INTER-AMERICAN COURT OF HUMAN RIGHTS

Gretel Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica

Case No. 12.361

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1. Nominated by the Government of New Zealand, I served as a member of the United Nations Committee on Economic, Social and Cultural Rights between 1999-2002, and was appointed the Committee's Rapporteur. Between 2002-2008, I was the first United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and submitted some 30 reports to the United Nations General Assembly, Commission on Human Rights and Human Rights Council. From 2011 to date, I have advised, on a part-time basis, Dr. Flavia Bustreo, Assistant Director-General of the World Health Organization (WHO), on human rights issues. This affidavit is submitted in a personal capacity and should not be read as reflecting the views of WHO or any other organisation.[1]

2. The Inter-American Commission on Human Rights invited me to submit testimony to the Court on: "the concept of 'disproportionate impact' as a violation of the principle of equality and non-discrimination, and how the concept of 'disproportionate impact' applies to women when their exercise of their reproductive rights is unduly restricted". These issues are the focus of my affidavit. In this affidavit, I sometimes use the shorthand 'the right to health', or 'the right to the highest attainable standard of health', instead of the full formulation: 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

The concept of "disproportionate impact" as a violation of the principle of equality and non-discrimination

3. The principle of non-discrimination and equality is a cardinal rule of international law, recognised in key international human rights instruments, such as the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racism, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, and Convention on the Rights of Persons with Disabilities.

4. In the Inter-American region, this principle is enshrined in Articles 1(1) and 24 of the American Convention on Human Rights (American Convention). Article 1(1) of the American Convention requires States Parties "to ensure to all persons […] the free and full exercise of [the Convention's] rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition". According to Article 24 of the American Convention, "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law". The obligation of non-discrimination is also contained in Article 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), according to which States Parties "undertake to guarantee the exercise of the rights set forth". The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (Inter-American Convention on Disabilities, 1999) and Articles 4(f) and 6 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará, 1994) address specific grounds of discrimination respectively, disability and sex.

[1] While preparing this affidavit, I have greatly benefited from the advice and industy of many colleagues. I am grateful to them all. I would especially like to record my debt of gratitude to Dr. Clara Sandoval and Dr. Joo-Young Lee, both of the Human Rights Centre, School of Law, University of Essex, UK. However, this document reflects my understanding of international human rights law: it does not necessarily reflect theirs.

Indirect discrimination at the global level

5. The concept of "disproportionate impact" is closely linked with the concept of indirect discrimination. Discrimination can occur when measures are not discriminatory at face value, but are discriminatory in fact and effect, which is often referred to as "indirect discrimination". The concept of indirect discrimination has a firm place in international human rights law, both at the global and regional levels.

6. Indirect discrimination is recognised in a number of international human rights instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Art. 1, emphasis added).

7. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women prohibits discrimination considering not only the purpose but also the effect of measures (Art. 1). More specifically, the United Nations Committee on the Elimination of Discrimination against Women, in its General Recommendation on temporary special measures, notes that "[i]ndirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women."[2] Some forms of indirect discrimination against women may result from gender stereotypes that ignore individuals' abilities, needs, wishes, and circumstances, and create gender hierarchies.[3] The Committee continues that seemingly gender-neutral laws, policies and programmes may "fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men."[4] Thus, the Committee has affirmed that States Parties have an obligation "to ensure that there is no direct or indirect discrimination against women in their laws", and "to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions".[5] The International Federation of Gynaecology & Obstetrics advises that "[s]tereotypical thinking about women […] has permeated health care in general, and reproductive health care in particular".[6] I return later to the issue of gender stereotyping.

8. The United Nations Human Rights Committee supervising the International Covenant on Civil and Political Rights has held that a violation of equal protection of the law (Article 26 of the Covenant) can

[2] CEDAW, General Recommendation No. 25 on Temporary Special measures (2004), note 1.

[3] Rebecca J. Cook and Simone Cusack, *Gender Stereotyping Transnational Legal Perspectives*, Philadelphia: Penn Press (2010).

[4] CEDAW, General Recommendation No. 25 on Temporary Special measures (2004), note 1.

[5] Ibid., para. 7.

[6] FIGO Committee for Ethical Aspects of Human Reproduction and Women's Health, Harmful Stereotyping of Women in Health Care, *International Journal of Gynaecology & Obstetrics*, October 2011, 115(1):90-1.

"also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate".[7] A disproportionate impact on a particular group is introduced as one of the tests for indirect discrimination: "[S]uch indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[8]

9. The United Nations Committee on Economic, Social and Cultural Rights defines indirect discrimination as "laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination", and confirms that both direct and indirect forms of different treatment can amount to discrimination under the International Covenant on Economic, Social and Cultural Rights.[9]

Indirect discrimination in Europe

10. The Grand Chamber of the European Court of Human Rights has confirmed, in *D.H. and Others v. Czech Republic*, that "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group".[10] A similar approach was also taken in *Sampanis v. Greece*, where the Court found a violation of Article 14 (non-discrimination) of the European Convention on Human Rights.[11]

11. Earlier, in *Autism-Europe v. France*, the European Committee of Social Rights has affirmed that the non-discrimination provision of the Revised European Social Charter (Article E) "not only prohibits direct discrimination but also forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all".[12]

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[7] Human Rights Committee, Communication No. 993/2001, *Althammer v. Australia*, U.N. Doc. CCPR/C/78/D/998/2001, 8 August 2003, para. 10.2; and General comment No. 18 on non-discrimination, 10/11/1989.

[8] Human Rights Committee, Communication No. 993/2001, *Althammer v. Australia*, U.N. Doc. CCPR/C/78/D/998/2001, 8 August 2003, para. 10.2.

[9] CESCR, General Comment No. 20. Non-discrimination in economic, social and cultural rights (art.2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20, 2 July 2009, para. 10.

[10] European Court of Human Rights, Grand Chamber, *D.H. and Others v. Czech Republic*, Application no. 57325/00, 13 November 2007, para. 175; See also *Hugh Jordan v. the United Kingdom*, no. 24746/94, para. 154, 4 May 2001; and *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005.

[11] European Court of Human Rights, First section, *Sampanis and others v. Greece*, Application No. 32526/05, 5 June 2008.

[12] European Committee of Social Rights, *Autism-Europe v. France*, Collective Complaint No. 13/2002, 4 November 2003, para. 52.

Indirect discrimination in the Inter-American System of Human Rights

12. The concept of indirect discrimination has also been developed in the Inter-American System of Human Rights. Attention to the discriminatory impact of a seemingly neutral regulation on potentially vulnerable groups seems required as an integral feature of the concept of non-discrimination and equality.[13] The Inter-American Court of Human Rights, in its several decisions, has paid attention to difference in effects, as well as difference in treatment. For instance, in *López-Álvarez v. Honduras*, the Court has reaffirmed its view that "the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that the States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights",[14] which was also expressed earlier in *The Girls Yean and Bosico v. Dominican Republic*.[15] In *YATAMA v. Nicaragua*, while acknowledging that "States may establish minimum standards to regulate political participation",[16] the Court held that the requirement of the electoral law which did not take into account the vulnerable and marginalised situation of indigenous and ethnic populations in the region in question "constitutes a disproportionate restriction that limited unduly the political participation of the candidates proposed by YATAMA [an indigenous political party]".[17]

13. The Inter-American Commission on Human Rights has reaffirmed the notion of indirect forms of discrimination. The Commission has held that "[a]n examination of laws and policies to ensure that they comport with the principles of effective equality and non-discrimination should also look for their potential discriminatory impact, even when their formulation or wording appears neutral or they apply to everyone, without distinction."[18]

14. Discriminatory effects, as well as such objectives, are explicitly recognised as elements of discrimination in the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities. Discrimination against persons with disabilities is defined by the Convention as "any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the *effect* or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms" (Art. I.2(a)). [Emphasis added]

15. Harmful gender stereotypes contributing to discrimination were also recognised by the Inter-American Court of Human Rights in *Gonzalez et al. ("Cotton Field") v. Mexico*,[19] and *Atala Riffo and*

[13] The Inter-American Court of Human Rights, Advisory Opinion No. 18 on Juridical Condition and Rights of Undocumented Migrants, 17 September 2003, para. 88: "The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law. Consequently, States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws."

[14] Inter-American Court of Human Rights, *López-Álvarez v. Honduras*, 1 February 2006, para. 170.

[15] Inter-American Court of Human Rights, *The Girls Yean and Bosico v. Dominican Republic*, 8 September 2005, para. 141.

[16] Inter-American Court of Human Rights, *YATAMA v. Nicaragua*, 23 June 2005, para. 207.

[17] Ibid., para. 223.

[18] Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, 20 January 2007, para. 90.

[19] Inter-American Court of Human Rights, *Gonzalez et al. ("Cotton Field") v. Mexico*, 16 November 2009.

Daughters v. Chile.[20] In the *Cotton Field* case, the Court stated that "[t]he creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women",[21] and stressed that training with a gender perspective should "enable all officials to recognize the effect on women of stereotyped ideas and opinions in relation to the meaning and scope of human rights."[22] In the case of *Atala Riffo et al. v. Chile*, the Court acknowledged "the perpetuation of stereotypes that are associated with the structural and historical discrimination suffered by sexual minorities",[23] and held that reparations must have a transformative purpose which includes "dismantling certain stereotypes and practices that perpetuate discrimination against LGBT [lesbian, gay, bisexual and transgender] groups".[24]

16. In short, there is agreement that, under international law, discrimination may result not only from treating people in a similar situation less favourably (direct discrimination), but also from apparently neutral laws, policies, or practices that have a disproportionate or disparate impact on a group distinguished by prohibited grounds of discrimination (indirect discrimination). The principle of non-discrimination and equality demands that States must ensure that there is neither direct nor indirect discrimination in their law, policy and practice, based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, age, disability, sexual orientation, or any other prohibited grounds.

The concept of "disproportionate impact" and women in the context of undue restrictions on reproductive rights

17. According to the International Conference on Population and Development in 1994: "Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly on the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence."[25] Reproductive rights encompass sexual and reproductive health rights.

18. Sexual and reproductive health is an integral element of the right to the highest attainable standard of physical and mental health, enshrined in major international human rights instruments, such as the Protocol of San Salvador, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of Child, Convention on the Elimination of All Forms of Discrimination Against Women, International Convention on the Elimination of All Forms of Racial Discrimination, and Convention on

[20] Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*, 24 February 2012.

[21] Inter-American Court of Human Rights, *Gonzalez et al. ("Cotton Field") v. Mexico*, 16 November 2009, para. 401.

[22] Ibid., para. 540.

[23] Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*, 24 February 2012, para. 267.

[24] Ibid., para. 271.

[25] Programme of Action of the International Conference on Population and Development, Cairo, 1994. New York: United Nations; 1995: para. 7.3.

the Rights of Persons with Disabilities, to all of which Costa Rica is a party. In 2003, the United Nations Commission on Human Rights, the predecessor to the Human Rights Council, confirmed that: "Sexual and reproductive health are integral elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".[26]

19. The United Nations Committee on Economic, Social and Cultural Rights has stressed that "[t]o eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including *sexual and reproductive services*. […] The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of *sexual and reproductive health*."[27][Emphasis added]

20. The United Nations Committee on the Elimination of Discrimination against Women has stated, in its General Recommendation No. 24 on Article 12 of the Convention (women and health), that: "It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."[28]

21. When serving as the United Nations Special Rapporteur on the right to the highest attainable standard of health, I submitted a report to the UN Commission on Human Rights on sexual and reproductive health,[29] in which I stated that "[t]he right to health, including sexual and reproductive health, encompasses both freedoms, such as freedom from discrimination, and entitlements." I elaborated that "[i]n the context of sexual and reproductive health, freedoms include a right to control one's health and body", and in terms of entitlements, "women should have equal access, in law and fact, to information on sexual and reproductive health issues."[30] As regards freedom, I argued that States must respect an individual's freedom to control his or her health and body, and must not engage in discriminatory practices.[31] In relation to entitlements: "States have an obligation to ensure reproductive health and maternal and child health services, including appropriate services for women in connection with pregnancy, granting free services where necessary. More particularly, States should improve a wide range of sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information."[32] In this report, I urged all duty-holders to "ensure access to such vital health services as voluntary testing, counselling and treatment for sexually transmitted infections, including HIV/AIDS, and breast and reproductive system

[26] UN Commission on Human Rights Resolution 2003/28, preamble and para. 6.

[27] The UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 on the Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, 11 August 2000, para. 21.

[28] CEDAW, General Recommendation, No. 24: Article 12 of the Convention (Women and Health), UN Doc. A/54/38/Rev.1, 1999, para. 11.

[29] Report of the Special Rapporteur on the right to the highest attainable standard of health, U.N. Doc. E/CN.4/2004/49, 16 February 2004.

[30] Ibid., paras. 25 and 28.

[31] Ibid., para. 27.

[32] Ibid., para. 29.

cancers, as well as *infertility treatment*."[33][Emphasis added] Moreover, I called for particular attention to laws, policies and practices that act as barriers to the availability, accessibility, acceptability, and quality of sexual and reproductive health services.[34] These passages continue to reflect my understanding of international human rights law.

22. According to the Pan American Health Organization (PAHO), sexual and reproductive health implies that "people are able to have a satisfying and safe sex life and have the capability to reproduce as well as the freedom to decide if, when, and how often to do so."[35] In particular, the right to reproductive health may entail "the right of men and women to be informed and to have access to safe, effective, affordable, and acceptable methods of family planning of their choice; the right to access appropriate health-care services that will ensure safe pregnancy and childbirth; the right to medical care for sexually transmitted infections, including HIV/ AIDS; and the prevention of cancer of the female reproductive system, menopause-related disabilities, and sexual violence."[36]

23. Sexual and reproductive health encompasses the right of all couples and individuals to decide freely and responsibly on the number, spacing and timing of their children. This right is an integral element of the right to found and raise a family as protected by Article 17 of the American Convention on Human Rights and Article 23 of the International Covenant on Civil and Political Rights. Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women requires States Parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women […] (e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." Under Article 23(1) (respect for home and the family) of the Convention on the Rights of Persons with Disabilities, States Parties are required to "to take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that […] b. the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided."

Interpretation of the American Convention on Human Rights

24. In accordance with Article 29(b) of the American Convention on Human Rights, the Convention must be read consistently with the State's obligations under other international human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of Persons with Disabilities, Convention on the Elimination of All Forms of Discrimination against Women, the San Salvador Protocol, the Belém do Pará Convention, and the Inter-American Convention on Disabilities, to all of which Costa Rica is a party. In other words, the Convention's provisions must be interpreted in a manner that does not restrict the enjoyment or exercise of the rights contained in those human rights treaties.

[33] Ibid., para. 29.

[34] Ibid., paras 41 and 42.

[35] Pan American Health Organization, *Health in the Americas 2007, Volume 1 – Regional*, 2007 at 143.

[36] Ibid.

25. Also, Article 24 of the American Convention on Human Rights (right to equal protection of law) is not confined to Convention rights; it creates an independent right to equality and non-discrimination: "In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription."[37] In its recent case law, the Court has confirmed that while Article 1(1) concerns discrimination in the exercise and enforcement of the rights recognised in the Convention, Article 24 prohibits discrimination in relation to the enactment and implementation of all domestic laws.[38] The scope of Article 24 of the Convention is similar to the scope of Article 26 of the International Covenant on Civil and Political Rights. The application of Article 26 as a 'free-standing' equality clause was illustrated in the cases of *Zwaan-de Vries v. the Netherlands*[39] and *SWM Brooks v. the Netherlands*.[40] The United Nations Human Rights Committee has confirmed:

> While article 2[41] limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.[42]

26. Thus, even though the right to the highest attainable standard of health is not explicitly included in the American Convention on Human Rights, the question of whether restrictions, imposed by a State, on access to reproductive health services have disproportionate impact on women falls within the scope of Article 24, an independent right to equal protection of law.

27. Furthermore, the right to the highest attainable standard of health is inextricably related to the right to life (Article 4) and the right to personal integrity (Article 5: the right to humane treatment) under the American Convention on Human Rights. In *Albán Cornejo et al. v. Ecuador*, the Court held that "the rights to life and humane treatment are directly and immediately linked to human health

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[37] Inter-American Court of Human Rights, Advisory Opinion No. 4 on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, 9 January 1984, para. 54. See also para. 8 of the statement on Separate Vote of Judge Rodolfo E. Piza E.

[38] Inter-American Court of Human Rights, Case of *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, 5 August 2008, para. 209; Case of *Rosendo Cantú v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, 30 August 2010, para. 183; Case of *Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, 30 August 2010, para. 199.

[39] Communication No. 182/1984, CCPR/C/29/D/182/1984, 1987.

[40] Communication No. 172/1984, CCPR/C/29/D/172/1984, 9 April 1987.

[41] Article 2(1) "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[42] Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), para. 12.

care", and applied those rights to health-related issues.[43] This approach also resonates with other decisions of the Court, such as *Ximenes-Lopes v. Brazil*[44] and *XÁKMOK KÁSEK Indigenous Community v. Paraguay*.[45] The Inter-American Commission on Human Rights has taken a similar view in health-related cases, such as *María Mamérita Mestanza of Peru*.[46] Therefore, in this present case, reproductive health and rights have to be considered in relation to the right to life with dignity (Article 4) and the right to personal integrity (Article 5) of the American Convention on Human Rights.

Prohibition of *in vitro* fertilisation and discrimination on the basis of disability

28. Infertility is a sexual and reproductive health issue. According to WHO, infertility is "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."[47] Infertility causing involuntary childlessness is a disability. The Preamble to the Convention on the Rights of Persons with Disabilities, to which Costa Rica is a party, recognises that "disability is an evolving concept and that disability results from interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others." According to the WHO's biopsychosocial model of disability, disability involves one or more of three levels of difficulty in human functioning: a physical or psychological impairment; a limitation on activity due to the impairment (activity limitation); and a participation restriction arising from an activity limitation.[48] According to the WHO International Classification of Functioning, Disability and Health (ICF), impairments include problems in body function; activity limitations are difficulties an individual may have in executing activities; and participation restrictions are problems an individual may experience in involvement in life situations.[49]

29. In accordance with the right to found a family recognised by Article 17 of the American Convention on Human Rights and Article 23(1) of the Convention on the Rights of Persons with Disabilities, those whose ability to have biologically/genetically descended children are impaired due to their biological or physical condition, must be able to have, on an equal basis with others, reasonable choices to conceive children, subject to minimum interference in making their own decisions, with adequate support where required. *In vitro* fertilisation technique is a medical means that can help to overcome involuntary childlessness. The right to found and raise a family is subject to "the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention" under Article 17(2) of the American Convention on Human Rights.

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[43] Inter-American Court of Human Rights, *Albán Cornejo et al. v. Ecuador*, 22 November 2007, para 117.

[44] Inter-American Court of Human Rights, *Ximenes-Lopes v. Brazil*, 4 July 2006.

[45] Inter-American Court of Human Rights, *the XÁKMOK KÁSEK Indigenous Community v. Paraguay*, 24 August 2010.

[46] Inter-American Commission on Human Rights, *María Mamérita Mestanza Chávez (Peru)*, Report No. 71/03, Petition 12.191, Friendly Settlement, October 3, 2003.

[47] WHO, The Revised Glossary on ART Terminology, 2009.

[48] WHO, Towards a Common Language for Functioning, Disability, and Health, Geneva: WHO, 2002.

[49] Ibid. at 10.

30. Under the right to the highest attainable standard of health enshrined in Article 10 of the Protocol of San Salvador, Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women, and Article 25 of the Convention on the Rights of Persons with Disabilities, infertile couples and individuals must have the freedom to control their health and body, and enjoy access to health services that can address their reproductive impairment without discrimination and undue interference. Also, in compliance with the right to health, the State must take steps to improve access to sexual and reproductive health services, including infertility prevention and treatment.[50]

31. The Costa Rican state's prohibition of *in vitro* fertilisation appears neutral on the surface as it applies to all individuals in the jurisdiction. However, the prohibition does not have the same effect on everyone. As mentioned earlier, not only difference in treatment but also difference in effect on the basis of a prohibited ground contravenes the principle of non-discrimination and equality. The ban on *in vitro* fertilisation places a disparate impact on those who are infertile, denying the opportunity for them to overcome their health conditions and conceive their biological child. I respectfully submit that, while disability and health status are not listed among the non-exhaustive prohibited grounds set out in Article 1 of the American Convention on Human Rights, the adoption of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities by the Organization of American States in 1999 confirms that disability is now implied within the prohibited grounds of discrimination in the Inter-American System of Human Rights, including the American Convention on Human Rights. For its part, the United Nations Committee on Economic, Social and Cultural Rights recognises that disability and health status are among the prohibited grounds of discrimination falling within the International Covenant on Economic, Social and Cultural Rights.[51] Health status refers to "a person's physical or mental health"[52] and the Committee has affirmed: "States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant".[53] Moreover, recent case law of the Inter-American Court of Human Rights confirms that the wording of Article 1.1 of the American Convention "leaves open the criteria with the inclusion of the term 'another social condition,' allowing for the inclusion of other categories that have not been explicitly indicated. Consequently, the Court should interpret the term 'any other social condition' of Article 1.1 of the Convention in the context of the most favorable option for the human being and in light of the evolution of fundamental rights in contemporary international law."[54] In all these circumstances, I respectfully submit that health status and disability are prohibited grounds of discrimination under Article 1(1) of the American Convention on Human Rights and thus a ban on *in vitro* fertilisation constitutes discrimination against those who are reproductively impaired on the ground of health status and disability, in violation of Articles 1, 17(2), and 24 of the Convention.

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[50] Report of the Special Rapporteur on the right to the highest attainable standard of health, U.N. Doc. E/CN.4/2004/49, 16 February 2004.

[51] The Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/20, 10 June 2009, paragraphs 28 and 33.

[52] Ibid., para. 33.

[53] Ibid.

[54] Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*, 24 February 2012, para. 85.

The disproportionate impact of infertility on women

32. When a State unduly restricts access to appropriate sexual and reproductive health services, including infertility treatment, it affects both men and women. But such restrictions have a greater detrimental impact on women.

33. Data from the PAHO noted a gender gap in sexual and reproductive health in Latin America and the Caribbean: sexual and reproductive health-related illness accounts for approximately 20% of the total health burden in women and 14% in men.[55] More specifically, infertility, part of sexual and reproductive health, may be a source of serious psychological stress for men and women. While the causes of infertility arise from men and women, the burden of infertility in many societies, to a large extent, is disproportionately placed on women, due to a persistent gender stereotype that defines women primarily as child bearers. Where such gender stereotyping is prevalent, infertile women experience social exclusion, stigma and distress. Denial of access to appropriate infertility prevention and treatment services exacerbates their predicament.

34. The WHO Department of Reproductive Health and Research convened a meeting on the medical, ethical and social aspects of assisted reproduction on 17–21 September 2001. A number of papers presented in the meeting pointed to the gender dimension of infertility and assisted reproductive technology:

> Although infertility may not be a public health priority in many countries, it is a central issue in the lives of the individuals who suffer from it. It is a source of social and psychological suffering for both men and women and can place great pressures on the relationship within the couple. While the role and status of women in society should not be defined solely by their reproductive capacity, in some societies womanhood is defined through motherhood. In these situations, the personal suffering of the infertile woman is exacerbated and can lead to unstable marriage, domestic violence, stigmatization and even ostracism.[56]
>
> Responsibility for infertility is commonly shared by the couple. […] For biological and social reasons, however, the burden of infertility is unequally shared. The psychological and social burden of infertility in most societies is much heavier on the woman. A woman's status is often identified with her fertility, and failure to have children can be seen as a social disgrace or a cause for divorce. The suffering of the infertile woman can be very real. The burden and risks of assisted reproduction are by no means equally shared between men and women. Women bear the physical and psychological burden.[57]
>
> Childless women are generally blamed for their infertility, despite the fact that male factor causes contribute to at least half of the cases of infertility around the world. In developing countries, especially, motherhood is often the only way for women to enhance their status within the family

[55] Pan American Health Organization (PAHO), 'Chapter 2: Health Conditions and Trends' in *Health in the Americas 2007 Volume I Regional*, Washington: PAHO (2007) at 143.

[56] Foreword, *Current Practices and Controversies in Assisted Reproduction: Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction"*, Geneva: WHO (2002) XV-XVII at XV

[57] Mahmoud F. Fathalla, 'Current Challenged in Assisted Reproduction', *Current Practices and Controversies in Assisted Reproduction: Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction"*, Geneva: WHO (2002) 3-12 at 10.

> and community. […] Moreover, the overpopulation discourse and lack of social focus on infertility exacerbates women's inequitable treatment in developing countries. As Ginsburg and Rapp have observed, women's bodies are frequently the locus through which social, economic, and political power is exercised. […] The lack of medical discourse on infertility and [assisted reproductive technology] exacerbates the harms of infertility. It contains the experience of infertility as a private harm for which individuals, usually women, are to blame.[58]

35. In 2002, WHO undertook a study into infertility and its consequences on relationships in developing countries, using data from 47 Demographic and Health Surveys in developing countries. This study estimated that "[o]verall, women who have never had a child or are currently childless are more likely to be divorced or separated, 14 per cent for primary sterility and 12 per cent for childlessness. […] By region, the largest difference for primary sterility is in Latin America, where 21 per cent of women are more likely to be divorced or separated than women who are not primarily sterile. This region also has the largest effect for secondarily sterile women, with 10 per cent being divorced or separated." [59] It concludes that "childlessness and infertility have consequences for a woman's chances of being in a stable relationship, whether through lowering her chances of entering into marriage, raising her chances of being divorced or separated, or increasing the chances that her husband will take another wife."[60]

36. In my view, the above two paragraphs have pivotal importance. They demonstrate that infertility has a devastating impact on the lives of many men and women. They also demonstrate that, because of the way many societies are constructed, the impact on childless women tends to be deeper and broader than the impact on childless men. I deplore the fact that, in many societies, expectations remain deeply gendered. However, this is the societal reality for millions of women and, if it is not recognised, many women will be doubly disadvantaged, first, by restrictive, disempowering and gendered expectations and, second, by laws and policies that are indirectly discriminatory, such as undue restrictions on *in vitro* fertilisation. States have concurrent and complementary human rights responsibilities to refrain from indirect discrimination and also to take effective measures to reverse gender stereotyping wherever it exists.[61]

Multiple discrimination based on sex /gender and disability

37. The unique burden experienced by infertile women can be analysed in terms of multiple discrimination. The United Nations Committee on Economic, Social and Cultural Rights, in its General Comment No. 20 on non-discrimination, states: "Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals

[58] Abdallah S. Daar, Zara Merali, 'Infertility and social suffering: the case of ART in developing countries', *Current Practices and Controversies in Assisted Reproduction: Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction"*, Geneva: WHO (2002) 15-21 at 16-17.

[59] WHO, *DHS Comparative Reports No. 9: Infecundity, Infertility, and Childlessness in Developing Countries*, September 2004, at 43.

[60] Ibid., at 50.

[61] Rebecca J. Cook and Simone Cusack, *Gender Stereotyping Transnational Legal Perspectives*, Philadelphia: Penn Press (2010).

and merits particular consideration and remedying".[62] The United Nations Human Rights Committee notes: "Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects".[63] The United Nations Committee on the Elimination of Discrimination against Women also acknowledges: "Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them."[64] In my United Nations report of 2004 on sexual and reproductive health rights, I emphasised that "discrimination and stigma continue to pose a serious threat to sexual and reproductive health for many groups, including women, sexual minorities, refugees, people with disabilities, rural communities, indigenous persons, people living with HIV/AIDS, sex workers, and people held in detention. Some individuals suffer discrimination on several grounds e.g. gender, race, poverty and health status."[65]

38. Using the WHO International Classification of Functioning, Disability and Health,[66] while infertile men have an 'activity limitation' of not being able to reproduce, infertile women have the additional disadvantage of 'participation limitation', based on the intersection between sex/gender, health status and disability. In relation to the intersection between gender and disability, Article 6(1) of the Convention on the Rights of Persons with Disabilities recognises that "women and girls with disabilities are subject to multiple discrimination", and requires States Parties to "take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms". *In vitro* fertilisation can assist those who suffer infertility to overcome involuntary childlessness, alleviate the social and psychological distress that they experience, and eliminate the limitations associated with disability.

39. In summary, while the ban on access to *in vitro* fertilisation seems gender neutral on its face, it imposes *de facto* disproportionate impact on infertile women, constituting discrimination on multiple grounds of disability, health status, and sex/gender, in contravention of Articles 1, 17(2) and 24 of the American Convention.

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[62] Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/20, 2 July 2009, para. 17.

[63] Human Rights Committee, General Comment No. 28: The Equality of Rights between Men and Women, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 30.

[64] Committee on the Elimination of Discrimination against Women, General Recommendation No. 25: Temporary Special Measures, 2004, para. 12.

[65] Report of the Special Rapporteur on the right to the highest attainable standard of health, U.N. Doc. E/CN.4/2004/49, 16 February 2004, para. 33.

[66] See paragraph 28 above.

Regulations of *in vitro* fertilisation and women's health

40. Some regulations regarding *in vitro* fertilisation, falling short of complete prohibition, may also constitute undue restrictions on reproductive rights. Medical experts indicate that certain conditions on *in vitro* fertilisation may increase risks to the health and lives of women undergoing the treatment, such as multiple pregnancies, leading to the increasing likelihood of obstetric complications, neonatal mortality, and spontaneous abortion (a medical term for miscarriage).[67] Such regulations have significant implications for the rights to life and health of women. Imposing conditions on *in vitro* fertilisation that subject women to increased risks to their health and life contravenes the State's obligations under the rights to health and life, but also can amount to a form of discrimination due to the disproportionate health burden those conditions place on women, in violation of Articles 1(1) (non-discrimination and equality), 4 (right to life), 5 (right to personal integrity) and 24 (right to equal protection) of the American Convention, Articles 4(f) (right to equal protection) and 6(a) (non-discrimination) of the Belém do Pará Convention, Articles 2(2) (non-discrimination) and 12 (right to health) of the International Covenant on Economic, Social and Cultural Rights, Articles 1 (non-discrimination) and 12 (right to health) of the Convention on the Elimination of All Forms of Discrimination Against Women, and Articles 2(1) (non-discrimination), 3 (equality between men and women) and 6 (right to life) of the International Covenant on Civil and Political Rights, to all of which the State of Costa Rica is a party.

41. States should establish human rights-compliant laws and policies for the regulation of assisted reproduction, including *in vitro* fertilisation. Guidance on the permissible regulation of assisted reproduction is provided by the limitation clauses set out in international human rights law. It is necessary to look to these limitation clauses for guidance on permissible regulation given that *in vitro* fertilisation is a means to assist the enjoyment of the right to found a family and the right to the highest attainable standard of health. Article 30 of the American Convention on Human Rights provides that "[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established." Other international human rights treaties contain similar provisions regarding permissible limitations on human rights.

42. Additionally, UNESCO's Universal Declaration on Bioethics and Human Rights (2005), which addresses ethical issues related to medicines, life sciences and associated technologies as applied to human beings, provides guidance on how to make rules concerning *in vitro* fertilisation compatible with international human rights law. The aims of the Universal Declaration on Bioethics and Human Rights include "to promote respect for human dignity and protect human rights, by ensuring respect for the life of human beings, and fundamental freedoms, consistent with international human rights law" (Article 2(d)). More specifically, Article 4 of the Declaration states: "In applying and advancing scientific knowledge, medical practice and associated technologies, direct and indirect benefits to patients, research participants and other affected individuals should be maximized and any possible harm to such individuals should be minimized"(Article 4). Article 5 of the Declaration requires respect for "[t]he autonomy of persons to make decisions, while taking responsibility for those decisions and respecting

[67] WHO, Recent Advances in Medically Assisted Conception, Report of a WHO Scientific Group, WHO technical report series 820 (1992) at 44; PAHO, Technical Opinion of the Pan American Health Organization of the World Health Organization (PAHO/WHO) with regard to the Contents of the Costa Rican Bill on In Vitro Fertilization and Embryo Transfer in the context of the Human Rights to Health, December 2010.

the autonomy of others." The Codes of Practice of some national bodies also provide helpful guidance on the permissibility of regulations concerning assisted reproduction.[68]

43. In all the circumstances, I respectfully submit that any regulation of *in vitro* fertilisation must be in accordance with the law, including international human rights standards, and serve legitimate objectives, such as to respect, protect and fulfil women's health. Regulations must be consistent with women's dignity and autonomy, and their rights to life, health, privacy, equality and to found a family. They must avoid preventable risks to health and be proportionate i.e. the least restrictive alternative must be adopted where several types of regulation are available. The regulations, and their application, must be subject to review.

Conclusion

44. The prohibition of *in vitro* fertilisation constitutes discrimination, on the basis of health status and disability, in relation to those who are infertile. There is evidence that, given societal expectations, infertility has a disproportionate impact on childless women. Gender stereotyping is incompatible with international human rights: measures must be taken against it. However, omitting to recognise women's disadvantage deepens their disadvantage. The prohibition of *in vitro* fertilisation has a disproportionate impact on infertile women, subjecting them to multiple forms of discrimination, based on their gender, health status and disability. States are required to take effective measures to improve access to health services for the prevention and treatment of infertility. Regulations on *in vitro* fertilisation must be consistent with international human rights standards, such as women's dignity, autonomy, health and equality.

Signed by Professor Paul Hunt: **[PH]**

On: **24 August 2012**

At: **Blenheim, New Zealand**

In the presence of: **Nicholas McKessar, Solicitor**

Blenheim

New Zealand

[68] Such as the Human Fertilisation and Embryology Authority, the UK's independent regulator.