

November 10, 2010

Inter-American Commission on Human Rights  
1889 F Street N.W.  
Washington, D.C., 20006

**RE: Report No. 85/10, Case 12.361 (Costa Rica)**

The Costa Rican media recently reported<sup>1</sup> that the Inter-American Commission on Human Rights communicated report No. 85/10, the preliminary report for Case 12.361, to Costa Rica on August 23, 2010. This report establishes that decision No. 2306 of 2000 of the Costa Rican Constitutional Court, prohibiting in vitro fertilization (hereinafter IVF) violated the right to be free from arbitrary interference with one's private life, the right to found a family, and women's right to equality.

As signatories to this letter, we applaud the honorable Commission's decision, which, true to the Commission's work in defense of women's human rights, found that the prohibition of IVF represented the obstruction of the full enjoyment of life, personal identity, and individual autonomy of those who decide to have biological children but who require access to in vitro fertilization in order to do so. As is noted among the reasons offered in Costa Rica's proposed law on in vitro fertilization and embryo transfer (*Ley sobre Fecundación in Vitro y Transferencia Embrionaria*), recently proposed by the executive branch, the Commission's decision echoed international human rights jurisprudence on IVF;<sup>2</sup> for example, the Commission noted that the decision to bear children belongs to the most intimate sphere of a woman's private and family life, and, consequently, state interference in this respect should be minimal.

As a result, and as described in the aforementioned bill, the honorable Commission issued a series of recommendations to Costa Rica's government that urge it to adopt proportionate measures allowing IVF in a manner that balances the fundamental rights to found a family, to privacy, to personal autonomy, and to equality with the state's legitimate interest in safeguarding the legally protected right to life. Unfortunately, the state appears to continue to disregard women's rights and to arbitrarily interfere in the most private aspects of its citizens' lives. The bill through which Costa Rica claims to follow the Commission's recommendations clearly contradicts guidelines for striking a balance between the state's interest in protecting fertilized eggs with a minimum level of interference and the protection of women's fundamental rights. Costa Rica's proposed IVF regulations make the procedure inaccessible by submitting women to enormous economic, emotional, psychological, and medical burdens, besides being incompatible with the manner in which the assisted reproduction procedure is meant to function. Furthermore, the proposed law is potentially harmful to women's health.

To begin with, the bill allows IVF to be carried out as long as "all the fertilized eggs in one cycle of treatment are transferred to the same woman who produced them" (article 8). In vitro

fertilization is a technique that requires the extraction of a woman's eggs from her uterus (which is accomplished by means of a surgical intervention); various eggs must be extracted because not all are successfully fertilized, and many of those that are fertilized do not develop into zygotes and subsequently embryos. If the cellular division of the fertilized eggs is successful, usually the embryos are not implanted immediately but rather after they reach a certain stage of maturity. The laboratory constantly monitors the quality of the embryos to determine which ones are developing well enough to be implanted and which ones stop developing or carry genetic defects that would prevent a successful pregnancy.<sup>3</sup> The proposed law would require a woman undergoing IVF to transfer all of the eggs—including those that are not developing successfully, that have genetic defects, or that are simply unviable—potentially violating the rights to health and to life of the women who, in spite of the burden imposed by these regulations, decide to seek the treatment.

Last year, Italy's Constitutional Court declared unconstitutional an IVF law that prohibited the freezing of embryos and required the woman to transfer all of the embryos produced in each treatment cycle. In arriving at its decision, the Court considered factors such as the regulations' limited effectiveness on the procedure as well as the fact that the regulations effectively subjected women to several complete IVF cycles (including stimulation of the ovaries to produce eggs), contradicting principles of good medical practice for this treatment. In addition, the Court emphasized the risks involved in requiring a woman to transfer embryos that have abnormal development, which could ultimately put the woman's life in danger and require a therapeutic abortion.<sup>4</sup> Along the same lines, on July 6 of this year, Germany's Federal Court of Justice allowed for preimplantation genetic screening for IVF embryos, with the intention of avoiding the transfer of embryos that are developing abnormally, given the potential negative consequences for a woman's life and health.<sup>5</sup>

Costa Rica's proposed law, on the other hand—keeping in mind that each complete IVF cycle costs between US\$7,000 and US\$15,000<sup>6</sup> and that the average economic capacity of a Costa Rican woman to cover such costs is extremely low<sup>7</sup>—could lead women to fertilize and transfer many eggs in the first cycle, in the hopes that one of them is implanted. This would contradict the medical indications for IVF, which recommend implanting just a few embryos for each attempt (for example, a woman under 35 years old should not receive more than two embryos at once) because multiple pregnancies increase the risk of spontaneous abortion, obstetric complications, premature births, and neonatal mortality, with the potential to cause permanent damage to the health of the woman and her future infant.<sup>8</sup>

In order for a woman in Costa Rica who requires IVF to avoid the risk of multiple pregnancies, she would need to undergo various complete cycles, assuming extraordinary costs that only a very small number of women in the country could manage. This is due to the fact that articles 8, 19, 20, and 21 of the bill not only prohibit—but penalize—the freezing or preservation of embryos for future use. It is widely understood that in the majority of cases, various transfer cycles are required before an embryo is successfully implanted in a woman's uterine wall.<sup>9</sup>

All of the above demonstrates that the proposed law, in addition to potentially harming women's health, is discriminatory because it creates a system that necessarily increases the costs of

successfully utilizing IVF, making it impossible for virtually the entire population to access the service—unless the woman who undergoes IVF decides to expose herself to multiple pregnancies and the accompanying risks to her health.

Costa Rica’s proposed law is also disconcerting because it prohibits and penalizes (see articles 8 and 20) the donation of embryos and the transfer of embryos produced with donated ovaries. Prohibiting the transfer of fertilized donated ovaries jeopardizes the right to form a family and the right to privacy of those women who require IVF because their own eggs are not adequate for conceiving; furthermore, it violates the rights of women who wish to donate an egg to help another woman conceive. In this respect, it is important to remember that the donation and use of sperm in Costa Rica is neither controlled nor prohibited, and that women are permitted to donate and to receive donations concerning any other part of their body. This law would grant the state an overwhelming level of interference in women’s control over their reproductive capacities, which, again, is discriminatory (and therefore in violation of articles 24 and 1.1 in relation to articles 11 and 17 of the American Convention).

Finally, the proposed law contains other elements beyond discrimination. Article 3 of the bill establishes that IVF is available only to women “in good physical and mental health,” curtailing the likelihood that a woman who, for example, has epilepsy, is HIV positive, or simply has a glucose problem can access the treatment and fulfill her decision to be a mother. This is particularly ironic in light of the fact that article 7 expressly prohibits discrimination against embryos for reasons of “genetic patrimony” while at the same time discriminating against women who, due to genetic defects, cannot meet the conditions of “physical and mental health” demanded by the law.

Costa Rica’s desire to reestablish IVF under such invasive conditions for the liberties and fundamental rights of its citizens is because the state continues to consider (as did the Constitutional Court in its decision to ban IVF) that a fertilized egg is a human being with the same rights as a woman (see article 6 of the proposed law). This interpretation not only contravenes the scientific fact that a fertilized egg is not a person<sup>10</sup> but also seeks to subordinate the rights of a woman (to decide the terms under which she exercises her reproductive capacity and therefore her identity and life project) to the “rights” of a biological entity that is a fertilized egg.<sup>11</sup> While the proposed law complies *prima facie* with the Commission’s recommendation to reinstate the practice of IVF in Costa Rica, in essence it destroys the balance for which the Commission calls. As structured, the law effectively eliminates any equilibrium between the interests in ethically regulating IVF and respecting women’s fundamental rights, as it represses the latter.

If the honorable Inter-American Commission on Human Rights were to condone the bill in question as a protective measure for Costa Rican women’s rights to privacy, to equality, and to found a family, it would be validating a measure that ignores precisely those rights that the Commission seeks to protect through its preliminary report No. 85/10. Simultaneously, it generates a precedent that deems acceptable the state’s disproportionate intrusion in women’s reproductive capacity and decision to be mothers and leaving unresolved the situation of infertile women in Costa Rica who require IVF in order to conceive.

Therefore, we respectfully request that the honorable Commission, true to its spirit of protecting human rights and women's rights, and following the guidelines from its own preliminary report No. 85/10, reject Costa Rica's proposed law as a measure that complies with international human rights standards that this very Commission has requested Costa Rica respect, protect, and fulfill.

Thank you for your consideration,

### **Costa Rican Organizations**

1. Alianza de Mujeres Costarricense
2. Asociación Colectiva por el Derecho a Decidir
3. Asociación Costarricense de Humanistas Seculares
4. Asociación Demográfica Costarricense
5. Centro Feminista de Información y Acción (CEFEMINA)
6. Centro de Investigación y Promoción para América Central de Derechos Humanos (CIPAC)
7. Ciudadanía por los Derechos Humanos
8. Coordinadora contra la discriminación por orientación sexual
9. Foro Autónomo de Mujeres
10. Mujer No Estás Sola
11. Red Feminista contra la Violencia hacia las Mujeres

### **Regional and International Organizations**

1. Anis - Instituto de Bioética, Derechos Humanos e Género, Brazil
2. Balance Promoción para el Desarrollo y Juventud AC, Mexico
3. Catholics for Choice, Washington, DC, United States
4. Católicas por el Derecho a Decidir, Bolivia
5. Católicas por el Derecho a Decidir, Mexico
6. Centro por la Justicia y el Derecho Internacional (CEJIL)
7. Center for Reproductive Rights, New York, United States
8. Centro de Promoción y Defensa de los derechos sexuales y reproductivos (PROMSEX), Peru
9. Comité de América Latina y el Caribe para la Defensa de los Derechos de la Mujer (CLADEM)
10. Consorcio Latinoamericano contra el Aborto Inseguro (CLACAI)
11. Cotidiano Mujer, Uruguay
12. Ddeser - Red por los derechos sexuales y reproductivos, Mexico
13. Elige Red de Jóvenes por los derechos sexuales y reproductivos A.C. (REDLAC Mexico), Mexico
14. Equidad de Género, Ciudadanía, Trabajo y Familia, A.C., Mexico

15. Federación Argentina de Medicina General (FAMG), Argentina
16. Foro de Mujeres y Políticas de Población, Mexico
17. Fundación Educación para la Salud Reproductiva (ESAR) – Bolivia, Bolivia
18. Fundación Oriéntame, Colombia
19. Fundación Desafía, Ecuador
20. Gire, Mexico
21. Grupo multisectorial en VIH-sida e ITS del Estado de Veracruz, Mexico
22. Ibis Reproductive Health, Oakland, California, United States
23. Instituto Peruano de Paternidad Responsable (INPPARES), Peru
24. Instituto de Salud Popular (INSAP), Peru
25. International Women's Health Coalition
26. Ipas
27. Ipas, Bolivia
28. Ipas, Brazil
29. Ipas, Central America
30. Ipas, Mexico
31. International Planned Parenthood Federation, Western Hemisphere
32. Movimiento Manuela Ramos, Peru
33. Mujer y Salud, Uruguay
34. Planned Parenthood Federation of America
35. Plataforma de Direitos Humanos Economicos, Sociais, Culturais e ambientais-Plataforma Dhesca, Brazil
36. Pathfinder International, Peru
37. Programa de Derecho a la Salud del CIDE, Mexico
38. Red Latinoamericana y Caribeña por los derechos sexuales y reproductivos
39. Red de Salud de las Mujeres Latinoamericanas y del Caribe (RSMLAC)
40. Rede Feminista de Saúde, Direitos Sexuais e Direitos Reprodutivos, Brazil
41. SÍ Mujer, Nicaragua
42. Sociedad Peruana de Contracepción
43. THEMIS, Assessoria Juridica e Estudos de Genero, Brazil
44. Women's Global Network for Reproductive Rights
45. Women's Link Worldwide

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14. Dr. Florencia Luna, FLACSO/ CONICET, Argentina
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19. Katherine Romero, Director of Sexual and Reproductive Health Programs, Women's Link Worldwide
20. Manuela Villafuerte M., Coordinator in the Area of Rights and Sexual Healthl, Derechos y Salud Reproductiva Fundación-Colectivo Luna Creciente, Ecuador
21. Margareth Arilha, Comissao de Cidadania e Reprodução, Brazil
22. María Cristina Pacheco Alcalá, Puerto Rico
23. María Elena Sabillón Paz, Honduras
24. Mariana Romero, Doctor and Researcher, CONICET/CEDES, Argentina
25. Marianela Sánchez Badilla, I.D. 1-1109-0991
26. Martha Quiñones Domínguez, Puerto Rico
27. Martha Pérez Martínez, Ministry of Health of the Government of the D.F., Mexico
28. Mary Rivera, Puerto Rico

29. Mercedes Neves Murillo, Regional Coordinator for Sexual and Reproductive Rights, Arequipa, Peru
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<sup>1</sup> This has been made public knowledge in Costa Rican daily newspapers such as *La Nación* and *El País*. See Luis Edo. Díaz, *Comisión Interamericana pide reactivar fecundación in vitro* [The Interamerican Commission requests reinstatement of in vitro fertilization], LA NACIÓN, Sept. 23, 2010, available at <http://www.nacion.com/2010-09-24/EIPais/NotasSecundarias/EIPais2532537.aspx>; and *Costa Rica permitirá fecundación in vitro pero sin congelación de embriones* [Costa Rica will permit in vitro fertilization but without freezing embryos], EL PAÍS, Oct. 15, 2010, available at <http://www.elpais.cr/articulos.php?id=34312>. Further, it was made public in the proposed law on in vitro fertilization, Expediente No. 17.900, presented before the Legislative Assembly of the Republic of Costa Rica by the executive branch on Oct. 22, 2010, which summarizes the contents of the honorable Commission's report in detail.

<sup>2</sup> In *Dickson v. The United Kingdom*, the European Court of Human Rights (ECHR) found a violation of the right to form a family and the right to privacy in the United Kingdom's denial to grant the physical conditions necessary for a husband and wife, who were serving extended prison terms, to undergo in vitro fertilization. The Court ruled that when an important facet such as the existence or identity of an individual is in play (such as the decision to become a genetic father or mother), the margin of appreciation accorded to the state will generally be restricted. ECHR, Case of *Dickson v. The United Kingdom*, No. 4462/04), Judgment of Dec. 4, 2007, para. 78, available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=22747&highlight=>.

<sup>3</sup> World Health Organization (WHO), *Recent Advances in Medically Assisted Conception, Report of a WHO Scientific Group*, technical report series, No. 820 (1992). The standard steps for in vitro fertilization can be found on the website of New York University's Fertility Center, <http://www.nyufertilitycenter.org/ivf/process>, or in the online



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magazine *Reproducción Asistida* [Assisted Reproduction], <http://www.reproduccionasistida.org/reproduccion-asistida/reproduccion-asistida/embarazada/congelacion-de-embriones/>.

<sup>4</sup> Corte Costituzionale [Constitutional Court] [corte cost.], May 5, 2009, n. 151, Racc. uff. corte cost., Foro It. (Italy). See in particular Sections 1, 1.1, and 1.2 that explain the Court's concerns regarding the consequences that Italy's IVF law (which prohibited the freezing of embryos and required the woman to transfer all of the embryos produced in each cycle to her uterus) imposed on a woman's life and health.

<sup>5</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], July 6, 2010, 5 StR 386/09 (F.R.G.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=52897&pos=0&anz=1>.

<sup>6</sup> Freezing embryos dramatically reduces the costs of IVF treatment because the process for transferring a developed embryo is relatively simple. What raises the costs of the treatment is the entire process that precedes freezing: from the extraction of the ovaries until the cultivation of the embryos in the laboratory. See, e.g., New York University Fertility Center, <http://www.nyfertilitycenter.org/ivf/process>.

<sup>7</sup> The current legal minimum wage in Costa Rica is 214,698 colones, or US\$419 each month; the minimum wage of a technically trained worker is 231,270 colones, or US\$451 monthly; that of a fully accredited worker is 243,325 colones, or almost US\$475. The minimum monthly salary of a university graduate averages 473,758 colones, or US\$925 a month. See CRTrabajos.com, sección empresas [business section], <http://www.crtrabajos.com/empresas/herramientas/salarios-minimos.php>.

<sup>8</sup> American Society for Reproductive Medicine and Society for Assisted Reproductive Technology, the Practice Committee of the American Society for Reproductive Medicine and the Practice Committee of the Society for Assisted Reproductive Technology, *Guidelines on Number of Embryos Transferred* (2009).

<sup>9</sup> The most extensive study on the success rate for in vitro fertilization determined that while one cycle carries, at most, a 40% chance of success for women under 35 years (diminishing dramatically as the woman's age increases), and the chances of success rise to 45–53% after three cycles, it is not until the sixth cycle that the chances reach 51–70%, giving women who undergo this treatment almost the same probabilities of becoming pregnant and becoming mothers as those women who do not have fertility problems. Beth A. Malizia, M.D. et al., *Cumulative Live-Birth Rates after In Vitro Fertilization*, 360 N. ENGL. J. MED., 236-243 (Jan. 15, 2009), available at [http://www.theafa.org/blog\\_images/New\\_England\\_Journal\\_of\\_Medicine.pdf](http://www.theafa.org/blog_images/New_England_Journal_of_Medicine.pdf).

Furthermore, a recent study documented that frozen eggs are more likely to implant themselves in the uterus than those that are recently grown. Armenian Medical Network, *In IVF, frozen embryos may fare better than fresh*, Feb. 17, 2010, <http://www.health.am/gyneco/more/in-ivf-frozen-embryos-may-fare-better/>.

<sup>10</sup> The Costa Rican government's reasoning in this regard is based on the idea that a fertilized egg should be protected as a human being because it contains unique and unrepeatable genetic information. Such an argument cannot be regarded as sufficient for granting the status of human being to a cellular entity. All of the body's cells, while alive, contain a complete human genome; but this does not mean that every cell is a person.

<sup>11</sup> It is worth pointing out that neither the zygote nor the embryo nor the fetus is a person under international law without signifying that they cannot be the objects of protection in balance with the fundamental rights of human beings.