below<sup>44</sup>).<sup>45</sup> Thus, the ban has a disproportionate impact on infertile women as compared to infertile men.
26. In addition, while the ban prohibits IVF procedures, and thus necessarily prohibits third party egg donations for women for whom non-surgical embryonic transfers for *in vivo* fertilization is impossible or unfeasible, there is no similar prohibition against sperm donation for artificial insemination procedures.<sup>46</sup> This effect has two results. First, this disproportionately affects infertile women for whom IVF is the only viable way of conceiving a child. Potentially, a man could seek a surrogate mother and donate sperm for artificial insemination, producing a biological offspring even in

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<sup>42</sup> See *infra* paras. 17–18 (defining discrimination and the enumerated protected grounds under various international legal instruments).

<sup>43</sup> Merits Report, *supra* note 7, para. 131

<sup>44</sup> See *supra*, paras. 24–25

<sup>45</sup> See Merits Report, *supra* note 7, para. 131–33.

<sup>46</sup> *Id.*, para. 62; see also Center for Reproductive Rights, Letter Submitted to the Inter-American Commission on Human Rights re Costa Rican IVF Ban, November 10, 2010, at 3.

cases of infertility issues. However, if a woman is infertile in the sense that *in vivo* fertilization is not feasible, but *in vitro* fertilization of her eggs may produce a child, the IVF ban precludes her from ever attempting to have a biological child. In other words, banning *only* IVF but allowing sperm donation and *in vivo* artificial insemination, the ban has a very clear negative impact on women that it does not have on men. By banning IVF, the State has limited a woman's ability to pursue biological children while not similarly limiting a man's ability to do so, producing a disproportionate impact on a protected group.

27. Second, there is a disproportionate impact on women in the sense that the ban restricts a woman's decision to donate eggs while imposing no such restriction on men regarding the donation of sperm.<sup>47</sup> The IVF ban, due to the nature of the procedures and the lack of prohibitions against sperm donation, has a strong disproportionate impact on women. It restricts a woman's decision regarding egg donation while imposing no such restriction on the decisions of men.

(ii) *In Vitro Ban and Disproportionate Affect on Infertile Individuals*

28. Infertility constitutes a social condition under the Convention, and Costa Rica's IVF ban has a disproportionate effect on infertile individuals, especially infertile women. As defined above, discrimination is prohibited for 'other statuses' or 'social conditions' in addition to specific, enumerated grounds.<sup>48</sup> Although the Court has yet to fully develop the parameters of "any other social condition," it has found that sexual orientation,<sup>49</sup> mental disabilities,<sup>50</sup> and migratory status<sup>51</sup> are social conditions. In analyzing the existence of a protected social group with regards to sexual orientation, the Court discussed the immutability of the characteristic as well as the arbitrary distinction created by the State based on sexual preference.<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> See *infra* paras. 21-24; American Convention, *supra* note 14, art. 1(1)

<sup>49</sup> IACtHR, *Caso Atala Riffo y Ninas v. Chile*, Merits, Reparations and Costs, Judgment of February 24, 2012, para. 93.

<sup>50</sup> IACtHR, *Ximenes-Lopes v. Brazil*, Merits, Reparations, and Costs, Judgment, ser. C, Report No. 149, July 4, 2006, para. 3, 105; see also Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.

<sup>51</sup> *Rights of Undocumented Migrants*, *supra* note 33, para. 47.

<sup>52</sup> See *Atala*, *supra* note 49, para. 83-99.

29. International instruments also imply “social conditions and other statuses” covers medical conditions, disabilities, and health statuses.<sup>53</sup> Infertility cannot be cured; instead, IVF and other assisted reproductive techniques overcome disadvantages imposed by the condition.<sup>54</sup> Medical and psychological experts agree that infertility, resulting from medical conditions, produces serious emotional and mental effects on individuals and couples. Barriers to conceiving a child and raising a family have considerable social stigma, and place infertile individuals at a disadvantage to other similarly situated individuals (married, fertile adults).<sup>55</sup> Individuals as members of infertile couples face not only severe emotional distress, but infertility can also impact the relationship of the infertile couple or individual to their community, the relationship between partners, and the relationship between the couple or individual and their extended family.<sup>56</sup> In developing countries especially, infertility may impose insurmountable economic barriers to the couple or individual.<sup>57</sup>

30. Given the disadvantages faced by infertile individuals, the consequences for these individuals in society, and the immutability of the condition, infertility should be considered a protected social condition by this Honorable Court.

31. The absolute ban on IVF in Costa Rica has an additional disproportionate, and therefore discriminatory, impact on infertile individuals, where two such individuals constitute a couple. For the victims in the present case, IVF was the only viable option for conceiving a biological child. In contrast, when one individual in a couple is fertile, or minor fertility issues arise, the options of sperm donation and/or surrogacy are still available, allowing the couple to pursue a child that is biologically

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<sup>53</sup> Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities; Principles of Declaration on Equality, *supra* note 3, art. 5 (listing, disability, health status, and genetic predisposition to illness as protected groups).

<sup>54</sup> Merits Report, *supra* note 7; WHO Report, *supra* note 4.

<sup>55</sup> See World Health Organization, *Assisted reproduction in developing countries - facing up to the issues*, PROGRESS IN REPRODUCTIVE HEALTH, No. 63, 2003.

<sup>56</sup> *Id.* at 2; see also Weiyuan Cui, Mother or Nothing: the Agony of Infertility, Bulletin of the World Health Organization, December 2010, available at: <http://www.who.int/bulletin/volumes/88/12/10-011210/en/>.

<sup>57</sup> *Assisted Reproduction in Developing Countries*, *supra* note 55, at 2.

derived from at least one member.<sup>58</sup> Additionally, couples in which both individuals are fertile face no barriers to conceiving biological children. Couples who find themselves in a similar situation to the victims, however, when IVF procedures are unavailable, are precluded from the option of having a biological child. By denying these individuals access to IVF treatments, the State is perpetuating the disadvantages faced by them. The ban imposed by the Constitutional Court necessarily targets and has a disproportionate impact on couples in which both individuals suffer from infertility, a protected social condition. It is therefore impermissible under Article 24 of the Convention, which prohibits discriminatory treatment of protected groups and requires equal treatment before the law.

32. Under Article 24, discriminatory legislation, policies or other State-enforced measures can give rise to responsibility under the Convention when they violate the exercise of the right to equality before the law and non-discrimination. Measures that are arbitrary and lack justification, or that have a disproportionate impact on protected groups are considered discriminatory under Article 24. In this immediate case, the absolute ban on IVF has a disproportionate impact on women and infertile couples, both protected groups under the Convention, therefore violating the victims' exercise of the right to equality and non-discrimination.<sup>59</sup>

33. As determined above, the absolute ban on IVF has a disproportionate impact on women and infertile individuals. Laws and policies that have a disproportionate impact on certain sectors of the population are generally impermissible. However, not all distinctions amount to discrimination, and if the State has an "urgent and overriding" objective, utilizes the least restrictive means necessary and ensures that the restriction is proportional to the objectives, the State may be able to justify the disproportionate impact.<sup>60</sup> The State asserts that its objective in maintaining the ban is to protect the right to life which is implicated by the destruction of embryos that

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<sup>58</sup> Merits Report, *supra* note 7, para. 13.

<sup>59</sup> The Commission has determined that the ban is arbitrary and lacks reasonable justification. For their thorough analysis of the legality, suitability and proportionality of the ban *see* Merits Report, *supra* note 7, paras. 91–116.

<sup>60</sup> *See supra* notes 20–22.

often takes place during IVF procedures, thus subordinating the interests and rights of women and infertile individuals to those of the embryos.<sup>61</sup> However, the State continues to allow sperm donation and artificial insemination, preserving a man's ability to conceive even in the face of infertility problems. Women, on the other hand, may be completely precluded from ever pursuing a biological child. Furthermore, individuals who wish to conceive a biological child are similarly precluded from such pursuits. As we discuss below, there are less restrictive means available that include a thoughtful balancing of the right to life and the rights of women and infertile individuals to make decisions regarding their own bodies and families.<sup>62</sup> The State does not provide clear or convincing justification for the disproportionate impact the ban has, and unless they can do so, the ban must be held impermissible.

*c. Discrimination and the Right to Privacy (Article 11) and the Rights of the Family (Article 17)*

34. Costa Rica's IVF ban discriminates against women and infertile couples in the exercise of the right to privacy and the rights of the family. With regard to the specific rights enshrined in the Convention, States are obligated to respect and guarantee the exercise of those rights, "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."<sup>63</sup> As argued above, infertile individuals are protected as members of a group suffering from a particular social condition, while sex and gender are traditionally enumerated grounds for protection.<sup>64</sup> When a State measure arbitrarily<sup>65</sup> interferes with the exercise of enumerated rights by the protected groups, the State may violate the obligation of non-discrimination laid out in Article 1(1). The Commission found that Costa Rica's absolute ban was an arbitrary interference into the right to privacy and the rights of a family when exercised by women and infertile individuals. Specifically, the Commission held that

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<sup>61</sup> See Merits Report, *supra* note 7, paras. 28–37.

<sup>62</sup> See *infra* paras. 37–38.

<sup>63</sup> American Convention, *supra* note 14, art. 1(1)

<sup>64</sup> *Id.*; see *infra* paras. 22–23.

<sup>65</sup> See *infra* para. 24 and accompanying notes.

because less restrictive alternatives existed for the State to regulate IVF, an absolute ban was impermissible.<sup>66</sup> In addition to being an arbitrary interference into the right to privacy and the right to a family, the ban has an disproportionate negative impact on the exercise of these rights by women and infertile individuals.

*i. Costa Rica's Absolute Ban Violates Article 1(1) and Article 11 By Disproportionately Affecting Women's and Infertile Individuals' Exercise of the Right to Privacy.*

35. The absolute ban constitutes an interference into the right to privacy. The Court has held that Article 11 has a broad scope, and covers protection of the home, the private life, the family, and correspondence.<sup>67</sup> Furthermore, the Court and Commission have held that a fundamental purpose of Article 11 is to prevent arbitrary interference into the private sphere.<sup>68</sup> The protection of this private life encompasses the development and determination of one's identity and the formation of personal relationships, including that between an infertile woman and a child in the absence of a partner or spouse.<sup>69</sup> The Commission has found that domestic civil provisions that prevent a woman from exercising autonomy in decisions over day-to-day aspects of life regarding marriage, home, children and property constitute arbitrary interference into the protected private life.<sup>70</sup> The provisions in question, which conditioned a woman's employment on the consent of her husband, denied the victim the right to benefit from self-determination, protected under Article 11.<sup>71</sup>

36. This notion is derived from jurisprudence from the European Court of Human Rights, which acknowledges that private life covers the "physical and psychological integrity of a person," as well as relationships with other individuals, and the right to decide

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<sup>66</sup> Merits Report, *supra* note 7, paras. 91–116

<sup>67</sup> IACtHR, *Case of Escué Zapata v. Colombia*. Merits, Reparations and Costs. Series C No. 165, July 4, 2007, para. 91.

<sup>68</sup> *Id.*; IACtHR, *Case of Escher et al. v. Brazil*. Preliminary Objections, Merits, Reparations and Costs, Series C No. 200, July 6, 2009, para. 113; IACHR, *María Eugenia Morales de Sierra v Guatemala*, Report No. 4/01, Case 11.625, January 19, 2001, para. 47. This is also supported by international jurisprudence. *See* ECtHR, *Kroon v. The Netherlands*, ser. A. no. 297-c, para. 31 (1994); *see also* United Nations Human Rights Committee, *Toonan v. Australia*, Comm. No. 488/1992, para. 8.3.

<sup>69</sup> *María Eugenia Morales de Sierra*, *supra* note 68, para. 46.

<sup>70</sup> *Id.* at para. 49.

<sup>71</sup> *Id.* at para. 50.

whether or not to become a parent.<sup>72</sup> The ECtHR has even held that the right to a private and family life<sup>73</sup> includes the decision to become a genetic parent in *Dickson v. UK*.<sup>74</sup> In this vein, decisions surrounding the creation of biological children are an important part of the determination of one's identity and one's existence.<sup>75</sup> The Commission has already recognized the development of one's identity in relation to the right to work and non-discrimination<sup>76</sup> as protected under Article 11. If the decision to work constitutes development of one's identity, then the even more intimate and personal decision regarding parenting seems to form part of this development as well. The inter-American system should likewise recognize the decision to have a child, and how to have a child, as protected under the right to a private life.

37. The absolute ban on IVF procedures in Costa Rica violates the right to privacy, enshrined in Article 11 of the Convention, when exercised by women and infertile individuals and is therefore an impermissible discriminatory measure. As discussed above, when a measure has a disproportionate or arbitrary impact on a protected group, it is discriminatory.<sup>77</sup> Because the measure restricts a woman's choices regarding her body, which fall within the private sphere protected under Article 11 it has a disproportionate impact on women as compared to men.<sup>78</sup> It also disproportionately affects the exercise of the right to decide how to have children by infertile couples in which both partners are infertile, as couples in which one partner is infertile, and all couples in which both partners are fertile, can pursue artificial insemination through sperm donors or can conceive naturally.

ii. *Costa Rica's Absolute Ban Violates Article 1(1) and Article 17 by Discriminating Against Infertile Individuals' Exercise of the Right to a Family.*

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<sup>72</sup> ECtHR, *Pretty v. The United Kingdom*, Application 2346/02, April 29, 2002; ECtHR, *Evans v. The United Kingdom*, Application 6339/05, April 10, 2007.

<sup>73</sup> European Convention on Human Rights, art. 8.

<sup>74</sup> ECtHR, *Dickson v. the United Kingdom*, Application 44362/04, December 4, 2007, para. 62, 78; ECtHR, *Case of S.H. and others v. Austria*, November 3, 2011, para. 80–1.

<sup>75</sup> *Id.* at para. 78.

<sup>76</sup> *See infra* para. 34.

<sup>77</sup> *See supra* paras. 19–21.

<sup>78</sup> Merits Report, *supra* note 7, para. 131.



38. The American Convention obligates member States to protect and respect “[t]he right of men and women of marriageable age to marry and raise a family.”<sup>79</sup> Costa Rica has also ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, which provides that “[e]veryone has the right to form a family.”<sup>80</sup> Similar provisions exist in the International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights.<sup>81</sup> Costa Rica has ratified both documents.<sup>82</sup> Because the victims in this case are infertile couples with no other recourse but IVF, the absolute ban necessarily has a discriminatory effect on their right to found and raise a family. When read in conjunction with Article 11,<sup>83</sup> protecting the right to a family means protecting the right to decide how and when to have a child, including whether to have a biological child. The absolute ban as ordered by the Constitutional Court precludes the ability of the victims ever to have a biological child. Similarly situated individuals (i.e. adult married couples who wish to conceive a biological child and do not have the characteristic of infertility) face no similar disadvantages in achieving their goal, or raising families as they desire. Therefore, the ban has a disproportionate impact on infertile individuals, a protected group under the Convention.

39. In the recent case of *S.H. and others v. Austria*, the ECtHR reinforces the holding that a decision to have a biological child is covered by the right to a private and family life. The ECtHR elaborated on this element of the right to decide to have a genetic child, holding that the right to “conceive a child and make use of medically assisted procreation for that purpose is also protected...” encompassing the use of IVF techniques.<sup>84</sup> In this case, the Court ultimately found that there was no violation of

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<sup>79</sup> American Convention, *supra* note 14, art. 17.

<sup>80</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, art. 15(2), O.A.S.T.S. 69, 28 I.L.M. 156 (hereinafter Protocol of San Salvador).

<sup>81</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 23, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 10, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>82</sup> Costa Rica was the first country to ratify the ICCPR in 1968. It ratified the ECESCR in 1976.

<sup>83</sup> See *supra* paras. 32–34

<sup>84</sup> *S.H. and others v. Austria*, *supra* note 74, at 82.

the right because the ban in question only applied to third party donations when used in IVF procedures.<sup>85</sup> The legislation permitted IVF to be used within a marriage, when the egg comes from the wife and the sperm comes from the husband, and the embryo is re-implanted into the wife.<sup>86</sup> The Court concluded that because the legislation did not interfere with the ability of individuals within a marriage to pursue IVF the State had balanced public and private interests in a reasonable manner and adequately protected the right to a private life and family.<sup>87</sup> The immediate case is easily distinguishable from *S.H. and others v. Austria* because the restrictive measure in question is an absolute ban. In Costa Rica, infertile individuals do not even have the option of pursuing IVF within marriage, let alone consider the procedure with third party donors. While marriage need not be the qualification permitting the use of IVF (such a qualification would infringe upon the rights of single parents and homosexuals), it is ample evidence that as the Commission thoroughly discusses, less-restrictive means of regulation are also available to the State, making the absolute ban impermissible.<sup>88</sup>

40. Because Austria weighed public and private interests and protected the rights of infertile individuals to raise a family by permitting IVF within marriages, in that instance the regulation was found not to amount to unreasonable or discriminatory interference. In contrast, Costa Rica's absolute ban on IVF is undeniably impermissible. The ban disproportionately affects infertile individuals because they are left with *no* recourse to pursue a biological child, even within marriage. However, as mentioned above, even allowing for the use of IVF only within marriage would leave no recourse to infertile women outside of couples or infertile homosexual couples in which alternative ART are not available. The inter-American system requires provisions restricting protected rights be the *least restrictive*, and the case of *S.H. v. Austria* provides an example of restrictions on IVF that are less restrictive, therefore demonstrating that an absolute ban is discriminatory. This reasoning

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<sup>85</sup> *Id.* at 29.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 113–17.

<sup>88</sup> Merits Report, *supra* note 7, paras. 99–110.

supports the Commission's finding that the ban was impermissibly unreasonable because there were less restrictive means of regulating IVF.<sup>89</sup> In extending protection of the right to found a family and the right to private life of infertile individuals, the State must therefore ensure some method of ART that will allow infertile individuals to pursue the option of having a biological child in order to comply with the standards of non-discrimination set-forth above.

## **VI. Conclusion**

41. International legal standards have established principles of non-discrimination that include prohibitions against disproportionate impacts on protected groups and arbitrary interference with rights when exercised by those groups. The inter-American human rights system has extensive jurisprudence on the topic, setting standards for determining when a measure is impermissibly arbitrary as well as how measures can disproportionately affect protected groups. As argued above, and in support of the Commission's findings, this *amicus* contends that the absolute ban on IVF as ordered by the Constitutional Court of Costa Rica violates these very principles of non-discrimination. The disproportionate impact and arbitrary distinctions created by the absolute ban give rise to responsibility under the right to privacy, to a family, and to equal protection enshrined in the Convention.

42. In general, the Constitutional Court order has a disproportionate impact on women because it inherently affects the control women have over their bodies and decisions they make regarding conception and reproduction. The decision to have a child, and decisions regarding a woman's body, have been recognized as the most intimate sphere of private life and the outright ban denies women the opportunity to make these decisions in private, with their partners, or with their physicians. It therefore has a discriminatory impact on women's exercise of their right to privacy.

Furthermore, it affects the decisions infertile individuals can make and the opportunities available to begin a family, discriminating against infertile individuals'

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<sup>89</sup> Merits Report, *supra* note 7, para. 111.

enjoyment of the right to privacy and to found a family. It disproportionately affects infertile individuals, creating arbitrary distinctions based on a social condition. The arbitrariness is a result of less restrictive options available for the State in regulating IVF, including provisions that would allow individuals to pursue IVF when no third party donation is required, or limiting the number of eggs to be harvested and implanted.

43. As this brief argues above, the right to have a biological child is implicated, and protected, by the right to equal protection before the law, the right to private life and the right to a family, enshrined in the Convention. Not only does the general discriminatory impact of the ban on women and infertile individuals violate the right to equal protection before the law, enshrined in Article 24 of the Convention, but it also has a discriminatory impact on these groups in the exercise of the right to a private life and family due to disproportionate impact and arbitrary distinctions.