

NGO Report on Costa Rica's Implementation of the International Covenant on Economic, Social and Cultural Rights

Submitted to the UN Committee on Economic, Social
and Cultural Rights for consideration in the
formulation of the List of Issues during the 57th Pre-
Sessional Working Group (7-11 March 2016)

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D) AUTHORS OF THE SUBMISSION AND PURPOSE

1) This submission has been prepared by the International Human Rights Clinic, of the Loyola Law School Los Angeles, directed by Professor Cesare Romano,¹ and by the Luca Coscioni Association for Freedom of Scientific Research. The purpose is to assist the Committee on Economic, Social and Cultural Rights in the formulation of the List of Issues during the 57th Pre-Sessional Working Group (7-11 March 2016), leading to the discussion of Costa Rica's 5th periodic report on its implementation of the Covenant on Economic Social and Cultural Rights during the 59th Session of the Committee on Economic, Social and Cultural Rights (19 Sept – 7 Oct 2016).

2) The International Human Rights Clinic of the Loyola Law School Los Angeles is committed to achieving the full exercise of human rights by all persons and seeks to maximize the use of international and regional political, judicial and quasi-judicial bodies through litigation, advocacy and capacity-building.² Loyola Law School Los Angeles is the school of law of Loyola Marymount University, a Jesuit university.

3) The Luca Coscioni Association for the Freedom of Scientific Research was founded in 2002 by Dr. Luca Coscioni, an Italian economist affected by Amyotrophic Lateral Sclerosis, who launched a national campaign to promote freedom of scientific research on embryonic stem cells.³ Since its foundation, the Association has been active on a range of issues, including the rights of persons ill and with disabilities, the right to die and freedom of scientific research.

4) This submission focuses on Costa Rica's obligations under a specific article of the Covenant on Economic Social and Cultural Rights, namely Art 15.1.b (To enjoy the benefits of scientific progress and its applications), and one specific issue: the ban on In Vitro fertilization (IVF) that there has been in Costa Rica since 2000.

¹ This communication was written, in part, by the following students under the supervision of Prof. Romano: Alexandra Gonzalez and Zachary Tripodes.

² See <<http://www.lls.edu/academics/clinicexperientiallearning/internationalhumanrightsclinic/>> (site last visited Jan. 14, 2016).

³ See <http://www.associazionelucacoscioni.it> > (site last visited Jan. 27, 2016).

5) First, we will present facts relating to IVF and Costa Rica's ban, including the various legislative steps that have been taken to challenge the ban and the judicial decisions that led to the ban. Second, we will offer our analysis of why the IVF ban amounts to a violation of Costa Rica's obligations under Article 15 of the International Covenant on Economic, Social and Cultural Rights. Third, we will offer some recommendations for inclusion in the List of Issues as well as General Conclusions on Costa Rica's fifth periodic report.

II) BACKGROUND AND FACTS

6) Costa Rica ratified the Covenant on Economic, Social and Cultural Rights (ESCR)⁴ on 29 November 1968.⁵ It is currently undergoing its 5th periodic review.

7) Article 15 of the ECSR reads:

"1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields".⁶

⁴ International Covenant on Economic, Social and Cultural Rights, art. 15(1)(b), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter ICESCR].

⁵ *States Party to the International Covenant on Economic, Social and Cultural Rights*, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Jan. 14, 2016).

⁶ ICESCR, supra note 4.

8) Article 15 of the Covenant is an umbrella article, grouping together three very different, but also interrelated, rights: The right to take part in cultural life; the right to enjoy the benefits of scientific progress and its applications; and the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production.

9) Of all the rights enshrined in the Covenant, arguably, the right to enjoy the benefits of scientific progress and its applications is the most frequently overlooked and least discussed.⁷ To date, this Honorable Committee has not yet issued a General Comment to this specific right and states party to the Covenant frequently omit to discuss measures taken to implement it in their periodic reports. Costa Rica is no exception. Although it addresses Article 15 in its Fifth Periodic Report, it only reports on measures taken to discharge obligations under paragraph (a) (Right to take part in cultural life).⁸

II.1) In Vitro Fertilization

10) In Vitro Fertilization (“IVF”) is a form of assisted reproductive technology by which an egg is fertilized by sperm outside the body. The process involves monitoring and stimulating a woman’s ovulation, removing an ovum or ova (egg or eggs) from the woman’s ovaries, and then letting sperm fertilize them in a liquid in a vial (*in vitro* – “in glass”) in a laboratory. The fertilized egg (zygote) is cultured for 2–6 days in a growth medium and is then implanted in the same, or another woman's uterus, with the intention of establishing a successful pregnancy.⁹

11) IVF is a common treatment for infertility and has been used world-wide for over forty years.¹⁰ For instance, since it was invented, over 200,000 children have been born in the United States alone as a result of IVF.¹¹ In 2012, the total number of children born from as a result of IVF

⁷ See, in general, Mikel Mancisidor, *Is There Such a Thing as a Human Right to Science in International Law?* 4 European Society of Int’l Law 1 (2015).

⁸ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Fifth periodic reports of States parties due in 2012 (Costa Rica), 30 April 2015, E/C.12/CRI/5, para. 195-212 .

⁹ “In vitro fertilization (IVF),” Mayo Foundation for Medical Education and Research, <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/definition/prc-20018905>.

¹⁰ *Id.*

¹¹ Nivin Todd, *Infertility and In Vitro Fertilization*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization>.

in the United States was 61,740, a 3% increase from the year before.¹² As of 2009, in Latin America, a total of 10,701 children were reported to have been born through some form of assisted reproductive technology, including IVF.¹³

12) Typically, during a process of in vitro fertilization, several eggs are fertilized at once. Then, only the eggs that show not to be affected by genetic diseases or malformations are implanted. In certain cases, only one fertilized egg is implanted so as to avoid a multiple pregnancy. Yet, the discarding of fertilized eggs raises ethical questions. No consensus exists in science, religion, and philosophy on when a human embryo should be recognized as a new person, and therefore, a being entitled to the right to life. For instance, the Roman Catholic Church opposes all kinds of assisted reproductive technology, including IVF. The opposition is rooted in the belief that children should only be conceived through sexual intercourse, and that the process of IVF carries a risk that embryos will be discarded.¹⁴ The Catholic Church further believes that embryos must be treated as persons.¹⁵ In place of IVF, the church advocates that couples seek to adopt children when they cannot have their own through intercourse.¹⁶

13) Because of the ethical, religious or scientific concerns associated with IVF, many States regulate IVF. To illustrate, many states in the Americas permit a wide range of assisted reproductive technology, including IVF. In the U.S. and Venezuela, assisted reproductive technology is governed by guidelines, in Brazil and Canada by statute, and yet in other states, such technology is not governed at all.¹⁷ States of the Americas regulate the use of these technologies in conformity with their social and political standards. Several states (i.e. Brazil, Canada, Chile, Dominican Republic, Ecuador, El Salvador, Mexico, Uruguay, the U.S., and Venezuela) allow

¹² Jen Christensen, *Record number of women using IVF to get pregnant*, CNN (Feb. 18, 2014, 2:36 PM), <http://www.cnn.com/2014/02/17/health/record-ivf-use/>.

¹³ Fernando Zegers-Hochschild et al. (eds.), *Registro Latinoamericano de Reproducción Asistida Annual Report (2009)*, 23, <http://www.redlara.com/images/arq/Registro2009.pdf>.

¹⁴ Jim Graves, *Church teaching on in vitro fertilization*, THE CATHOLIC WORLD REPORT (Nov. 29, 2012), http://www.catholicworldreport.com/Item/1774/church_teaching_on_in_vitro_fertilization.aspx.

¹⁵ Tadeusz Pacholczyk, *Do Embryos Have Souls?*, CATHOLIC EDUCATION RESOURCE CENTER (2008), <http://www.catholiceducation.org/en/science/ethical-issues/do-embryos-have-souls.html>.

¹⁶ “The Gospel shows that physical sterility is not an absolute evil. Spouses who still suffer from infertility after exhausting legitimate medical procedures should unite themselves with the Lord’s Cross, the source of all spiritual fecundity. They can give expression to their generosity by adopting abandoned children or performing demanding services for others,” Catechism of the Catholic Church, 2379, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm.

¹⁷ F. Zegers-Hochschild et al. (eds.), *supra* note 13, at 23.

assisted reproductive technology without requiring the sperm and/or egg donors to be married to each other (heterologous fertilization).¹⁸ Jamaica, however, does have such a requirement. Many of these States also permit singles and lesbians to benefit from assisted reproductive technology.¹⁹

14) The widespread availability of assisted reproductive technology, including IVF, in the Americas and throughout the world, makes it clear that the overwhelming majority of States believe that they can permit assisted reproductive technology, including IVF, without violating their duty to protect life. Those States have found a way to reconcile the rights that infertile persons have to form a family, while still respecting the State's interest in protecting life.

15) However, Costa Rica distinguishes itself for completely banning the procedure. Indeed, since 2000, it is the only State in the world to expressly ban IVF.²⁰ The balanced approach advanced by these States of the western hemisphere, sharing similar views on prenatal life, highlights the irrationality of Costa Rica's ban on a legitimate and desirable medical cure for infertility.

II.2) Executive Decree No. 24029-S (1995)

16) Costa Rica authorized and regulated first IVF on February 3, 1995, when the Ministry of Health issued Executive Decree No. 24029-S.²¹ The Executive Decree contained a series of requirements that sought to avoid the destruction of embryos. It prohibited the fertilization of more than six eggs per treatment cycle; required that all embryos be implanted; prohibited the storage or destruction of embryos; and authorized the Ministry of Health to revoke operating permits and inform the Public Prosecutor's Office in the event that a health care provider did not comply.²² From 1995 to 2000, the Costa Rican Infertility Institute (*Instituto Costarricense de Infertilidad*) provided IVF services in the country, which led to the birth of fifteen children.²³

¹⁸ Adaptado de "International Federation of Fertility Societies Surveillance 2010." [Control del año 2010 de la Federación Internacional de Sociedades de Fertilización] Tabla 4.1 (p. 23). Derechos de Autor 2010 American Society for Reproductive Medicine [Sociedad Americana para la Medicina Reproductiva], Publicado por Elsevier Inc.

¹⁹ *Id.*

²⁰ *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 67 (Nov. 28, 2012).

²¹ *Id.* at ¶ 68.

²² *Id.* at ¶ 69.

²³ *Id.* at ¶ 70.

II.3) Supreme Court Judgment (2000)

17) On April 7, 1995, right after the enactment of Executive Decree No. 24029-S, Mr. Hermes Navarro del Valle filed a case before the Supreme Court under article 75 of the Law on Constitutional Jurisdiction (which grants standing to any citizen wishing to challenge the constitutionality of a law even when no direct injury to the plaintiff can be shown) arguing the unconstitutionality of the Decree.²⁴ One of Mr. Navarro del Valle's arguments was that the loss of embryos during the process of IVF violated the right to life, as he believed that life begins at conception, and conception happens at fertilization.²⁵

18) On March 15, 2000 the Constitutional Chamber of the Supreme Court of Justice ruled that Executive Decree No. 24029-S was unconstitutional.²⁶ The Supreme Court concluded that, for the purpose of application of article 4(1) of the American Convention on Human Rights, (Right to Life), life begins at conception and conception takes place when the egg is fertilized, even if this happens in a vial. "[A] human embryo is a person from the time of conception; hence it cannot be treated as an object for investigation purposes, be submitted to selection processes, kept frozen and, the most essential point for the Chamber, it is not constitutionally legitimate to expose it to a disproportionate risk of death."²⁷ The Supreme Court found that IVF technology inherently did not protect the right to life because of the unavoidable risk that implanted embryos would be lost.²⁸

19) In a joint dissenting opinion, Justices Arguedas Ramires and Calzada Miranda considered that IVF does not give rise to concerns about the right to life because it is "a scientific instrument and technique created to assist humanity" with infertility.²⁹ Moreover, the dissenting Justices believed that the use of IVF should be protected by an implicit right to human reproduction, which is rooted in the rights to freedom, privacy, and family life.³⁰

²⁴ *Id.* at ¶ 71.

²⁵ *Id.*

²⁶ Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Justice], Sala Constitucional, 15 marzo 2000, Sentencia 2000-02306, Expediente 95-001734-007-CO (Costa Rica).

²⁷ Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Judgment, *supra* note 20, ¶ 76.

²⁸ *Id.*

²⁹ *Id.* at ¶ 77.

³⁰ *Id.*

20) Since the Supreme Court’s decision in 2000, IVF has been illegal in Costa Rica. Couples suffering from infertility problems who want to become parents have only two options: adoption or travelling abroad to other States that do not ban IVF.

II.4) Subsequent Domestic Developments (2008)

21) On May 30, 2008, Ms. Ileana Henchoz filed an action of unconstitutionality before the Supreme Court against the 2000 judgment.³¹ However and unsurprisingly, the Supreme Court rejected the application.³² She subsequently filed suit against the Costa Rican Social Security Institute in the Superior Court of Accounts for Contentious Administrative and Civil Proceedings (“Superior Court of Accounts”) seeking an order to compel it to study the feasibility of allowing Ms. Henchoz to undergo IVF.³³ On October 14, 2008, the Superior Court of Accounts ruled in Ms. Henchoz’s favor, finding that, in the meantime, advances in IVF technology had made the procedure compatible with the Supreme Court’s judgment.³⁴ It could be done by just fertilizing one single egg.³⁵ However, on appeal the First Chamber of the Supreme Court of Justice overturned the order on May 7, 2009, finding that “the technique of [IVF] would not be advisable for the plaintiff based on her age,” and that she had made claims to the media that she would not undergo IVF.³⁶

II.5) Inter-American Court Judgment (2012)

22) In addition to actions brought before Costa Rican courts, the issue has been considered by the human rights system of the Organization of American States (“OAS”): the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. It should be noted that in the OAS human rights legal regime (i.e. the American Convention on Human Rights and subsequent protocols and other treaties) article 15(1)(b) of the ICESCR is echoed, almost verbatim, in article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador). It provides that “[t]he States Parties to this Protocol recognize the right of everyone: . . . (b) [t]o enjoy the benefits of scientific

³¹ *Id.* at ¶ 78.

³² *Id.*

³³ *Id.* at ¶ 79.

³⁴ *Id.* at ¶¶ 79–80

³⁵ *Id.*

³⁶ *Id.* at ¶ 81.

and technological progress.”³⁷ Costa Rica ratified the Protocol of San Salvador on November 16, 1999.³⁸

23) On January 19, 2001, a group of petitioners, including Ms. Henchoz, filed a petition before the Inter-American Commission of Human Rights, alleging that Costa Rica’s ban on IVF violated the American Convention on Human Rights, in particular Articles 11(2) (right to be free from arbitrary interference with private life, family, home, correspondence, and of unlawful attacks on honor and dignity), 17(2) (right to marry and raise a family) and 24 (right to equal protection) .³⁹ The petitioners did not raise the question of Costa Rican violation of the Protocol of San Salvador, thus limiting the inquiry of the Commission, and subsequent proceedings before the Inter-American Court, to the American Convention only.

24) On July 14, 2010, the Inter-American Commission found that the ban violated the prohibitions of arbitrary interference with private life, family, home, correspondence, and of unlawful attacks on honor and dignity in article 11(2); the right to marry and raise a family in article 17(2); and the right to equal protection in article 24 of the American Convention.⁴⁰

25) Following the Inter-American Commission’s findings, the Costa Rican Legislative Assembly considered draft legislation in 2010 to legalize and regulate IVF.⁴¹ The bill defined fertilized eggs as humans, required that all fertilized eggs be implanted into the woman who produced them, and criminalized the destruction of embryos.⁴² The Pan-American Health Organization – a regional international organization – opposed the bill, noting that the its requirement that all fertilized eggs, even defective ones, be transferred posed a heightened risk of miscarriage, premature birth, the death of a newborn, and other complications.⁴³

³⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights art.14(b), Nov. 17, 1988, O.A.S.T.S. 69.

³⁸ “Signatories and Ratifications: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador),” Organization of American States, Department of International Law, <http://www.oas.org/juridico/english/sigs/a-52.html>.

³⁹ *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Judgment, *supra* note 20, at ¶ 1.

⁴⁰ *Id.* at ¶¶ 1, 3.

⁴¹ *Id.* at ¶ 84.

⁴² *Id.*

⁴³ *Id.*

26) Because the State continued not complying with its report of July 14, 2010, on July 29, 2011, the Inter-American Commission submitted the case to the Inter-American Court for consideration.⁴⁴ The case attracted enormous international attention. The Court received a total of forty-six amicus curiae briefs – including amici of the two organizations authors of this submission–,⁴⁵ which is much higher than what it receives for a typical case.⁴⁶

27) On November 28, 2012, the Inter-American Court ruled, in the case of *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, that Costa Rica’s ban on IVF violated articles 5(1) (right to physical, mental, and moral integrity), 7 (right to personal liberty), 11(2), 17(2), and 24 of the American Convention.⁴⁷ The Court found that the case involved a “combination of different aspects of private life that are related to the right to found a family, the right to physical and mental integrity and, specifically, the reproductive rights of the individual.”⁴⁸ Article 11 “requires the State to protect individuals against the arbitrary actions of State institutions that affect private and family life”⁴⁹ Article 17 “recognizes the central role of the family and family life in a person’s existence and in society in general,” and that “the family’s right to protection entails, among other obligations, facilitating, in the broadest possible terms, the development and strength of the family unit.”⁵⁰ Together, these rights can form the foundation to a right to private life, which involves both “reproductive autonomy” and “access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right.”⁵¹ In the context of this case, “the protection of private life includes respect for the decisions both to become a mother or a father, and a couple’s decision to become genetic parents.”⁵² Also and significantly, the Inter-American Court noted that “the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right” and cited the ICESCR,

⁴⁴ *Id.* at ¶ 1.

⁴⁵ The one of the Associazione Luca Coscioni can be found here:

<http://www.associazionelucacoscioni.it/sites/default/files/documenti/atto%20Definitivo%20%20%20intervento%20paginado%20traducido%20_4_.pdf> (site last visited Jan. 27, 2016); the one of the Loyola Law School Clinic is available on request.

⁴⁶ *Id.* at ¶ 13.

⁴⁷ See, generally, *id.*

⁴⁸ *Id.* at ¶ 144.

⁴⁹ *Id.* at ¶ 142.

⁵⁰ *Id.* at ¶ 145.

⁵¹ *Id.* at ¶ 146.

⁵² *Id.* at ¶ 146.

the American Declaration, and the Protocol of San Salvador to conclude that “[t]he right to enjoy the benefits of scientific progress has been internationally recognized.”⁵³

28) With regard to equal protection, the Inter-American Court found that the Costa Rican Supreme Court “based [its judgment] on an absolute protection of the embryo that, by failing to weigh up or take into account the other competing rights, involved an arbitrary and excessive interference in private and family life.”⁵⁴ The Costa Rican Supreme Court’s judgment had a particular impact on the victims in the case due to their disability, gender, and financial situation.⁵⁵ With regard to disability, the Inter-American Court noted that “infertility is a disease of the reproductive system” and that persons with infertility should be extended “the rights of persons with disabilities, which include the right to have access to the necessary techniques to resolve reproductive health problems.”⁵⁶ In discussing gender, the Inter-American Court concluded that “the ban on IVF can affect both men and women and may have differentiated disproportionate impacts owing to the existence of stereotypes and prejudices in society.”⁵⁷ For example, because in many societies femininity is associated with motherhood, infertile women may experience stigmatization, ostracism, marital problems, or domestic violence⁵⁸ whereas infertile men may suffer from “a strong sense of impotence” or begin to question their masculinity.⁵⁹ Lastly, the Inter-American Court noted that ban on IVF disproportionately affects couples without the financial means to undergo IVF outside of Costa Rica.⁶⁰ Thus, the Inter-American Court ordered Costa Rica “to ensure that the prohibition of the practice of IVF is annulled as rapidly as possible.”⁶¹

⁵³ *Id.* at ¶ 150 (citations omitted).

⁵⁴ *Id.* at ¶ 316.

⁵⁵ *Id.* at ¶ 314.

⁵⁶ *Id.* at ¶ 293.

⁵⁷ *Id.* at ¶ 294.

⁵⁸ *Id.* at ¶ 296.

⁵⁹ *Id.* at ¶ 301.

⁶⁰ *Id.* at ¶ 303.

⁶¹ *Id.* at ¶ 336.

II.6) Attempted Compliance with Inter-American Court (2015)

29) On September 10, 2015, Costa Rica's President, Mr. Luis Guillermo Solís, issued Executive Decree No. 39210-MP-S ordering compliance with the judgment.⁶² Four members of Christian democratic parties in the National Assembly,⁶³ and an anti-abortion activist,⁶⁴ challenged Executive Decree No. 39210-MP-S on grounds of unconstitutionality before the Constitutional Chamber of the Supreme Court of Justice; the same Chamber that declared IVF unconstitutional in 2000. On October 7, 2015, the Chamber declared the application admissible.⁶⁵ Justices Gilbert Armijo Sancho, Ernesto Jinesta Lobo, and Nancy Hernández López dissented, concluding that the Supreme Court did not have jurisdiction because the Inter-American Court had yet to rule on whether Executive Decree No. 39210-MP-S satisfied the judgment's order to legalize IVF in Costa Rica.⁶⁶ To date, the case is still pending.

III) THE RIGHT TO BENEFIT FROM SCIENTIFIC RESEARCH – APPLICABLE RIGHTS AND LEGAL ANALYSIS

III.1) Applicable Rights

30) The right to benefit from scientific research is set forth in Article 15(1)(b) of the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), to which Costa Rica is a party.⁶⁷ Article 15(1)(b) reads, "The States Parties to the present Covenant recognize the right of everyone to enjoy the benefits of scientific progress and its applications."⁶⁸ In order to facilitate this right, paragraphs 2 and 3 of Article 15 of the Covenant elaborate: "[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science,"⁶⁹ and

⁶² Diego Arguedas Ortiz, *Costa Rica Finally Allows In Vitro Fertilisation after 15-Year Ban*, INTER PRESS SERVICE (Sept. 15, 2015) <http://www.ipsnews.net/2015/09/costa-rica-finally-allows-in-vitro-fertilisation-after-15-year-ban/>.

⁶³ Mr. Mario Redondo Poveda of the Christian Democratic Alliance (*Alianza Demócrata Cristiana*), Mr. Gonzalo Ramírez Zamora of the Costa Rican Renovation Party (*Renovación Costarricense*), Mr. Fabricio Alvarado Muñoz of the National Restoration Party (*Partido Restauración Nacional*), and Mr. Luis Alberto Vásquez C. of the Social Christian Unity Party (*Partido Unidad Social Cristiana*).

⁶⁴ Ms. Alexandra Loría Beeche.

⁶⁵ Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Justice], Sala Constitucional, 7 octubre 2015, Sentencia 2015-015725, Expediente 15-013929-0007-CO (Costa Rica).

⁶⁶ *Id.*

⁶⁷ *Supra*, note 5.

⁶⁸ *Supra*, note 4.

⁶⁹ *Id.* art. 15(2).

further, that “States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research.”⁷⁰

31) Similar to the ICESCR, the Charter of the Organization of American States,⁷¹ the Protocol of San Salvador,⁷² the Arab Charter on Human Rights,⁷³ the Charter of Fundamental Rights of the European Union,⁷⁴ the Universal Declaration of Human Rights,⁷⁵ and the American Declaration of the Rights and Duties of Man⁷⁶ also recognize the right to benefit from scientific research. Further, the right is recognized in the United Nations (“U.N.”) Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and For The Benefit of Mankind,⁷⁷ the Universal Declaration on the Human Genome and Human Rights,⁷⁸ the Universal Declaration on Bioethics and Human Rights,⁷⁹ and the UNESCO Recommendation on the Status of Scientific Researchers.⁸⁰

32) At the same time, Article 4 of the Covenant specifies: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” This indicates that the right to benefit from scientific progress is not absolute, and that a State may only restrict the right if it is for the “purpose of promoting the general welfare,” and so long as it is consistent with the nature of the rights set forth in the Covenant.⁸¹

⁷⁰ *Id.* art. 15(3).

⁷¹ Charter of the Organization of American States, art. 38, Dec. 13, 1951, 119 UNTS 3.

⁷² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador" art. 14, Nov. 17, 1988, OAS Doc. OAS/Ser.L/V/I.4 rev. 13.

⁷³ League of Arab States, Arab Charter on Human Rights, art. 42(1), Mar. 15, 2008, 18 HRLJ 151.

⁷⁴ Charter of Fundamental Rights of the European Union, art. 13, Dec. 1, 2009, OJ C 364/01.

⁷⁵ Universal Declaration of Human Rights, art. 27, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

⁷⁶ American Declaration of the Rights and Duties of Man, art.13, OAS Res. XXX (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Doc. OAS/Ser.L/V/1.4 rev. 13.

⁷⁷ G.A. Res. 3384 (XXX), Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and For The Benefit of Mankind, A/RES/3384(XXX) (Nov. 10, 1975).

⁷⁸ UNESCO, Universal Declaration on the Human Genome and Human Rights, art. 19(a)(iii-iv), Nov. 11, 1997.

⁷⁹ UNESCO, Universal Declaration on Bioethics and Human Rights, arts. 2(d), (f), 15, Oct. 19, 2005.

⁸⁰ UNESCO, Recommendation on the Status of Scientific Researchers, Nov. 20, 1974.

⁸¹ ICESCR, *supra* note 4, art. 4.

33) Of all the rights enshrined in the Covenant, arguably, the right to enjoy the benefits of scientific progress and its applications is the most frequently overlooked and least discussed.⁸² To date, this Honorable Committee has not yet issued a General Comment to this specific right, and States party to the Covenant frequently omit to discuss measures taken to implement it in their periodic reports. For instance, although Costa Rica addresses Article 15 in its Fifth Periodic Report, it only reports on measures taken to discharge obligations under paragraph (1)(a) (Right to take part in cultural life).⁸³

34) Likewise, there is very little international jurisprudence on the right to benefit of scientific progress. Only recently has the international scholarly community started paying attention to this right.⁸⁴

35) Despite these lacunae, there are at least three documents that seek to define the right to benefit from scientific progress in depth. The first one is the *Limburg Principles* on the Implementation of the International Convention on Economic, Social and Cultural Rights, written in 1987 as a guideline for the rights set forth in the ICESCR.⁸⁵ Then, the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) partnered with various human rights organizations⁸⁶ from 2007 to 2009 to create the *Venice Statement*, which aims to interpret the obligations of State Parties to the ICESCR and the Universal Declaration of Human Rights.⁸⁷ Lastly, in 2012, the U.N. Special Rapporteur in the Field of Cultural Rights (“U.N. Special

⁸² See Mikel Mancisidor, *Is There Such a Thing as a Human Right to Science in International Law?* 4 European Society of Int'l Law 1 (2015).

⁸³ UNESCO, Fifth Periodic Reports of States Parties Due in 2012, “Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Costa Rica,” ¶¶ 195-212, E/C.12/CRI/5, Apr. 30, 2015.

⁸⁴ See generally Mancisidor, *supra* note 81; Yvonne Donders, *The Right to Enjoy the Benefits of Scientific Progress: in Search of State Obligations in relation to Health* 14 Medicine, Healthcare and Philosophy 371 (2011).

⁸⁵ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex, also published in 9 HUMAN RIGHTS QUARTERLY 122 (1987) [hereinafter Limburg Principles].

⁸⁶ Namely, “the Amsterdam Center for International Law, the Irish Centre for Human Rights, and the European Inter-University Centre for Human Rights and Democratisation.” See Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, ¶ 1 (2009), adopted at the Experts’ Meeting on the Right to enjoy the Benefits of Scientific Progress and its Applications, convened by UNSECO, available at <http://unesdoc.unesco.org/images/0018/001855/185558e.pdf> [hereinafter Venice Statement].

⁸⁷ *Id.*

Rapporteur”) published a *Report on The Right to Enjoy the Benefits of Scientific Progress and its Applications*.⁸⁸

III.2) Legal Analysis

36) As a starting point, it is necessary to define scientific progress, and analyze which fields fall into its scope. The U.N. Special Rapporteur stated in her 2012 Report on the Right to Enjoy the Benefits of Scientific Progress that the term “science” as used in the ICESCR is “knowledge that is testable and refutable, in all fields of inquiry . . . and encompassing all research.”⁸⁹ She elaborated that “[t]he ‘benefits’ of science encompass not only scientific results and outcomes but also the scientific process, its methodologies and tools.”⁹⁰ Consistent with the Special Rapporteur’s definition, the *Venice Statement* says that the right to benefit from scientific research is “applicable to all fields of science and its applications.”⁹¹

37) As IVF is a series of procedures that constitutes a form of assisted reproductive technology (“ART”), within the scientific field of “reproductive endocrinology,”⁹² the process itself, as a methodology, and the research into ART in general, fall under the definitions set forth in the Venice Statement and in the Special Rapporteur’s Report as “science” and a “benefit of scientific progress.”

III.2.a) Costa Rica is Not Discharging its Positive Obligations Under Art. 15(1)(b)

38) The right to enjoy the benefits of scientific progress, enumerated in Article 15(1)(b) of the Covenant, creates certain positive obligations for State Parties. The positive obligation stems from Article 15(2), because State Parties must actively take steps to “achieve the full realization of this right,”⁹³ meaning States must actively allow people to benefit from scientific research. According to the Venice Statement, this includes “adopt[ing] a legal and policy framework and to establish institutions to promote the development and diffusion of science and technology in a

⁸⁸ Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed: *The Right to Enjoy the Benefits of Scientific Progress and its Applications*, Doc. A/HRC/20/26 (May 14, 2012).

⁸⁹ *Id.*, ¶ 24.

⁹⁰ *Id.*

⁹¹ Venice Statement, § 12(a).

⁹² Reproductive Medicine Associates of Connecticut, *What is a Reproductive Endocrinologist?*, <http://www.rmact.com/our-fertility-doctors/what-is-a-reproductive-endocrinologist> (last accessed Jan. 23, 2015).

⁹³ ICESCR, *supra* note 4, art. 15(2).

manner consistent with fundamental human rights.”⁹⁴ This involves periodic review of the States’ policies, “with particular attention to the status and needs of disadvantaged and marginalized groups.”⁹⁵ Further, the Venice Statement mandates that States “take measures to encourage and strengthen international cooperation and assistance in science and technology to the benefit of all people and to comply in this regard with the States’ obligations under international law.”⁹⁶

39) Based on this framework, it is clearly the State’s obligation to take effective steps to repeal the ban of IVF in Costa Rica. As a starting point, Costa Ricans with fertility obstacles cannot fully realize the right to benefit from the scientific progress that has been made in the field of ART, due to the ban on IVF. Further, Costa Rica has not provided a legal framework allowing ARTs to be implemented; it has done the exact opposite, by establishing and upholding laws that prohibit IVF entirely. And while the State has various institutions devoted to scientific and technological development,⁹⁷ it currently lacks adequate institutional resources dedicated to fertility treatments, due to the illegality of IVF. Moreover, this ban directly results in the marginalization of those who cannot bear children using traditional methods.⁹⁸ Women who cannot bear children without the help of IVF often feel stigmatized,⁹⁹ and can only seek fertility treatments abroad, which incur a tremendous financial burden that they may not be able to meet. Not only is the State failing to attribute sufficient attention to the special needs of disadvantaged populations, specifically those who cannot conceive a child using traditional methods, it is further marginalizing these populations by denying them access to health care that could correct their conditions, and this results in them being harassed and ridiculed in the media, by those who are against IVF.¹⁰⁰

40) Lastly, Costa Rica has gravely failed to implement its obligation to the international community to contribute and cooperate collectively in scientific and academic fields, and to

⁹⁴ Venice Statement, § 16(a).

⁹⁵ *Id.*

⁹⁶ *Id.* § 16(d).

⁹⁷ For example, the *Instituto Tecnológico de Costa Rica*, or the “Institute of Technology of Costa Rica,” is an internationally renowned center for research and development. See Cristina V. Fallas, *TEC Garantía de Calidad Educativa*, AL DIA, Jun. 24, 2012, http://www.aldia.cr/ad_ee/2012/junio/24/nacionales3218442.html.

⁹⁸ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, *supra* note 20, ¶ 126 (Nov. 28, 2012).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

“comply in this regard with [its] obligations under international law.”¹⁰¹ As Costa Rica is the only nation in the world to have an outright ban on IVF,¹⁰² Costa Rican scientists are precluded from participating in the advancement of the field of reproductive endocrinology. Moreover, the State’s failure to repeal the anti-IVF laws, despite a judgment from the Inter-American Court in 2012 that mandated the annulment of such laws “as rapidly as possible,”¹⁰³ constitutes a blatant disregard for its obligations under international law.

41) For all of the reasons above, we believe it is Costa Rica’s government obligation to actively take steps to repeal the ban of IVF. The ban of IVF in Costa Rica results in the denial of the right to benefit from scientific research to all Costa Ricans who cannot bear children naturally and who wish to benefit from procedures, such as IVF, that would allow them to become pregnant. Thus, the State’s initiation of the ban on IVF in 2000,¹⁰⁴ as well as its failure to repeal the ban as instructed by the Inter-American Court in the *Artavia Murillo et al.* judgment, results in the State’s continual failure to meet its positive obligation to take steps to ensure that Costa Ricans can fully benefit from scientific research.

III.2.b) Costa Rica is Not Discharging its Negative Obligations Under Art. 15(1)(b)

42) Likewise, we believe the facts suggest Costa Rica might also be in breach of its negative obligation detailed in Article 15(3) to “respect the freedom indispensable for scientific research and creative activity.”¹⁰⁵ In addressing this right in detail, the Venice Statement notes that the “duty to respect” includes the duty “to respect the freedoms indispensable for scientific research . . . [by allowing researchers] to seek, receive, and impart information and ideas of all kinds.”¹⁰⁶ Similarly, the Venice Statement declares that States must “respect the freedom of the scientific community and its individual members to collaborate with others both within and across the country’s borders, including the free exchange of information, research ideas and results.”¹⁰⁷

¹⁰¹ Venice Statement, § 16(d).

¹⁰² *Artavia Murillo et al.* (“In Vitro Fertilization”) v. Costa Rica, Judgment, *supra* note 20, ¶ 67.

¹⁰³ *Id.* ¶ 336.

¹⁰⁴ *Id.* ¶¶ 70, 72.

¹⁰⁵ ICESCR, art. 15(3).

¹⁰⁶ Venice Statement, § 14(a).

¹⁰⁷ *Id.* § 14(c).

43) We believe that by being the only country in the world to ban IVF entirely,¹⁰⁸ Costa Rican scientists and doctors are not given the freedom to research developments in fertility treatments that scientists in the rest of the world can freely research and access. Several medical centers in Costa Rica have indicated that they are prepared to perform the treatment as soon as it becomes legal.¹⁰⁹ Despite this, there are currently only fourteen doctors in Costa Rica who are certified to perform IVF, due to the nationwide ban which prohibits doctors from taking the specific courses of study to become a certified specialist in IVF.¹¹⁰ We believe that this is not only in violation of the State's duty to respect scientific freedom, but as a practical matter, this prohibits Costa Rican scientists and doctors from contributing to the area of fertility treatments has a ripple effect that hinders progression in the field worldwide.

44) The negative obligations of States that derive from the right to enjoy the benefits of scientific progress have also been commented on by prominent scholars in the field. Dr. Yvonne Donders, who specializes in cultural diversity and economic, social, and cultural rights,¹¹¹ concluded that the right to enjoy scientific progress means that a State has an obligation "not to interfere with choices and priorities decided by scientists and not to impose a certain topic or method of research on the academic community."¹¹² By upholding the laws prohibiting IVF, Costa Rica is continually failing to satisfy its obligation to not interfere with scientific progress, and specifically is preventing scientists from engaging in an entire field of study in reproductive health.

45) Another principle at the heart of the right to enjoy the benefits of scientific progress is ensuring that the public have the opportunity to participate in decisions pertaining to scientific progress. The Venice Statement notes that States have an obligation to "provide opportunities for public engagement in decision-making about science and technology and their development."¹¹³ The Special Rapporteur's 2012 Report on the right to enjoy the benefits of scientific progress

¹⁰⁸ See Laura Waxmann, *Filmmaker Chronicles Ban on Fertility Treatment*, MISSION LOCAL, Sept. 11, 2015, <http://missionlocal.org/2015/09/costa-rica-lifts-15-year-ban-on-fertility-treatment/>; see also Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Judgment, *supra* note 20, at 22, note 74.

¹⁰⁹ Natalia Chaves, *Costa Rica Competiría en In Vitro*, LA REPUBLICA, Jul. 16, 2014, https://www.larepublica.net/app/cms/www/index.php?pk_articulo=533317963.

¹¹⁰ *Id.*

¹¹¹ Prof. Dr. Y.M. (Yvonne) Donders, Universiteit van Amsterdam, <http://www.uva.nl/over-de-uva/organisatie/medewerkers/content/d/o/y.m.donders/y.m.donders.html> (last visited Jan. 14, 2016).

¹¹² Yvonne Donders, *The Right to Enjoy the Benefits of Scientific Progress: in Search of State Obligations in relation to Health* 14 *Medicine, Healthcare and Philosophy* 371, 376 (2011).

¹¹³ Venice Statement, § 16(e).

affirms this principle, stating that public participation in decision-making is a “key aspect of the right to science,”¹¹⁴ and that “[m]ajor decisions regarding funding and research priorities, science policies, emerging areas of research, and new technological applications should entail a participatory process.”¹¹⁵ In the case of IVF in Costa Rica, there was no public participation in the decision to outlaw the procedure, as the ban was instated by the Constitutional Court, at the behest of one petitioner, Mr. Hermes Navarro del Valle.¹¹⁶ There was no popular vote or referendum on the issue; there was no way for the public to participate in this decision to eradicate the use and development of IVF technology. Costa Rican citizens who oppose the ban on IVF have sought various methods of legal recourse domestically and internationally,¹¹⁷ none of which has resulted in the legalization of the procedure, despite the judgment from the Inter-American Court four years ago mandating the state to repeal their ban on IVF.

III.2.c) The Relationship Between Discrimination and the Right to Benefit from Scientific Progress

46) As mentioned previously, there is a connection between the right to benefit from scientific research and discrimination. The World Health Organization (“WHO”) recognizes infertility as a disability, because it intrinsically limits the major life activity of reproduction.¹¹⁸ The WHO emphasized that environmental factors that aid disabled people can allow them to participate in society “on an equal basis with others.”¹¹⁹ IVF is a widely recognized and utilized treatment that effectively helps women overcome disabling fertility issues.¹²⁰ By banning this treatment, Costa Rica is “effectively denying a group of disabled persons access to a treatment that would enable them to overcome a biological disadvantage that interferes with their right to reproduce and form a family.”¹²¹ This is in violation of international standards on disability rights,

¹¹⁴ Shaheed, *supra* note 87, ¶ 22.

¹¹⁵ *Id.* ¶ 43.

¹¹⁶ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Judgment, *supra* note 20, ¶ 71.

¹¹⁷ *Id.* ¶¶ 78-81.

¹¹⁸ World Health Organization, *Infertility Definitions and Terminology*, <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/> (last accessed Jan. 23, 2016); Shorge Sato, *A Little Bit Disabled: Infertility and the Americans With Disabilities Act*, 5 N.Y.U.J. LEGIS. & PUB. POL’Y 223 (2002).

¹¹⁹ World Health Organization, *World Report on Disability (2011)* at 4, available at http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf (last accessed Jan. 23, 2016) [hereinafter WHO 2011 World Report].

¹²⁰ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Judgment, *supra* note 20, ¶ 66.

¹²¹ Amicus Curiae Brief Presented to the Inter-American Court of Human Rights by the International Human Rights Clinic of the Loyola Law School of Los Angeles and Co-Signed by the Elven Academics and Practitioners of Human

because it disproportionately impacts those who have the disability of infertility, as people who are fertile can conceive using traditional methods and do not need to undergo IVF, rendering them unaffected by the ban.

47) Additionally, the U.N. Special Rapporteur in the Field of Cultural Rights emphasized in her 2012 report on The Right to Enjoy the Benefits of Scientific Progress and its Applications that the right to benefit from scientific research includes enabling “access to the benefits of science by everyone, without discrimination.”¹²² Access to the benefits of scientific progress is correlated with discrimination because when a State bans a specific type of procedure, such as IVF, it in turn discriminates against a specific group of people, regardless of whether this class of people is defined as disabled. In this case, it is more than just infertile couples who are facing discrimination, but lesbians, single mothers, and other groups who cannot bear children using traditional methods. These groups become marginalized and subject to discrimination through the denial of access to the medical procedures necessary for them to successfully carry a pregnancy to term.¹²³ By discriminating based on medical condition, the State is effectively denying “equal access to medical services,”¹²⁴ and this infringes upon the right to health in addition to the right to benefit from scientific research.¹²⁵

III.2.d) The Relationship Between the Right to Health and the Right to Benefit from Scientific Progress

48) The right to health is further related to the right to benefit from scientific progress. In this instance, it is because advancements in the health field cannot be achieved without scientific freedom to study innovative or new treatments.¹²⁶ The Committee on Economic, Social, and Cultural Rights (“CESCR”), stated in General Comment 14 that the right to health entails “the

Rights and International Law, ¶ 71 (Sept. 3, 2012), in the case of *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012) [hereinafter *Amicus Curiae to Artavia Murillo*].

¹²² Shaheed, *supra* note 87, ¶ 25.

¹²³ *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Judgment, *supra* note 20, ¶ 126.

¹²⁴ *Amicus Curiae to Artavia Murillo*, *supra* note 120, ¶ 133.

¹²⁵ *Id.*

¹²⁶ Donders, *supra* note 111, at 374.

right to control one's health and body, including sexual and reproductive freedom.”¹²⁷ Specifically, the CESCR elaborated that “women and men have the freedom to decide if and when to reproduce,” and have a right of access to “appropriate health care-services that will, for example, enable women to go safely through pregnancy and childbirth.”¹²⁸ By banning IVF, Costa Rica denies women who cannot become pregnant through traditional methods access to necessary reproductive health care services, and thus impinges upon their freedom to choose when or if they want to reproduce.

III.2.e) No Derogation under Article 4 of the ICESCR

49) As noted in the section on Applicable Rights, the Covenant states that the only situation in which a State can limit the rights set forth in the Covenant is when “such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”¹²⁹ The purpose of Article 4 within the ICESCR is “to ensure that states must not *arbitrarily* limit ICESCR rights. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.”¹³⁰

50) It is necessary to further examine the various elements of Article 4, in order to show that the State does not meet the criteria for derogation of its obligations under the ICESCR, and that the ban on IVF is excessive, arbitrary and unreasonable, and thus outside the scope of Article 4. The Limburg Principles on the Implementation of the ICESCR provide some guidance into the various elements of Article 4.¹³¹ To begin with, the Limburg Principles state that the phrase “determined by law” encompasses the principle that “[l]aws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.”¹³²

¹²⁷ United Nations Committee on Economic, Social, and Cultural Rights, General Comment No. 14, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: The Right to the Highest Attainable Standard of Health* at 3 ¶ 8, Doc. E/C. 12/2000/4 (Aug. 11, 2000).

¹²⁸ *Id.* at 20, n.12.

¹²⁹ ICESCR, art. 4.

¹³⁰ BEN SAUL, DAVID KINLEY, AND JAQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 242 (1st ed., 2014).

¹³¹ Limburg Principles, *supra* note 84.

¹³² *Id.* ¶ 49.

51) We believe that Costa Rica's ban on IVF is discriminatory for the reasons addressed in the above section, but also unreasonable and excessive in light of what it seeks to protect. The State argued before the Inter-American Court in the *Artavia Murillo, et al.* case that by banning IVF, it was protecting the right to life of the fertilized eggs that are not implanted, either voluntarily or involuntarily, into a woman and carried to term as a child.¹³³ There has been no general consensus as to when a human embryo should be recognized as a person. However, all states in the world, except Costa Rica, expressly or implicitly allow IVF, and all states similarly recognize the right to life;¹³⁴ thus, it seems that the world has implicitly recognized that IVF does not infringe upon or violate the right to life.

52) Further, there are less restrictive means of protecting the rights that a fetus may have during the IVF process that fall short of an outright ban. For example, many States regulate IVF, for ethical, religious or scientific reasons. Jamaica, for example, allows IVF only in cases where the sperm and egg donors are married.¹³⁵ In Egypt, IVF is allowed, subject to the restriction that no third party, aside from a married husband and wife, can participate in the procreation.¹³⁶ This means that the use of a surrogate mother to carry the fetus to term, or a sperm or egg donation from an outside party, are illegal.¹³⁷ Should Costa Rica be concerned with the destruction of embryos, it could legalize IVF, but impose restrictions against the intentional destruction of embryos, which is the approach used by the American state of Louisiana.¹³⁸

53) The widespread availability of assisted reproductive technology in the Americas, including IVF, makes it clear that the overwhelming majority of States in the Americas believe that they can permit assisted reproductive technology, including IVF, without violating their duty to protect life. These States have found a way to reconcile the rights that infertile persons have to form a family, while still respecting the State's interest in protecting life. The balanced approach

¹³³ *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Judgment, *supra* note 20, ¶ 71.

¹³⁴ See W. PAUL GORMLEY, *THE RIGHT TO LIFE AND THE RULE OF NON-DEROGABILITY: PEREMPTORY NORMS OF JUS COGENS IN THE RIGHT TO LIFE IN INTERNATIONAL LAW* 121 (Bertrand G. Ramcharan, ed. 1985); see also Anthony D'Amato *It's a Bird, It's a Plane, It's a Jus Cogens!*, 6 CONN. J. OF INT'L LAW 1, 2 (1990).

¹³⁵ Adaptado de "International Federation of Fertility Societies Surveillance 2010." [Control del año 2010 de la Federación Internacional de Sociedades de Fertilización] Tabla 4.1 (p. 23). Derechos de Autor 2010 American Society for Reproductive Medicine [Sociedad Americana para la Medicina Reproductiva], Publicado por Elsevier Inc.

¹³⁶ Marcia C. Inhorn, *Islam, IVF, and Everyday Life in the Middle East: The Making of Sunni versus Shi'ite test-Tube Babies*, 1 ANTHROPOLOGY OF THE MIDDLE EAST 42, 44 (2006).

¹³⁷ *Id.*

¹³⁸ Louisiana Rev. Statutes, 9 § 129, available at http://biotech.law.lsu.edu/cases/la/health/embryo_rs.htm.

advanced by these States with similar views on prenatal life highlights the irrationality of Costa Rica's ban on a legitimate and desirable medical cure for infertility.

54) Another issue to consider is Costa Rica's approach to abortion, which is "the termination of pregnancy by the removal or expulsion from the uterus of a foetus or embryo prior to viability."¹³⁹ Costa Rica allows abortion in cases where it is necessary to save the mother's life, as well as to preserve the mother's physical health in general.¹⁴⁰ It should be noted that no international instrument prohibits abortion, and in at least one case, the denial of access to a legal abortion was held to be a human rights violation.¹⁴¹ As Costa Rica is already allowing embryos to be intentionally destroyed via abortion, their argument that the destruction of embryos via IVF violates the right to life is difficult to justify.

55) Another relevant aspect of Article 4 with regard to the present case is the requirement that measures taken to restrict any rights in the Covenant must be for "promoting the general welfare," which has been interpreted to mean, "furthering the wellbeing of the people as a whole."¹⁴² The fact that there has been significant opposition, in the form of multiple legal actions at the domestic and international levels,¹⁴³ to the ban on IVF, and that the State has been ordered by the Inter-American Court to repeal the ban,¹⁴⁴ it seems evident that banning IVF does not further the wellbeing of the people as a whole, but in fact is impeding and impermissibly interfering with the welfare of a specific group.

IV) RECOMMENDATIONS FOR THE LIST OF ISSUES

56) Given the fact that Costa Rica completely ignored the right to enjoy the benefits of scientific progress in its 5th periodic report, we believe it is critical this Committee takes this occasion to remind Costa Rica that it is bound to give full effect to *all* obligations arising from the ICESCR. To this effect, we respectfully make the following recommendations for inclusion in the List of Issues and/or its Concluding Observations. Namely, we recommend that the Committee...

¹³⁹ Amicus Curiae to Artavia Murillo, *supra* note 121, ¶ 43.

¹⁴⁰ Guttmacher Institute, *In Brief: Facts on Abortion in Latin America and the Caribbean*, Jan. 2012, http://www.guttmacher.org/pubs/IB_AWW-Latin-America.pdf.

¹⁴¹ See UN HRC, *KL v. Peru*, Comm. No. 1153/2003 ¶ 2.1, Oct. 24, 2005, U.N. Doc. CCPR/C/85/D/1153/2003.

¹⁴² Limburg Principles, *supra* note 84, ¶ 52.

¹⁴³ See *supra* ¶ 21-29.

¹⁴⁴ Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Judgment, *supra* note 20, ¶ 336.

remind Costa Rica that:

- i. it is bound to give full effect to all obligations arising from the ICESCR;
- ii. the current ban on IVF is not compatible with the obligation it has under Article 15.1.b of the Covenant to ensure everyone the right to enjoy the benefits of scientific progress;
- iii. it has an obligation, as a matter of international law, to comply with the decision of the Inter-American Court of Human Rights of November 28, 2012 in the case *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*.¹⁴⁵

urge Costa Rica to:

- i. provide information on what steps it has taken to implement the right to enjoy the benefits of scientific progress;
- ii. give full implementation to the right to right to enjoy the benefits of scientific progress;
- iii. take all the necessary steps to lift the ban on IVF and make IVF treatment accessible to the population;
- iv. take all necessary measures to expedite proceedings before the Supreme Court in the case Expediente 15-013929-0007-CO;¹⁴⁶
- v. take all necessary steps to implement Executive Decree No. 39210-MP-S.¹⁴⁷

¹⁴⁵ *Supra*, note 20.

¹⁴⁶ *Supra*, ¶ 29.

¹⁴⁷ *Id.*