

The moderating influence of international courts on social movements: evidence from the IVF case against Costa Rica

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Bios, acknowledgements and funding

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Abstract

Feminists and religious conservatives across the globe have increasingly turned to courts in their battles over abortion. Yet while a significant literature analyzes legal mobilization on abortion issues, it tends to focus predominantly on domestic scenarios. In this article we consider the effects of this contentious engagement of pro-choice and anti-abortion movements in international human rights fora, asking what happens to social movement claims when they reach international human rights courts. We answer the question through detailed description of a single case, Gretel Artavia Murillo et al. v. Costa Rica, decided by the Inter-American Court of Human Rights in 2012 but with ongoing repercussions for abortion rights, given its authoritative interpretation of embryonic right to [life](#). Through our analysis of Artavia Murillo, we show how legal mobilization before international human rights courts moderates social movement claims within the legal arena, as rivals respond to each other and argue within the frame of courts' norms and language.

Introduction

Feminists and religious conservatives across the globe have increasingly turned to courts in their battles over abortion. [Yet while a significant literature describes legal mobilization on abortion issues, it tends to focus on domestic scenarios,¹ and even then often fails to consider the effects of movement and countermovement confrontation in the courts on social movements' framings of key issues.² More generally, socio-legal literature on legal mobilization focuses on movements' use of legal claims \(whether limited to litigation or espousing wider cultural approaches to rights language\), but with little attention to the](#)

specific nature of movement and counter-movement engagement in court.³ Social movement moderation has been linked to the effect of organization, rather than to the effect of recourse to law or to engagement with opponents in court.⁴ In this article we consider the effects of this contentious engagement of pro-choice (feminist) and anti-abortion movements (conservative) in international human rights fora. We ask what happens to social movement claims when they reach international human rights courts, and how these courts react to the presence of movement and countermovement claims. These are the key questions addressed, rather than the much broader issue of effects of contentious engagement on social movements themselves.

In order to answer these questions and given the dearth of literature on contentious engagement in international courts, we adopt a case-study methodology, relying on detailed description to help us navigate the impact of contentious engagement in the international arena on social movement claims as they go transnational. The selected case study is Gretel Artavia Murillo et al. v. Costa Rica (henceforth Artavia Murillo), decided by the Inter-American Court of Human Rights (henceforth IACtHR) in 2012, but with ongoing repercussions both in Costa Rica and throughout Latin America. We base our analysis of the case, and of movement and countermovement claims, mainly on documentary sources, offering a close reading of the 39 amicus briefs submitted by individuals and organizations, as well as press and other secondary documentation on the case and the organizations and individuals involved. We complemented this documentary review with a snowball sample of interviews of eight lawyers who had participated in the case at different stages, either writing amicus for feminist organizations, or as clerks in the Interamerican Human Rights system.

Artavia Murillo is a case of singular importance in the inter-American human rights system (henceforth the IAHR system.) In Artavia Murillo the IACtHR ordered Costa Rica to lift its unique ban against in-vitro fertilization (IVF) rejecting Costa Rica's argument that embryos had personhood, and full human rights following article 4.1 of the Interamerican Human Rights Convention (henceforth the Convention). Together with Karen Attala Ruffo v. Chile (on parental rights for gay people), it is one of only two sexual and reproductive rights cases that have completed the process from domestic tribunals all the way to the IACtHR, and it clearly shows the trajectory from the domestic jurisdiction to the regional human rights system, and back.

The reference to the right to life in Artavia Murillo, ostensibly about IVF, quickly transformed it into a landmark abortion case. The Convention, as had been abundantly argued, is unclear on the point of the beginning of life. Article 4.1 says literally: *Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.* Religious conservatives have long used the phrase “*in general, from the moment of conception*” to reject abortion rights and support criminalization of abortion. Feminists on the other hand have insisted, first, that the actual meaning of the phrase is ambiguous because the process of life that begins at conception does not necessarily entail personhood and, second, that the words “in general” meant States were free to protect rights to abortion.

Interpretation of the protection of the right to life afforded by the Convention is of extreme importance for legal activism, both for religious conservatives and for feminists. It not only affects international law, but also directly impacts domestic law, since regional constitutional law in Latin America tends to integrate the provisions of the Convention. Thus the unprecedented opportunity to elicit an authoritative interpretation of article 4 from the IACtHR had immediate legal relevance for domestic battles over abortion rights in a region characterized by contradictory impulses towards both liberalization and increased criminalization.⁵

Hence, from its inception as a seemingly obscure dispute over access to IVF in Costa Rica, the case grew into the major abortion rights case in the Americas, given the potential impact of an authoritative interpretation of the right to life. Over the years the list of amicus in the case grew to read like a “who’s who” of transnational conservative and feminist activism for and against abortion rights: all the major regional activists are present, including both NGO and human rights clinics and law professors. The relatively numerous amicus briefs (for the IAHR system) represented a wide range of positions on both sides of the international conservative Catholic and feminist divide, presented by an impressive range of influential regional and international actors, in turn indicating emerging alliances and strategies. The case became a landmark in the legal battles over sexual and reproductive rights between feminist and religious conservative, mostly Catholic, lawyers in the Americas. For feminists, *Artavia Murillo* was a triumph: the IACtHR adopted their interpretation of a progressive protection of human life *in utero*, linked to the protection of the pregnant woman’s health and well-being, and excluded rights for embryos outside a female uterus. For religious conservatives it was a serious setback to a concerted effort to convince the IAHR system that the Convention is in fact “a pro-life treaty,” a position that has influenced Costa Rica’s reluctance to date to implement the ruling of the IACtHR. In the following sections we describe the unfolding of the case, the social movement actors that mobilized for or against the ban, and the final decisions and its implications. We particularly focus on the moderating effect of legal mobilization.

Costa Rica bans IVF as a violation of the right to life

In January 1995 the news broke that the first “test tube baby” had been successfully conceived in Costa Rica, the result of the work of a single private clinic that first brought IVF to Costa Rica. The news was met with condemnation, particularly from the country’s Catholic Church hierarchy and congregations, an important factor given that Costa Rica’s 1949 Constitution establishes the Catholic Church as the official state Church. That same year, 1995, Pope John Paul II had published a major encyclical, *Evangelium Vitae*, which insisted human life was a sacred gift from God from its beginning, that embryos had the same dignity and right to respect as a child once born, and that discarding embryos killed innocent human creatures and was morally unacceptable.

In March 1995 the Costa Rican Health Ministry adopted a decree that regulated IVF for the first time. This stipulated that only six embryos that could be implanted at a given time, and specifically limited the intervention to heterosexual couples who were married or living in civil unions. Conservatives challenged the decree before the Constitutional Chamber (*Sala IV*) of the Costa Rican Supreme Court of Justice (henceforth the Constitutional Chamber.)

The conservative challenge wielded conservative Catholic arguments aligned with *Evangelium Vitae*, but precluding religious references. The claimant was Hermes Navarro del Valle, legal counsel for the national council of Bishops of Costa Rica.⁶ In his brief, Navarro asked the Constitutional Chamber to declare the Health Ministry's decree and the procedure of in vitro fertilization unconstitutional, as they violated the right to life of the embryos discarded in the IVF procedure. The argument built on the view, widely and transnationally disseminated by Catholic scientists and lawyers, that human personhood begins at the moment a distinct chromosome emerges from the encounter of human egg and sperm. The biological product of conception thus defined deserves the respect and consideration due to a human being.

In 2000 the Constitutional Chamber, after five years of deliberation, banned IVF in Costa Rica, agreeing with the plaintiff that life begins at conception, that this life has personhood as well as human rights within Costa Rica's legal system, and that the surplus embryos produced by IVF procedures had dignity and human rights that were violated by IVF. Once more the conservative position precluded any reference to religious authority, but reflected the Catholic Church's position as described above. Additionally, the Court extensively cited the Convention and other documents produced within the Inter-American system, interpreting these to insist there is personhood and full human rights from the moment of conception.

Plaintiffs take their case before the IACmHR

In 2001 twelve Costa Rican couples brought a case before the Inter-American Commission of Human Rights (henceforth IACmHR), claiming the ban violated their rights to family, equality and non-discrimination. The case was not brought as part of any focused litigation campaign, but rather by former patients of the *Instituto Costarricense de Fertilidad*; married, heterosexual couples denied access to IVF following the 2000 ruling. In 2004 the IACmHR admitted the case.

Over the next six years transnational activists, conservative as well as feminists, and the IACmHR itself, would slowly come to understand the relevance of Artarvia Murillo for the wider struggle for and against abortion rights. The IACmHR received some amicus during this period, three for the claimants (presented by the Center for Reproductive Rights –CRR- in 2004, Yale University Law School Human Rights clinic in 2005 and the University of Toronto in 2009) and two for the defendants (Human Life International –HLI- in 2005 and University of St Thomas' School of Law in 2008). Amici mobilization around the case was still weak.

The IACmHR declined to address the Costa Rican (and Catholic) argument that life, and full human personhood and rights, begin at conception. In its final report on the merits of the case in 2010, the IACmHR attempted to find a middle ground and skirt the issue of abortion rights by avoiding an interpretation of article 4, focusing instead on IVF.⁷ It decided unanimously that the Costa Rican ban violated the right to private life (Article 11) and to family life (Article 17), arguing that there were less restrictive alternatives to protect the right to life. The IACmHR also linked the case to regional practice, pointing out the fact

that Costa Rica was the only country in the western hemisphere to enforce a total ban on IVF, thus opening a door to delinking the case from abortion and abortion rights, since there is no similar consensus on criminalization of abortion. [The case could then remain as decided by the IACmHR, or, following the system's procedure, be taken by the IACmHR to the IACtHR for a binding judicial decision.](#)

Neither feminists nor religious conservatives were pleased with the IACmHR report. Feminists were concerned it opened the door for an authoritative IACtHR interpretation of article 4 as recognizing embryonic personhood, precisely because the IACmHR avoided the issue and linked the case to regional practice, which criminalizes abortion. Conservatives were also concerned interpretation could go the other way, and two leading legal figures in the regional antiabortion movement, Ligia De Jesus and Álvaro Paúl, published separate law review articles in 2011 examining article 4 and arguing it included a clear right to life for the unborn and recognition of legal personhood for embryos.⁸ [Both camps braced for an IACtHR decision, inevitable given Costa Rica's defiance of the orders contained in the report.](#)

Transnational activist networks mobilize before the IACtHR

Costa Rica accepted the decision, but never implemented the recommendations. This spurred the IACmHR to take the case to the IACtHR. In submitting Artarvia Murillo to the IACtHR, the IACmHR argued the case raised issues of Inter-American public order, meaning it had important implications for a wider understanding of the rights protected by the Inter-American human rights system. Specifically, the IACmHR argued, the case referred to the scope and content of the rights recognized in article 11 and 17 (privacy and the right to family life), [but the question in everyone's mind was abortion.](#)

[It was before the IACtHR that Gretel Artavia became a major case for both feminist and conservative transnational social movements, based for the most part out of the United States \(US\).](#) Both were concerned with the IACtHR's possible interpretation of article 4. Of the 39 amicus presented in this case, 16 were clearly conservative and 13 clearly feminist. The conservative briefs defended the IVF ban, arguing generally that life begins at conception and embryos have a right to life; feminist briefs argued the ban represented a disproportionate violation of a number of women's and couple's rights, especially the rights to health, privacy and to have a family. The remaining 10 amicus took issue with conservative claims about scientific evidence, especially the claims that the embryo was a person and that IVF was harmful to the health of both fetuses and women.

Many of the feminist briefs came from the United States and Canada, signaling these countries' centrality to feminist legal mobilization. The CRR (Center for Reproductive Rights) presented two: one put forward by its regional Latin American Office, and the other by the New York office, written together with Rebecca Cook and Bernard Dickens of the University of Toronto. The CRR is the leading advocate for sexual and reproductive rights in the international arena, as well as a well-known domestic organization. Cook and Dickens both teach at the University of Toronto and for many years Cook has co-directed the International Reproductive and Sexual Health Law Program. Two United States

universities with a history of feminist advocacy in international arenas also submitted amicus: the American University and Yale Law School, both from their human rights clinics. The additional US-based amicus came from Catholics for Choice (CFC), originally a US-based NGO with a long history of confrontation with the Catholic Church's hierarchy over abortion and contraception rights.⁹

The case also activated feminist networks working on sexual and reproductive rights in Latin America. One amicus was submitted by an alliance of reproductive rights NGO from Colombia, Mexico, and Argentina and from the Latin America branch of the International Pregnancy Advisory Service (IPAS), based in the US. An alliance of sexual rights advocates in Brazil submitted another brief, as did a human rights clinic at the Universidad de los Andes in Bogotá and the Colombian human rights NGO, Dejusticia. Two professors at the Universidad Torcuato di Tella in Argentina, one of whom had studied at the University of Toronto, also submitted feminist amicus. Only two feminist amicus came from Costa Rica and both seem to have links with the same small independent NGO, the *Colectiva por el Derecho a Decidir* (CDD).

A number of briefs were presented by liberals not directly affiliated with the feminist movement, but supportive of IVF as a safe and ethical medical procedure. Perhaps the most impressive of these amici was submitted by the association of Latin American doctors of obstetrics and gynecology, an umbrella organization based in Panama that includes several national chapters with thousands of members. Further liberal briefs were submitted by human rights organizations, according to our interviews in response to requests from feminist activists [who employed a deliberate strategy to diversify the profile of the briefs supporting the plaintiffs.](#)

On the conservative side, the transnational amicus also outnumbered the Costa Rican briefs, revealing the importance of the case for the regional and global anti-abortion movement. [Again US-based organizations were quite present, but so were organizations with links to the Vatican.](#) These briefs for the most part trace networks that adopt Catholic definitions, framing them not as religious but as bioethics. The first transnational amicus emphasizing Catholic bioethics is signed by a group of Italian pro-life politicians and bioethics professors who teach at the Catholic University of the Sacred Heart in Rome, as well as representatives from the US-based organizations Human Life International (HLI) and the Fund for the Defense of Bioethics (BD), in addition to a little known Mexican association "Crece Familia" (CreceFam.) The presence of HLI and BD is particularly significant: HLI, like the Population Research Institute (PRI), which participated in various amici, was founded by US Catholic priest Paul Marx to promote anti-abortion views around the world.

The remaining briefs further illustrate the strong presence of Catholic bioethics as the main conservative legal mobilization frame against IVF. This is a recurrent reference in the amici signed by a group of Peruvian bioethics specialists from a Catholic University and the second by a group of Peruvian NGO linked to the PRI. Two additional amici were submitted by conservative legal scholars; the first by Álvaro Paul and by the directors of a number of Catholic US-based NGO (the Alliance Defense Fund (ADF, now Alliance Defending Freedom), C-Fam (the leading Catholic NGO at the United Nations) and Americans United for Life. Paul is a professor at a Catholic University in Chile and a

respected expert in the Inter-American legal system. The second was submitted by Ligia M. De Jesús, professor at the Ave Maria School of Law and author of several academic articles defending conservative Catholic interpretations of the Convention; together with Rafael Nieto Navia, Professor at the Pontificia Universidad Javeriana in Bogota (a Jesuit University) and a former judge of the IACtHR. Their transnational links with Catholic bioethics networks might explain some of the other amici, such as those from the President of the Spanish Association of Bioethics and Medical Ethics, from bioethics activists in Mexico, and a brief from a Pro-life doctors association in Guatemala.

Catholic views on the beginning of human life are the common denominator of many of the conservative amicus briefs in the *Atarvia Murillo* case, as evidenced by their affiliations and arguments. However, many of the claims made in other forums are not present in the amici: for example none expressed the conservative hostility toward feminism so often framed in the critiques that feminist ideas promote both “gender ideology” and a “culture of death”.¹⁰ [Similarly, feminist organizations eschewed the more polemic historical arguments about achieving women’s liberation through reproductive freedom. The next section analyzes this moderating trend affecting both movements.](#)

The moderating effect of legal mobilization

While some positions were more radical and others more moderate, the majority of the arguments presented in the briefs were moderate in comparison with each movement’s framing of the issues for its supporters: a deep religious faith for conservatives, and a strong commitment to women’s liberation for feminists. [Our conclusion is that all actors moderated their claims before the IACtHR.](#)

Feminist lawyers, usually adamant in their rejection of female stereotypes and their central defense of female autonomy, [strategically](#) appealed instead to women’s rights to health, privacy and to a family, as well as the right to equality of couples and infertile women. These arguments defending abortion rights appear in the feminist amicus in a more moderate form than they do in general feminist theory and social movement claims. For example, the briefs never mention the right to choose pregnancy as a human right derived from the rights to autonomy and privacy, and generally avoid making the link between the IVF case and abortion rights. [The CRR for example describes reproductive choice as the core of its organizational vision: “We envision a world where every woman is free to decide whether and when to have children; where every woman has access to the best reproductive healthcare available; where every woman can exercise her choices without coercion or discrimination.”](#)¹¹ In this vision, abortion is a constitutional right as well as an international human right.

In addition to avoiding hard-line positions defending abortion as a human right, the feminist briefs also generally avoided the movement’s usual emphasis on women’s point of view and experience. References to the case’s specific victims came from the plaintiffs themselves, including both men and women and, some plaintiffs appealed to stereotypical notions of women in order to characterize the harms caused by the IVF ban, for example that women’s natural urge to motherhood was harmed by the ban. These arguments remained unchallenged.

In addition to the exclusion of autonomy arguments, and the appeal to motherhood, legal language and techniques of interpretation act as a moderating force in framing the feminist amicus, especially appeals to proportionality and balancing as techniques of interpretation. There is an inherent moderation in saying that one's claims must be balanced against those of the other side, or that all laws, adverse or favorable, must be applied taking into account a proportionate relation between the rights protected and the harms caused by this protection. Hence the value of human life since conception must be protected but only in a fashion consistent with the rights of pregnant women carrying this life in their uterus. [The Center for Reproductive Rights argues in its amicus:](#)

“While States may take certain measures in order to advance an incrementally-growing interest in developing human life, this is different than granting legal rights prior to birth because the granting of legal rights creates an inherent conflict between the rights of women and the embryo. The latter characterizes the Costa Rican Supreme Court's decision, which states that even before gestation begins, the embryo is already entitled to all human rights to such an extent that these rights trump and nullify women's fundamental human rights. This characterization is impermissible under international human rights norms, as it inevitably infringes upon women's human rights as well as the principle of proportionality.”

Proportionality and balancing are similar in that both call for interpretation that recognizes the importance of the different rights in question, and demand that the protection of one right (in this case the right to life) be respected in such a way that the harm to other rights (in this case family life, autonomy and privacy) is *proportionate* to the benefits of protecting the right to life. These techniques of legal argumentation entail recognition of at least some of the claims of the counterpart and address them directly without completely denying their validity. This is probably the strongest feature of the feminist briefs in terms of the culture of the IAHR system, which has frequently emphasized proportionality as an important form of interpretation of the rights protected in its treaties.

The strength of feminist appeals to proportionality can be directly traced to the feminist movement's high level of comfort with the culture of international human rights, signaling another distinct feature of the international women's movement: its legalism. The claim that women's rights are human rights has been a staple of the transnational feminist movement for over two decades, which has argued that the defense of sexual and reproductive rights derives from international human rights treaties. The orientation toward rights-claims includes feminist appropriation of Catholic appeals to human dignity, the right to life and the right to a family. This appropriation is especially striking in the case of the right to a family - a conservative aspiration that in these briefs becomes closely linked to the right to opt for IVF.

Conservative activists also moderated their claims, eschewing an important portion of their mobilizing frames in order to litigate before the IAHR system. Perhaps most importantly, they excluded all mention of faith, God and Church. [The importance of faith however is clear in the websites of the conservative NGO that submitted amicus in this case. HLI for example describes itself as “pro-life missionaries.”](#) This is its description of its mission:

“HLI defends both the God-given life and dignity of all human persons from conception until natural death, and the natural family based on marriage—the fundamental human institution defined by a lifetime union between one man and one woman that is open to life. As followers of Jesus Christ and members of the Catholic Church, our goal is to build a Culture of Life and of Love around the world through education, outreach, and advocacy.”¹²

These types of religious claims do not appear in the conservative amicus, in line with trends among Catholic conservative lawyers who have eschewed from their arguments the religious basis of their conviction of the full humanity and personhood rights of human life in utero.¹³ In addition to excluding faith-based arguments, other frames closely linked to the Catholic Church also disappeared from the framing of the IVF issue, such as the references to “gender ideology” and the “culture of death” as well as general references to good and evil, to love and prayer and to God and his will. References to nature were decoupled from the Catholic link between nature and God as creator, and to a natural law that would predate state law and be outside state purview.

Instead, the conservative amicus focused on developing two lines of argument. First, those [defending the embryo’s right to life from conception, arguing conception is the moment of fertilization, when distinct DNA emerges](#). Second, they used arguments referring to appropriate techniques for legal interpretation of article 4. The references to the right to life are repeated across the different briefs, while the latter two are found in the amici submitted by conservative legal scholars. The arguments on legal interpretation (the recourse to the original intent of the framers, and respect for States’ margin of appreciation of human rights treaties) are associated with legal conservative interpretations. Originalist arguments are central to the conservative turn in US constitutional law, and margin of appreciation doctrine has a similar function in the European Court of Human Rights. However, these associations are contextual as there is nothing inherently conservative in appealing to them; they are not however the dominant form of interpretation in the IAHR system, which has overtly rejected both originalism and margin of appreciation. In this context, they served conservative claims, by showing the intent of the framers had been to allow the prohibition of abortion through Article 4, and giving Costa Rica the margin of appreciation needed to pass the IVF ban. In conclusion, conservatives, like feminists, used more moderate arguments than those in evidence in in their websites and in street protests against abortion.

Outcomes: feminist triumph but careful response to conservative arguments

In 2012 the IACtHR decided against Costa Rica and ordered both remedies against the specific victims, and more generally as a measure of non-repetition the repeal of the ban on IVF. The Court concluded that the prohibition of IVF violated the rights mentioned by the IACmHR in its report: the rights to personal integrity, personal liberty, privacy, and the rights of the family. It went beyond the commission, arguing the right to privacy includes reproductive autonomy, and linking sexual and reproductive health to the right to the benefits of scientific progress, to conclude in practice these rights are nullified by the IVF ban.

The court's judgment clearly inclined towards the interpretations, both substantive and in forms of interpretation, put forward in the feminist briefs. While it does not mention or cite the amici in its briefs, it does accept the argument of incremental protection of embryonic life, ruling that the embryo is not a rights-holding person but the State does have an interest in protecting embryos, an interest that accrues gradually during the course of pregnancy. It also concurred with the liberal medical amici that conception takes place not at fertilization but rather at the implantation of an embryo into a woman's body. It rejected the argument that personhood is present in fertilized ovum to the attribution of "metaphysical attributes" to embryos, and said that the adoption of these religious conceptions would imply imposing a certain type of belief on people who do not share in these beliefs. It specifically said the phrase *in general* -that defines the right to *life in general from the moment of conception*-could not be interpreted in defiance of the need to protect the rights of pregnant women, precluding balancing and proportionality.

In terms of forms of interpretation, the decision specifically rejected the margin of appreciation, arguing "this Court is the ultimate interpreter of the Convention," and also adopting feminist arguments that rejected this possibility. Likewise the decision did not openly reject a historic interpretation of the treaty, but rather echoed the CRR's interpretation of the *travaux préparatoires* as excluding the possibility of fetal personhood. It also rejected originalism by saying historic interpretation coexisted with the recognition that treaties are living instruments that evolve.

After more than two decades of failure, the transnational feminist movement finally succeeded in securing a ruling from the IACtHR that could potentially be used to support national and regional struggles to decriminalize abortion. Similar positions had previously been taken by constitutional courts in Mexico, Argentina and Colombia, but the fact that the movement and countermovement legal activism eventually prompted the IACtHR to define article 4.1 of the Convention signaled the fundamental importance of the regional human rights system for national battles over abortion, contraception and assisted reproduction. Because Inter-American Court decisions are binding on the 22 countries that have ratified the American Convention on Human Rights, Artarvia Murillo has effects for legislation and policies regulating access to emergency contraceptives, therapeutic abortion, embryonic stem cell research, and reproductive health care more generally.

Domestically, the IAHcHR did not completely settle the matter, although it tilted the scale in favor of feminist and liberals that opposed the ban. In September 2015 Costa Rican President Luis Guillermo Solís (2014-2018), following a public follow-up hearing on the case in the IACtHR, issued a presidential decree finally regulating IVF. However, once more on 3 February 2016 the Constitutional Chamber of the Costa Rican Supreme Court declared the decree unconstitutional, this time because it violated the legal reserve that meant that only the legislature could regulate in human rights matters, including IVF. While apparently deciding only on matters of competency, the Constitutional Chamber insisted this was a human rights issue concerning both the mother and embryos' right to life.¹⁴ A few weeks later, on 26 February, the IACtHR responded by issuing additional orders demanding compliance; the issue remains open to contestation.¹⁵

Conclusions

Despite the slow pace of litigation in the IAHR system, it has increasingly become a focus for social movement activists who attempt to secure favorable interpretations or framings of human rights instruments. In contrast to other judicialized rights disputes in the IAHR system -for example, on indigenous rights, where movement activists confront the state- in sexual and reproductive rights transnational movement and countermovement directly engage each other.

Our conclusion shows the moderating effect of movement and countermovement engagement in court extends to the international arena.¹⁶ As explained by Siegel for the United States, actors discipline and shape their claims into reasoned legal arguments that are intelligible to officials in the IAHR system and its own forms of legal arguments. Part of this intelligibility has to do with the formality and rules of appellate argumentation in courts generally, which emphasize legal analysis. This article contributes to the literature on legal mobilization on abortion issues, which tends to focus on domestic scenarios and fails to consider the dynamics of movement and countermovement confrontation in courts. It does so by arguing that moderation of social movement claims is probably inherent to legal mobilization regardless of the scale (domestic or international).

Artarvia Murillo is significant in that it forced movement and countermovement to engage with each other's claims to a far greater extent than had previously occurred. It also signaled the growing conservative legal mobilization, and the secularization of previously faith-based invocations, for example deploying arguments from the field of bioethics to bolster claims that life begins at conception. The feminist movement, in turn, was obliged to engage with the arguments of countermovement conservative lawyers, even incorporating aspects of their arguments into their own briefs in order to refute their broader claims about the Convention and its interpretation. In general and at least in the short term, this contentious engagement served to legitimate the Interamerican system, even though the outcome of Artarvia Murillo clearly favored one side in the debate, a side that already had significant, albeit contested, influence in the system.¹⁷

However, there is an open possibility of backlash, and also of delegitimation of the IACtHR. It must be noted that while the IACHR's 2010 report recognizes the importance of the right to life argument in Costa Rica's case (making an explicit reference to the Constitutional Chamber's decision which explicitly says the embryo has the same right to life as a human person), the IACtHR -while careful to acknowledge opposing arguments- rejected the Constitutional Chamber's interpretation of article 4. In doing so, it rejected the possibility that national courts could be authoritative interpreters of the Convention, an issue that could in turn lead to backlash from national judiciaries. Alvaro Paúl and Ligia de Jesus have published law review articles lamenting Artarvia Murillo and signaling a possible loss of legitimacy of the IACtHR stemming from the decision, while at the same time attempting to steer the system back to more conservative interpretations and limit the impact of the court's ruling as precedent for abortion rights in the region.¹⁸ This could

signal further backlash in domestic courts if they adopt Paúl and de Jesus' arguments and if the case for a national margin of appreciation of the Convention gains clout within the states party to the Convention.

Nonetheless, in the broader context of the IAHR system, adopting the affirmation that article 4 gave the embryo a prenatal right to life, and upholding Costa Rica's ban in consequence would have been a significant challenge to the status-quo, not only in terms of the regional system, but also in terms of the other international systems with which the IACtHR finds itself in dialogue, particularly the European Human Rights System.

In this article we have identified a moderating effect of contentious engagement within the IAHR system, an effect that may possibly extend to both feminist strategizing after the decision and to conservative reactions to it. As we have shown in our analysis of this case, in which we focus particularly on the amicus briefs presented by different organizations and individuals, the conservative side limited its references to faith and its close relation to the Catholic Church hierarchy and dogma, insisting instead on originalist and textual interpretations of the Convention, as well as on scientific evidence of the beginning of life and of harms allegedly derived from IVF. On the feminist side activists limited their emphasis on women's autonomy and reproductive choice, and insisted on balancing rights and proportionality, and recruiting liberal scientists to disprove the scientific evidence brought forth by conservatives. At the end of the day, feminist arguments won the case, but it was the more moderate frame, not the original claims for autonomy and abortion rights, that prevailed [within the IAHR system. Further research is needed in order to explore the relationship between feminist strategies in court \(which in this case clearly involved moderation in order to maximize the possibilities of a favorable judgement\) and broader social movement repertoires and actions on sexual and reproductive rights beyond the courts, which may entail moderation and/or radicalization, depending on other factors, such as internal movement dynamics and structures of opportunities. Certainly feminist activists in countries throughout Latin America are reflecting on how to use the Artavia Murillo judgement in future domestic litigation. At the same time issues of backlash and domestic compliance by Costa Rica are still unfolding.](#)

In conclusion, we argue that evidence from Artavia Murillo shows legal mobilization before international human rights courts moderates social movement claims, as rivals respond to each other and as they argue within the frame of courts' norms and language. [It is clearly difficult to generalize from a single case and a limited set of materials: further research should explore this effect in other cases and courts, including the particularities of the international system where, unlike national courts, there is no clear engagement with national publics and disputes but rather with a more diffuse transnational arena.](#)

Endnotes

¹ See i.e. Linda Greenhouse and Reva Siegel, Before and "After Roe v. Wade: new questions about backlash" 120 Yale Law Journal 2028 (2011). Myra Max Ferree et.al. (2002) *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States*, Cambridge University Press; Alba Ruibal (2014) "Movement and Countermovement: a history of abortion law reform and the backlash in Colombia 2006-2014" *Reproductive Health Matters*, Volume 22 , Issue 44.

² But see Ruibal (Op.Cit), Siegel (Op.Cit.), Deanna Rohlinger (2002) “Framing the abortion debate: organizational resources, media strategies and the movement-counter movement dynamics” *Sociological Quarterly* Fall; 43(4):479-507.

³ For a useful review of the legal mobilization literature see Lisa Valhala “Legal Mobilization” *Oxford Bibliographies, Political Science* (2011). Available at <http://oxfordindex.oup.com/view/10.1093/obo/9780199756223-0031> See also Epp, C.R. (1998). *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: The University of Chicago Press. McCann, M. (2006). Law and Social Movements: Contemporary Perspectives. *Annual Review of Law and Social Sciences*, 2, 17-38.

⁴ Lauren B. Edelman, Gwendolyn Leachman, and Doug McAdam (2010) “On Law, Organizations, and Social Movements” *Annual Review Law Social Sciences* 6:653–85.

⁵ Paola Bergallo and Agustina Ramón Michel, “Abortion” in Juan F. González-Bertomeu and Roberto Gargarella (eds), *The Latin American Casebook: Courts, Constitutions and Rights* (New York: Routledge 2016): 36-59, pp.45-6.

⁶ http://www.nacion.com/In_ee/2000/octubre/12/pais1.html

⁷ Report No.85/10 Case 12,361 Gretel Artavia Murillo et al (in vitro fertilization) July 14, 2010.

⁸ Lúgía de Jesús, “Post baby Boy vs. US Developments in the Interamerican System of Human Rights: Inconsistent Application of the American Convention’s protection of the right to life from conception”. (2011) 17 *Law and Business Review* 435; Alvaro Paul, “Constitutional Conceptions the Unborn and the American Convention”. (2011-12) 4 *Loyola University of Chicago International Law Review* 210-247.

⁹ Patricia Miller (2014) *Good Catholics. The Battle over Abortion in the Catholic Church* (Berkeley and London: University of California Press, 2014).

¹⁰ For gender ideology see: Congregation for the Doctrine of the Faith (2004) *Letter to the Bishops of the Catholic Church on the Collaboration of men and women in the Church and in the World*. At: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html for culture of death see Pope John Paul II (1995) *Encyclical Letter Evangelium Vitae* At: http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html

¹¹ <https://www.reproductiverights.org/about-us/mission>

¹² <https://www.hli.org/about-us/our-mission/>

¹³ Julieta Lemaitre, “Catholic constitutionalism on sex, women and the beginning of life”. In Rebecca Cook, Joanna Erdman and Bernard Dickens, ed. *Abortion Law in transnational perspective*. (University of Pennsylvania Press, 2013); *Laicidad y resistencia: movilización católica contra los derechos sexuales y reproductivos en América Latina*. (Instituto de Investigaciones Jurídicas, Universidad Autónoma de México, México, 2013); Juan Marco Vaggione, “La ‘Cultura de la Vida’: Desplazamientos estratégicos del activismo Católico conservador frente a los derechos sexuales y reproductivos”, *Religião e Sociedade*, Rio de Janeiro, 2012. Vol.32(2): 57-80..

¹⁴ <http://www.elmundo.cr/sala-iv-anula-decreto-que-autorizaba-la-fertilizacion-in-vitro-y-pide-a-diputados-aprobar-ley/>

¹⁵ Inter-American Human Rights Court. Caso Artavia Murillo y otros ("Fertilización In Vitro") Vs. Costa Rica. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos de 26 de febrero de 2016.

¹⁶ Reva B. Siegel, 2006 “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA” *Faculty Scholarship Series*. Paper 1097.

http://digitalcommons.law.yale.edu/fss_papers/1097; Siegel, Reva B. and Post, Robert C., 2007. “Roe Rage: Democratic Constitutionalism and Backlash”. *Faculty Scholarship Series*. Paper 1136, http://digitalcommons.law.yale.edu/fss_papers/1136; Greenhouse, Linda and Reva B. Siegel.

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¹⁷ Alba Ruibal, Feminismo frente a fundamentalismos religiosos: mobilização e contramobilização em torno dos direitos reprodutivos na América Latina. 2014. *Revista Brasileira de Ciência Política*; Año: 2014 p. 111 – 138; Movilización y contra-movilización legal. Propuesta para su análisis en América Latina. 2015. *Política y Gobierno* vol.22 no.1 México ene./jun.

¹⁸ Ligia de Jesús, A Pro-Choice Reading Of A Pro-Life Treaty: The Inter-American Court On Human Rights' Distorted Interpretation Of The American Convention On Human Rights In *Artavia V. Costa Rica*. (2014). 32 *WIS. INT'L L.J.* 223; The Inter-American Court on Human Rights' judgment in *Artavia Murillo v. Costa Rica* and its implications for the creation of abortion rights in the Inter-American System of Human Rights. (2015). 16 *OR. REV. INT'L L.*; Alvaro Paul, Decision-Making Process of the Inter-American Court: An Analysis Prompted by the 'In Vitro Fertilization' Case. (2015) 21:1 *ILSA Journal of International & Comparative Law*, Florida, Estados Unidos, pp. 87-130.