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# Interrelationship Between State and Individual Criminal Responsibility in International Law

January 5, 2018  
by Emirjon Kaçaj\*

## Introduction

This article analyzes the interrelationship between state and individual criminal responsibility in international law. It argues that while international courts and related instruments governing these two regimes of liability suggest a clear separation between state and individual criminal responsibility, in practice they are closely connected.<sup>[1]</sup> By analyzing international jurisprudence, this article argues that there is no “pure separation” between state and individual criminal responsibility and that prior determinations of the latter significantly impact the establishment of former.<sup>[2]</sup> This article argues that a dependence on individual criminal liability would jeopardize the eventual accountability of the state by “hiding” behind the responsibility of the individual.

## Background

The International Military Tribunal (IMT) and of the International Military Tribunal for the Far East (IMTFE) paved the way to the establishment of individual criminal responsibility in international law.<sup>[3]</sup> Individual criminal responsibility broadened with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and of the International Criminal Court (ICC).<sup>[4]</sup> These bodies ensure that individuals could no longer “hide” behind “abstract entities”, i.e. states.<sup>[5]</sup>

Inevitably, the affirmation of individual criminal liability raised questions with regard to its interaction with state responsibility, which is determined by the International Court of Justice (ICJ). Hence, what is still debatable in international law is the interrelationship between state and individual criminal responsibility and when the same criminal conduct gives rise to both regimes of liability.<sup>[6]</sup> Therefore, having in mind the significant development of individual criminal responsibility, its repercussions on state responsibility and how these two regimes of liability interact assume a particular importance.

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## Analysis

International instruments suggest that state and individual criminal responsibility are separate regimes of liability. The Statute of the International Criminal Court, the Draft Articles on State Responsibility and the Draft Code of Crimes against Peace and Security of Mankind imply this separation.<sup>[7]</sup> The International Law Commission acknowledged that the punishment of individuals who are organs of the state does not exhaust issues related to state responsibility.<sup>[8]</sup> Hence, state and individual criminal responsibility are considered separate regimes of responsibility in international criminal law giving rise to dual responsibility, i.e. state and individual liability.<sup>[9]</sup>

The separation between state and individual criminal responsibility is also suggested by the fact that different enforcement mechanisms deal with these two regimes of liability, i.e. the ICTY for individual criminal responsibility and the ICJ for state responsibility.<sup>[10]</sup> However, it is argued that this does not imply that these two regimes are not connected.<sup>[11]</sup> For instance, in *Tadić* the ICTY determined that the Bosnian-Serb politician was individually responsible for crimes committed in Bosnia and Herzegovina and in doing so it also considered issues of state liability.<sup>[12]</sup> When the ICJ was called to rule on Serbia's responsibility during the conflict in former Yugoslavia, it criticized the ICTY for making recourse to rules of state responsibility and it found that Serbia was not guilty of genocide in relation to the crimes committed in Bosnia and Herzegovina.<sup>[13]</sup>

In the 2015 *Genocide* case, while the ICJ found that Serbia was not guilty of genocide in relation to Croatia for crimes committed during the conflict in former Yugoslavia, it reaffirmed the separation between state and individual criminal responsibility.<sup>[14]</sup> In particular, the ICJ noted that states may be held responsible under the Genocide Convention even though no individual was convicted of the crime.<sup>[15]</sup> Hence, the ICJ supported a clear separation between state and individual criminal responsibility, underlining their different legal regimes and aims.<sup>[16]</sup> However, this separation is blurred given that the ICJ considered ICTY's prior determinations as "significant factor" in assessing Serbia's genocidal intent.<sup>[17]</sup> Hence, the ICJ considered as significant factor the fact that the ICTY never charged any individual on account of genocide against the Croat population.<sup>[18]</sup> The ICJ added that *mens rea*, (psychological element) required by the Genocide Convention, must be established in order to determine state responsibility.<sup>[19]</sup> Hence, the ICJ applied typical requirements of individual criminal responsibility, i.e. *mens rea*.<sup>[20]</sup> However, considering that states are abstract entities, ICJ's recourse to prior determinations on individual criminal responsibility appears to have been inevitable.<sup>[21]</sup>

## Conclusion

While in theory international instruments and jurisprudence suggest a strict separation between state and individual criminal responsibility, in practice, these liability regimes are interrelated.<sup>[22]</sup> Arguably, this interrelationship presents signs of dependence, considering that individual criminal responsibility has significant repercussions on the determination of state responsibility.<sup>[23]</sup>

While the establishment of individual criminal liability contributes to the enforcement of international law, attention should not be shifted away from state responsibility.<sup>[24]</sup> Courts should be cautious in giving weight to prior determinations of individual criminal responsibility.<sup>[25]</sup> This would ensure that states could not find “shelter” behind prior determinations on individual criminal responsibility.<sup>[26]</sup>

## ENDNOTES

<sup>[1]</sup>See *infra* notes 7-9.

<sup>[2]</sup>See *infra* note 21.

<sup>[3]</sup>See Article 6 of the IMT Charter and Article 5 of the IMTFE Charter. See generally Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes 98-105 (2008). See also Pemmaraju Sreenivasa Rao, *International Crimes and State Responsibility*, in *International responsibility Today* 63, 64 (Maurizio Ragazzi ed., 2005).

<sup>[4]</sup>See Article 7 of the ICTY Statute and Article 6 of the ICTR Statute (providing individual criminal responsibility). See also ICC Statute: Article 25 (Individual criminal responsibility); Article 27 (Irrelevance of official capacity); Article 28 (Responsibility of commanders and other superiors) and Article 33 (Superior orders and prescription of law).

<sup>[5]</sup>See Trial of Major War Criminals before the IMT, Nuremberg, (Nov. 1945 – Oct. 1946), at 223 (stating that: “Crimes against international law are committed by men, not by abstract entities, – and only by punishing individuals who commit such crimes can the provisions of international law be enforced”). See also Philippe Kirsch, President, International Criminal Court, Keynote Address at the Washington University Conference: Judgment at Nuremberg, at 2 (Sept. 30, 2006) (arguing that the Nuremberg trials constituted a historic moment in the development of international law). See generally Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes 86 (2008) (analyzing the evolution of individual criminal responsibility).

<sup>[6]</sup>See Beatrice Bonafè, The Relationship between State and individual responsibility for international crimes 1 (2009).

<sup>[7]</sup>See Article 25(4) of the ICC Statute. See also Article 58 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. See also Article 4 of the Draft Code of Crimes against Peace and Security of Mankind.

<sup>[8]</sup>See Article 4 of the Draft Code of Crimes against Peace and Security of Mankind. See also Article 7 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>[9]</sup>See Beatrice Bonafè, The Relationship between State and individual responsibility for international crimes 43 (2009).

<sup>[10]</sup>*Id.* at 193.

<sup>[11]</sup>*Id.* at 194.

<sup>[12]</sup>See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 105, 171 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). See also Antonio Cassese, The Nicaragua and Tadić Test Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 18 EJIL 655-56 (arguing that in order to determine the meaning of ‘belonging to a Party to the conflict’ pursuant to Article 4(A)(2) of the Third Geneva Convention, and to determine the degree of authority or control over those armed units in the meaning of the term ‘belonging’, it was necessary to make reference to principles of state responsibility that establish when individuals may be regarded as acting as *de facto* state officials, since international humanitarian law did not contain any criteria in this regard).

<sup>[13]</sup>See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 319 and 403 (Feb. 26, 2007) [hereinafter 2007 Genocide case].

<sup>[14]</sup>See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J., ¶ 402-440 (Feb. 3, 2015), [hereinafter 2015 Genocide case].

<sup>[15]</sup>See 2015 Genocide case at ¶ 128. See also 2007 Genocide case at ¶ 182.

<sup>[16]</sup>See 2015 Genocide case at ¶ 129. See also Andrea Bianchi, *State Responsibility and Criminal Liability of Individuals*, in *The Oxford Companion to International Criminal Justice* 16, 19 (Antonio Cassese ed., 2009) (arguing that the purpose of these two regimes of liability is different because while individual criminal responsibility has a punitive character for particular atrocious crimes, the primary purpose of state responsibility is to provide reparations for a wrongful act). See also Beatrice Bonafè, Reassessing Dual Responsibility for International Crimes, 73 Sequência (Florianópolis) 20 (2016).

<sup>[17]</sup>See 2015 Genocide case at ¶¶ 187 and 440. See also 2007 Genocide case at ¶ 217.

- [18] See 2015 Genocide case at ¶ 440 (The Court also noted that Milošević's indictment included charges of genocide in relation to the conflict in Bosnia and Herzegovina but no such charges were brought in the part of the indictment concerned with the hostilities in Croatia. *Id.* at 187). See also 2007 Genocide case at ¶ 374. But see 2007 Genocide case, Dissenting Opinion of Vice-President Al-Khasawneh at ¶ 42 (criticizing the Court for relying on the prosecutorial decisions of the ICTY in order to determine the responsibility of the state).
- [19] See also 2015 Genocide case at ¶ 145. See also 2007 Genocide case at ¶ 187
- [20] See also Beatrice Bonafè, Reassessing Dual Responsibility for International Crimes, 73 Sequência (Florianópolis) 25 (2016) (arguing that the ICJ applied the *mens rea* requirement, which is a typical requirement of the regime of individual criminal responsibility).
- [21] See 2015 Genocide case at ¶ 145 (where the Court noted that in absence of a State plan expressing the intent to commit genocide, it is necessary to analyze individual conduct of perpetrators). But see 2015 Genocide case, Separate Opinion of Judge Sebutinde at ¶ 17-20 (criticizing the Court for taking into account the prosecutorial decisions of the ICTY which are of discretionary nature).
- [22] See Beatrice Bonafè, The Relationship between State and individual responsibility for international crimes 200 (2009) (confirming the existence of points of contact between state and individual criminal responsibility in the *Tadić* case). See also 2015 Genocide case at ¶ 187 (where the ICJ confirmed that significance will be given to prior determinations of the ICTY).
- [23] See Kimberley N. Trapp, State Responsibility for International terrorism 232 (2011) (arguing that determinations of individual criminal responsibility can play a decisive role in judicial determinations of state responsibility). See also André Nollkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law, 52 ICLQ, 615 (2003) (arguing that prior findings related to individual criminal responsibility could influence future determinations on state responsibility). See also Beatrice Bonafè, Reassessing Dual Responsibility for International Crimes, 73 Sequência (Florianópolis) 35 (2016) (arguing that state responsibility appears dependent on the establishment of individual responsibility). But see Paola Gaeta, On What Conditions Can a State Be Held Responsible for Genocide?, 18 EJIL 641(2007) (arguing that state and individual criminal liability are fully independent of each other).
- [24] See Trial of Major War Criminals before the IMT, Nuremberg, (Nov. 1945 – Oct. 1946), at 223 (affirming that international law will be enforced by punishing the individual). See also Beatrice Bonafè, Reassessing Dual Responsibility for International Crimes, 73 Sequência (Florianópolis) 36 (2016) (arguing that state responsibility should not be confined to the safe area where individual responsibility has already been established).
- [25] See 2015 Genocide Case, Separate Opinion of Judge Sebutinde at ¶ 17-21 (criticizing the Court for taking into account prosecutorial decisions of the ICTY and for not having a global view of the evidence). See also 2007 Genocide case, Dissenting Opinion of Vice-President Al-Khasawneh at ¶ 35 (arguing that the Court failed to take into consideration additional evidence). See also Susana SáCouto, Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case against Serbia and Montenegro, 15 Hum. Rts. Brief 3 (2007) (arguing that the Court failed to explain why it chose not to pursue additional evidence apart from the ICTY records).
- [26] See Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment, ¶ 123 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). See also Beatrice Bonafè, Reassessing Dual Responsibility for International Crimes, 73 Sequência (Florianópolis) 36 (2016) (flagging that states might evade responsibility if the determination of their liability is confined to the area of individual criminal responsibility).

# Protecting Environmental Defenders

February 27, 2018

by Page Monji

One of the [first murders](#) of an defender of environmental rights in 2017 was Isidro Balenegro Lopez, a subsistence famer, activist, and leader among the Tarahumara people. He was a Goldman Environmental Prize winner in 2005 for his peaceful action against deforestation from illegal logging in the northern Mexican state of Chihuahua. [Amidst threats](#) against his and his family's lives, Balenegro left the community, but was [murdered](#) upon returning to visit a family member in Coloradas e la Virgen. Balenegro's story is one of many cases of deaths and increased risk of harm to land and environmental activists in 2017.

With the UN's release of the [Sustainable Development Goals](#), the alarming lesson in these casualties and escalating violence is whether our global priorities also protect the defenders of those initiatives. The [Sustainable Development Goals](#) list among its environmental priorities climate action (including initiatives combatting climate change and the impacts of emissions), life below water (including the conservation and sustainable use of water resources and marine life) and life on land (including sustainable use of land resources).

According to a report released by [Global Witness, 197](#) land and environmental defenders were murdered globally in 2017. The report [defines](#) defenders as "people who take peaceful action to protect land or environment rights, whether in their own personal capacity or professionally." This includes family members, friends, and colleagues of the defender who may have been murdered in retaliation of the defender's efforts or in the same attack as that which resulted in the defender's death. While the Global Witness's coverage is [limited](#), the underreporting of verified cases highlights the challenges in validating violence globally. Tension between government, companies, and local communities predominantly were driven by mining and oil, logging, agribusiness, poaching, water and dams.

While Global Witness largely tracks verified murders, the [Environmental Justice \(EJ\) Atlas](#) tracks claims and testimonies of communities engaged in [ecological conflict](#). So far, the EJ Atlas recorded [2,344](#) current claims of tension globally across 10 categories: Nuclear, Mineral Ores and Building Extractions, Waste Management, Biomass and Land Conflicts, Fossil Fuels and Climate Justice/Energy, Water Management, Infrastructure and Built Environment, Tourism Recreation, Biodiversity Conservation Conflicts, Industrial and Utilities Conflicts. The data illustrates the magnitude of global tension surrounding environmental causes and the onus upon governments and organizations to protect the activists who are at the front lines of environmental causes.

Large scale ecological social tension often results in the murder, [criminalization](#), and [disappearances](#) of human rights defenders. The cases presented by Global Witness and Environmental Justice highlight infringements of international law prohibiting violence against human rights defenders. For example, the [Universal Declaration of Human Rights](#)'s protections include the right to life, liberty, security, freedom of expression, prohibition on torture, peaceful assembly and association. Additionally, the [Declaration on Human Rights Defenders](#) contains protections accorded to human rights defenders, which include the right to peacefully assemble, to

form non-governmental organizations, to freedom of expression regarding human rights complaints, and to protection under domestic law.

The magnitude of escalating violence and casualties highlight the increased risk for environmental defenders. Furthermore, the heightened vulnerability poses critical questions of whether our global initiatives sufficiently protect the defenders of those efforts and who is best responsible to protect these advocates.



# International Human Rights Through the Eyes of TWAIL

March 23, 2018

by Achalie Kumarage\*

Over a period of years, a discourse has been developing questioning the potential of the international human rights framework. International Human Rights Law (IHRL) is accused of [failing to attain](#) its aspirations and to be inclusive of diverse human experiences. Its enforcement towards different states has been a subject of controversy. The critique of IHRL has intensified with the [recent trend](#) of Western liberal democracies turning inward. The debt crises in Europe, [poverty](#), racism, xenophobia, immigration, and alarming concerns of national security today all pose compelling questions for IHRL. The critique by Third World Approaches to International Law (TWAIL) of IHRL is increasingly relevant against this backdrop. Through the lens of TWAIL, this Article deconstructs the foundations of IHRL to ascertain its limitations in responding to these existing challenges.

## What is TWAIL?

Originally aimed at critically examining the foundations of international law, TWAIL progressed as [an adventure and an experiment](#). Emerging formally in the 1990s, TWAIL is [distinguishable](#) from a mere method of analysis. Professor Antony Anghie, a prominent scholar in the area, describes TWAIL as a [particular set of concerns](#) that a number of scholars from various locations with different perspectives and interests utilize. TWAIL as of now is in its second development epoch.

TWAIL primarily aims to understand how international law affects people in the ‘third world.’ ‘Third world’ no longer is constrained to a [geographical rubric](#) or as a label for under developed and developing countries. Instead, it is conceptualized as a [social movement](#) geared at furthering the interests of oppressed or marginalized people. These groups could mean under developed countries of the Global South or could even be [marginalized populations](#) in the developed Western liberal democracies, such as aborigines or natives, people of color, women, and poverty ridden cohorts in the community.

TWAIL scholarship unravels how dynamics of international politics and transnational interaction have profoundly impacted and redefined IHRL. Although TWAIL’s critique of IHRL takes many forms, its core criticisms could be divided into three substantive layers, for the purpose of this Article: Eurocentrism, top-down approach, and non-inclusivity of all diverse human experiences.

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## TWAIL's Critique of IHRL

TWAIL's approach to IHRL is divided. On the one hand IHRL is seen as a mechanism through which people of the third world seek protection from depredations of state power, while on the other it is seen as [everyday imperialism](#). The latter refers to the imposition of Western liberal morals upon relatively less powerful countries. It can be illustrated by an analogy of colonialization where Western European values were imposed on colonies, in the guise of 'civilization,' without any regard to the domestic systems of law and governance and the local cultures. The monolithic mindset that was present in the inception of IHRL could be failing to grapple with the current issues of addressing poverty, social integration of diversity, and evaluating cultures. As TWAIL scholar and feminist Ratna Kapur asserts, the human rights promise of progress, emancipation, and universalism is thus exposed as a myopic project in light of the panic over national security, sexual morality, and cultural survival.

## Eurocentrism

The Western European origin of the international legal framework is a fact. Legal historians such as [J.H.W. Verzijl](#) claim international law to be an exclusive product of the European mind. The [Oxford Handbook of the History of International Law](#) states that the development of international law, would "generally ignore the violence, ruthlessness, and arrogance which accompanied the dissemination of Western rules, and the destruction of other legal cultures in which that dissemination resulted." Further, it "even discards such extra-European experiences and forms which were discontinued as a result of domination and colonization by European powers" and deems it "irrelevant to a (continuing) history of international law." It continues to be Western, not merely because of its origin, but also owing to the absence of any substantive non-Western contribution to its development. Though there have been cohesive contributions by scholars from the third world, their viewpoints have been diluted in [Western thinking and education](#) and the [forceful counter challenges](#) waged by first world actors.

Although birthed from the ashes of the atrocities committed during World War II, the Universal Declaration of Human Rights (UDHR) and the [nine core international human rights treaties](#) are founded upon the predominant contribution by the First World and Western European states. Therefore, the basic framework of IHRL is reliant on an [illusion](#) of symmetry and equal status to all countries rooted in sovereignty. Some scholars now contend that it is the untiring efforts of the [Global South](#) that sustained IHRL subsequent to the 1960s. Among the TWAIL proponents, Latin American scholars seem to come out stronger in the International Human Rights fora. However, their role is more profound in developing an exemplary [regional approach](#) to human rights thorough the Inter-American system.

Complexities have arisen through the change of power dynamics in the world. As new democracies such as India, Brazil, and the [Republic of China](#) are emerging powerfully on the global stage, Eurocentrism that made domination possible in the colonial era is no longer a fact. Elsewhere in the world, the political dynamics are becoming even more complex with [Arabic countries](#) opposing Western secularization. In view of these changes, a revision of IHRL in a more inclusive and wider perspective is necessary.

## Top-Down Approach

The top-down approach of IHRL has been the subject of criticism of many scholars. The approach illustrates the [emanation of IHRL from global elite actors](#), including international organizations such as the United Nations, [perpetuating dominance](#) as well as tools for domination. The top-down approach to IHRL can be criticized on two key points. Firstly, as an inevitable consequence of Eurocentrism. Secondly, as a product of a collective state-level effort which doesn't adequately represent the ethos and aspirations of the common people.

The first has its roots in the era of colonialism and imperialism where the Western liberal democracies, in particular Western Europe, dominated international legislating. However, one could argue that the IHRL framework was set in motion following World War II, which was a more diverse stage led by the United States. Nevertheless, the final traces of colonialism were present as late as the 1970's in states such as [Taiwan](#). In fact, it is claimed that some regions such as [Africa](#) and even the [Middle East](#) are victims of [neo-colonialism](#), for which IHRL is manipulated to penalize the states and its people rather than as a tool for their "salvation."

The second criticism is closely connected and is likely giving rise to the existing IHRL violations. The states were exclusively involved in founding IHRL (as opposed to developing it later on). The [charter based system](#)'s initial stages did not involve independent experts or civil society. Implementation of this legal framework exemplifies a top-down approach. This is particularly important in using IHRL as a counter-majoritarian instrument against state power. Moreover, the political power dynamics affect enforcement of IHRL. The United States, a founding contributor of IHRL, has been criticized by many TWAIL [scholars](#) on its' compliance with the framework, especially when it comes to issues such as torture.

## Non-Inclusivity of Diverse Human Experience

The cumulative result of the above two realities has been the non-inclusivity of diverse human experiences in IHRL. Being inclusive of diverse human experience, a seemingly impossible task attainable as IHRL is stipulated in normative and broad principles rather than 'laws' in a narrower and more domestic sense. An illustration of this is the Universal Declaration of Human Rights (UDHR), which is [not a treaty](#) in the strictest sense but has become binding in customary international law.

Outside evaluation of cultural diversity and non-inclusivity is a continuing problem in IHRL. This is evident in the [neo liberal economic agenda](#) of the international superpowers. The major compelling question TWAIL raises is: Can Western liberal democracies impose the blueprint for political and economic development for the advancement of other countries in the world?

TWAIL further unravels that some of the new human rights challenges before Western liberal democracies have been crippling the third world for many years such as [war, terrorism, and poverty](#). TWAIL scholars express [displeasure](#) in the double standards of the international community in implementing IHRL. The discourse has been built around dealing with cases such as terror and torture in Afghanistan as opposed to Guantanamo Bay, and proposals for pre-emptive self-defense by first world countries such as the United States, Europe, and Russia.

## Conclusion

In light of the above analysis one could naturally demand an alternative discourse. Scholars such as [Kapur](#), in fact, enquire if the human rights project that “held out the promise of a grand spicy fete mutated into an insipid appetizer.” However, TWAIL scholars such as Anghie are of the opinion that there is no equally profound alternate discourse to entirely replace IHRL. Others are more hopeful and are exploring additional non-liberal emancipatory possibilities.

As the [Oxford handbook](#) states, although we may not be able to learn from the mistakes of the past, TWAIL promises a better understanding of the character of a particular legal order, its promise, and its limits. IHRL therefore should welcome TWAIL as a [reconstructive project](#), which potentially credits the aspirations it desires to achieve.

# Assisted Reproductive Technology, Parenthood, and Rights Implications

May 28, 2018

by Achalie Kumarage

With the increasingly pervasive role played by technology in assisting reproduction, imperative [questions are raised](#) in terms of right to life, parenthood, and family. Highly contested cases have been fought before [national](#) and [international courts](#) over the past twenty years. The root cause of all such cases is the fact that human life is no longer only created by conventional, natural means. With assisted reproductive technology (ART), what once were [questions](#) of fate have turned into matters of choice intertwined with rights.

Evincing the complexity of this phenomenon, the [latest data](#) suggests that there are more than 620,000 cryo-preserved embryos in the United States alone. The vast majority of these cryo-preserved embryos are still being considered for use in the family-building efforts of the couples who created them. Questions related to the use of these embryos particularly arise following decisions by genetic parents to [separate as a couple](#), [divorce](#), or upon deciding the number of children.

Focusing on In Vitro Fertilization (IVF), this Article explores the complicated rights of parenthood and family life in IVF, and analyzes the varying approaches developed by national and international courts in addressing difficult rights-related questions.

## Assisted Reproductive Technology: Definitions and the Legal Framework

ART has grown in both means and effectiveness over the years. The reproductive process can now be [severed](#), allowing interventions or substitutions at different stages of the reproductive process. The key ART for this analysis, [IVF](#), is the process of fertilization by extracting eggs and sperm, and manually combining them in a laboratory dish. The embryo(s) is then either transferred to the uterus or preserved. [Cryo-preservation](#) aids the embryo to survive for years. The possible number of years for preservation is generally stipulated by the [law](#). The success rate of IVF, though it varies from case to case, is [said](#) to be between twenty to fifty percent, and there is no significant [difference](#) in success rates between fresh and frozen embryos. Often the process is carried out by parties subject to a [contractual](#) agreement, which governs the process and its results.

All key international and regional human rights instruments enshrine a right to privacy, family life, and the non-interference of the state to decisions made within the private sphere. At the same time, they uphold a right to life. The [Universal Declaration of Human Rights \(UDHR\)](#) (1948) in Articles 12 and 16 upholds the same, while the [International Covenant on Civil and Political Rights \(ICCPR\)](#) expresses similar rights in Article 17. Regional human rights bodies such as the Inter-American system and the European system are more promising and strongly advocate for these rights. For instance, the [American Convention of Human Rights](#) (1969) upholds a guarantee of non-suspension of the right to family life (Article 17) by the State. The instruments further grant equal rights to men and women to make decisions pertaining to family life.

International law, however, allows [leeway](#) for national laws governing these rights. There is minimum guidance set by international law in resolving issues involving embryo preservation. In the United States, there are no federal regulations governing the disposition of frozen embryos created through assistive technology. However, some countries, such as the United Kingdom, have [domestic statutes](#). Generally, though the IVF process is carried out subject to a contractual agreement, this is not always upheld by the courts in resolving disputes and may not necessarily address particular future issues that can arise.

### **Compelling Questions Raised by the Discourse Surrounding Rights**

As described above, the ART process adds multiple new dynamics to the natural reproductive process. In light of this fact, there are two key substantive rights-related challenges that IVF poses for national and international courts: (1) [balancing](#) the competing constitutional rights to procreate and not procreate, and (2) tracing the place of the embryo in the debate of personhood. As the analysis of IVF develops, it is hard to overlook its stark resemblance to the abortion debate and the views expressed pertaining to the issues of rights and life.

- **Balancing Competing Rights**

Harvard law professor and renowned academic in the area Glenn Cohen [raises](#) the difficulty of balancing one person's constitutional right to procreate with another's countervailing constitutional right not to procreate. Designating his point in the equation between the genetic parent and the gestational parent, he opines that the rights of both parties are equally strong in the debate. Drawing an analogy between this issue and the abortion debate, specifically *Roe v. Wade*, he [questions](#) "if women have the right to not be forced to be a gestational parent, do men – or women – have the right not to be forced to be a genetic parent?"

United States courts have addressed these matters through [three approaches](#): the balancing interests approach, the contractual approach, and the contemporaneous mutual consent approach. The balancing interests approach [resolves](#) disputes by "considering the position of parties, significance of their interests and the relative burden imposed by differing resolutions." In Colorado in the case of *In re the Marriage of Drake F. Rooks and Mandy Rook*, the Academy of Adoption and Assisted Reproductive Attorneys [said](#) that courts must take a "balancing of interests" approach in such disputes, but should "give special weight to the partner who does not want to have genetic offspring." On the other hand, the contractual approach [resorts](#) to giving effect to the [agreement](#) devised by the parties at the point of pursuing IVF, given that the contract stands valid and enforceable. Finally, the [mutual consent approach](#) resonates with the second approach, favoring the consent expressed in a valid contract and any modifications carried out with contemporaneous mutual consent of the other party.

Lisa Ikemoto, a bioethics professor at the University of California, has [said](#) that one party's right not to procreate has usually been considered to trump the other's right to procreate. Aptly summarizing the debate, Professor Cohen [highlights](#) that although the first child born from a cryo-preserved embryo was in 1984, United States courts "have not been addressing this issue head-on."

Similarly, other countries are also grappling with various legal issues arising as a result of burgeoning IVF practices. In [China](#), parents of a deceased couple were recently granted the right over fertilized eggs of the couple. Having gone through a “legal minefield” until their grandchild was born through a surrogate mother, the four grandparents are now preparing to legally establish their relations to the child through DNA testing.

International courts adjudicate similar cases with a relatively loose approach. This is due to the tedious exercise of having to balance competing rights enshrined in international conventions with applicable national law. The European Court of Human Rights often predicates on the parties’ consent, while giving substantial weight to the “margin of appreciation” to give effect to relevant domestic legislative provisions. This is evident in judgments such as [Evans v. United Kingdom](#) (2005) where the court [rejected](#) the claim of violation of the right to privacy and family life based on withdrawal of consent by one party. Withdrawal of consent was the cause for termination agreed to by the parties at the time of making the contract, and national laws reflected respecting the decision of the parties. On the other hand, the Inter-American Court of Human Rights in [Artavia Murillo et al. v. Costa Rica](#) depicts an instance where the right to family life (Article 17) and the right to privacy (Article 11) superseded concerns of the right to life. The court [upheld](#) that the non-availability of IVF itself could amount to a violation of the right to family life and privacy, after Costa Rica had banned IVF on the basis that it violated the right to life.

On a different note, some scholars [opine](#) that more than two parties can be involved in these disputes and that personal intention is a more significant element. Since the IVF process can be severed it becomes depersonalized and multiple persons may be involved in one or a few stages of the reproductive process and then later withdraw from it after their role is fulfilled.

- **Embryos & Personhood**

Is the human embryo a person? The answer to this question has [significant](#) implications for human rights. Answers to this question could either lift or strengthen the guarantee of non-interference by the state to a person’s privacy and family life, depending on the state’s interest in protecting life.

Fertilization is a process, therefore, personhood does not attach the moment an embryo starts to develop. The [scientific](#) view is that the embryo is [not a person](#) during its ‘pre-embryo’ stage of fourteen days. In [In re the Marriage of Drake F. Rooks and Mandy Rooks](#), the counsel for Drake Rooks asserted that the constitutional right to be a parent may not have any bearing upon matters passing the point of conception. Arguing that the case is no longer about separate human cells but a formed fetus, the counsel stated that the cases of frozen embryos are an “unknown territory.” This sentiment reflects strong parallels to the abortion debate which ultimately boils down to a matter of individual choice versus a matter of life, as decided in *Roe v. Wade* and more recently in [Whole Woman’s Health v. Hellerstedt](#) (2016).

The distinction between embryos and personhood is unsettled at a global level, and international courts prefer to give effect to the laws of the jurisdiction from which a case is emanating. [Rulings](#) of the European Court of Human Rights best exemplify this position.

## **Conclusion**

In resolving disputes in the area, different approaches are suggested by scholars. Some propose proceeding with the contractual approach while others propose a [property approach](#) as an alternative. In the case of Mimi Lee and James Cohen, from California, it was [expressed](#) that “the policy best suited to ensuring that these disputes are resolved in a clear-eyed manner — unswayed by the turmoil, emotion and accusations that attend to contested proceedings in family court — is to give effect to the intentions of the parties at the time of the decision at issue.” Courts in the United States and internationally have frequently precipitated on this contractual approach.

Many of the questions brought in the ART and procreation debate resonate with concerns and questions that were raised during the abortion debate. Such similarities create the possibility of further pushing the issue into a grey area in which law and policy makers hesitate to tread. The dynamics of this matter are so increasingly complex that leaving it unaddressed, or to be resolved only on a case by case basis, might lead to an exacerbated human rights battle in the near future.