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A Right to Create a Child? How the Inter-American Court of Human Rights is Wrong on In Vitro Fertilization

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In vitro fertilization (IVF) is one of the more novel additions to the burgeoning new crop of elements that are being tacked on to the international "reproductive rights" bandwagon. The technique, in which an embryo is fertilized outside a woman's uterus and then implanted into her womb,[1] is a phenomenon that necessarily implicates international legal norms.

The intersection of scientific advances with human rights raises profound moral and legal concerns and questions as to whether fundamental human rights, such as the right to found a family, can encompass these new technologies used to create children. Given the fragmented understanding of human dignity in the application of human rights in our world, another urgent question is what effect the creation of such a right might have on societies.

As the use of artificial reproduction techniques becomes increasingly frequent, familiar, and accessible, it is often thought that to deny an infertile couple recourse to IVF—and thus, to deny them (as many assume) the chance to have a child—is to rob them of their right to found a family. But there is no right to IVF or similar technologies in international human rights law. No international treaty mentions such a right, or can be said to have contemplated such a right, when it was negotiated and ratified. The issue is whether the right to found a family, or other related human rights, can be extended to include a right to avail oneself of artificial reproduction technology.

This was the question posed in 2012 to the Inter-American Court of Human Rights in Murillo et al. ("In Vitro Fertilization") v. Costa Rica.[2] In that case, nine couples that were unable to avail themselves of IVF—because of Costa Rica's law against the destruction of embryos—alleged that their government had

1 Artavia Murillo et al. ("*in vitro* fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 64 (Nov. 28, 2012) [hereinafter Murillo] (definition of *in vitro* fertilization as used by the Court).
2 Murillo, *supra* note 1, at ¶ 159.

violated their rights to privacy, family, health, and equal protection.

The Court in the Murillo case sided with the nine couples in a lengthy 130-page opinion that failed to pinpoint exactly how the right to government non-interference in procreation encompasses a right to create a child through artificial reproduction technologies.

Assisted Reproductive Technologies and Human Life

IVF is the process by which an egg is fertilized by sperm outside a woman's body and then implanted into a woman's uterus after the fertilization process.[3] It is an artificial reproductive technology, which is a category of techniques or procedures that involve "the manipulation of both ovocytes and spermatozoids, or embryos . . . for the establishment of a pregnancy."[4] Assisted reproductive technology is therefore generally any practice that uses IVF to achieve pregnancy, although it also includes other measures such as embryo transfer, cryopreservation of ovocytes (oocytes) and embryos, oocyte donation, and surrogacy.[5]

The prevalence of IVF is continually on the rise, and since the first child born of IVF in 1978 in England,[6] an estimated five million children worldwide have come into existence using this method.[7] Due to its ability to generate embryonic human life independent of a woman's body, it is typically employed to implant a human life in the womb of a woman who finds it difficult to conceive naturally. It is estimated that about ten percent of women in the world experience infertility, and a little over one percent of men are diagnosed with fertility problems.[8]

The common perception that IVF is a sort of antidote for infertility is however misleading. Infertility is not the same thing as childlessness. While artificial reproductive techniques may seem like a cure for infertility, they are in fact an artificial way to create children that bypasses the issue of fertility altogether without actually remedying the underlying causes of infertility.[9] But reproductive rights advocates claim that IVF is "the only medical intervention that can resolve a case of infertility or sub-fertility" and that "[d]enying people IVF technologies denies access to care to the vulnerable, disabled and those in need."[10] This kind of misleading narrative bolsters the argument that women should be able to have recourse to IVF as a right. It also makes it difficult to actually stop and look at the ethical issues implicated in IVF in the first place.

Due to the human desire to have a biological connection with one's children, it is understandable

3 Murillo, supra note 1, at ¶ 64 (definition of in vitro fertilization as used by the Court).
4 *Id.*
5 *Id*. at ¶ 63.
6 *Id*. at ¶ 66. The first Latin American baby born of IVF was in 1984 in Argentina.
7 *Id.*
8 Infertility FAQs, CDC, http://www.cdc.gov/Reproductivehealth/Infertility/#a (last updated Jun. 20, 2013).
9 *See* Brief of Asociación para la Defensa de la Vida and El Centro Iberoamericano de Estudios para la Familia as Amici Curiae in Support of the Republic of Costa Rica, Artavia Murillo et al. ("*in vitro* fertilization") v. Costa Rica, No. 257 (Nov. 28, 2012) [hereinafter Brief of Asociación para la Defensa de la Vida].
10 Morven Shearer & Sheryl Vanderpoel, *Right to Life vs Right to Found a Family: The Case of Costa Rica*, BioNews (Sep. 19, 2011), http://www.bionews.org.uk/page_106023.asp (last visited Mar. 02, 2014).

that infertile couples might want to have a child through IVF.[11] However these procedures raise a number of ethical dilemmas. The procedure creates and then destroys or freezes embryonic human life. Every time the technique is attempted, many more embryos are created that can actually be implanted. In 2002, experts estimated that there are over 400,000 frozen embryos—new and distinct living human organisms[12]—waiting in cryopreservation banks in the United States alone.[13] The current number is unknown. The sobering reality is that there is simply "no option for practicing IVF without some possibility of embryonic loss."[14]

The medical community has not been blind to these issues. In 2006, the World Medical Association released a statement on artificial reproduction that warned:

> Assisted reproductive technologies raise profound moral issues. Views and beliefs about the moral status of the embryo, which are central to much of the debate in this area, vary both within and among countries. Assisted conception is also regulated differently in various countries. Whilst consensus can be reached on some issues, there remain fundamental differences of opinion that cannot be resolved.[15]

The Catholic Church is among those that have stressed the pressing need to be aware of the moral danger associated with these procedures. In its Compendium on the Social Doctrine of the Church, the Church emphasizes the "ethical unacceptability of all reproductive techniques,"[16] explaining that the problem with IVF includes, along with the destruction of human life, the concern that

> The child comes about more as the result of an act of technology than as the natural fruit of a human act in which there is a full and total giving of the couple. Avoiding recourse to different forms of so-called "assisted procreation" that replace the marriage act means respecting—both in the parents and in the children that they intend to generate—the integral dignity of the human person.[17]

Though religion traditionally assumes a strong stance in family and life issues, it is important to keep in mind that the moral hesitations inherent in IVF are not solely relegated to the religious realm. Since IVF strips unborn children of their fundamental right to life—after these children are intentionally

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11 *See, e.g.*, Brief of The Allard K. Lowenstein International Human Rights Clinic at Yale Law School as Amicus Curiae on behalf of Petitioners, Artavia Murillo et al. ("*in vitro* fertilization") v. Costa Rica, No. 257, at * 4 (Nov. 28, 2012) [hereinafter Brief of Yale Law School] (discussing the reasons why infertile couples may want to conceive via IVF), *citing* Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. Cal. L. Rev. 623, 629 (1991).

12 SAN JOSE ARTICLES, Notes to Article 1, *available at* www.sanjosearticles.com.

13 Alana S. Newman, *Going the Distance for Children*, Public Discourse (Oct. 04, 2013), http://www.thepublicdiscourse.com/2013/10/10933/.

14 Murillo, *supra* note 1, at ¶ 159.

15 World Medical Association, Statement on Assisted Reproductive Technologies (adopted at the WMA General Assembly, Pilanesberg, South Africa, October 2006), *available at* http://www.wma.net/en/30publications/10policies/r3/ (last visited Mar. 02, 2014).

16 Pontifical Council for Justice and Peace, *Compendium on the Social Doctrine of the Church* ¶ 235 (Libreria Editrice Vaticana 2004), *available at* http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

17 *Id.*

created—the issue may actually come into the purview of international law.[18]

Costa Rica and the Right to Life

Costa Rica takes the right to life very seriously. It has strong protections for life built into its Constitution, which states "life is inviolable,"[19] and has consistently interpreted the Universal Declaration of Human Rights (UDHR) and the American Charter of Human Rights (ACHR) on "the right to life" as beginning at conception. Therefore it is unsurprising that the Costa Rican people deem IVF problematic.

The present controversy began in 2000, when the Constitutional Chamber declared that an Executive Decree, promulgated five years earlier in 1995, was unconstitutional.[20] This Executive Decree purported to regulate in vitro fertilization for married couples. After its issuance, fifteen Costa Rican couples underwent the procedure.[21]

In declaring the Executive Decree unconstitutional, the Constitutional Chamber remarked, "as soon as conception occurs, a person is a person and we are in the presence of a living being, with the right to be protected by the legal system."[22] The court reasoned that since the practice of IVF necessarily entails multiple deaths of embryos for every one embryo successfully implanted it "clearly jeopardizes the life and dignity of the human being."[23]

The Constitutional Chamber also looked to the "strong guiding principles regarding the issue of human life" in international law.[24] Here, they cited Article 1 of the American Declaration of the Rights and Duties of Man, Article 3 of the UDHR,[25] Article 6 of the International Covenant on Civil and Political Rights (ICCPR),[26] Article 4 of the ACHR,[27] and Article 6 of the Convention of the Rights of the Child (CRC), all which establish protections to the right to life from conception. The latter treaty, the CRC, cites norms that "impose the obligation to protect the embryo from the abuse that it could be subject to in a laboratory and, especially, the most severe of all, the one that can eliminate its existence."[28]

Based on these legal provisions in Costa Rica's law and international law, the Constitutional Chamber declared that IVF was not permissible in Costa Rica, making Costa Rica the only country that

18 *See* SAN JOSE ARTICLES, ibid. 18, *supra*
19 La Constitución Política de la República de Costa Rica, art. 21.
20 Executive Decree No. 24029-S of February 3, 1995. Murillo, *supra* note 1, at ¶ 68. Judgment No. 2000-02306 of March 15, 2000. *Id.* at ¶ 70.
21 Murillo, *supra* note 1, at ¶ 70.
22 *Id.* at ¶ 73.
23 *Id.* at ¶ 74.
24 *Id.* at ¶ 75.
25 UDHR, *supra* note 2, at art. 3 ("Everyone has the right to life, liberty, and security of person.").
26 ICCPR, *supra* note 5, at art. 6 (1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").
27 ACHR, *supra* note 3, at art. 4 (1) ("Every person has the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").
28 Murillo, *supra* note 1, at ¶ 75.

expressly prohibited IVF.[29] This was not a unilaterally imposed decision. The judgment was consistent with the consensus of the Costa Rican people themselves, who had "rejected the introduction of in vitro fertilization in a democratic legislative process, revealing that the decision of the Supreme Court reflects national values."[30]

There were, of course, some who were in disagreement with this decision. This group included nine couples who had been in the process of procuring IVF procedures, and whose efforts were halted.[31] They brought suit against the Supreme Court's reading of Costa Rica's law and international obligations, and brought the case to the Inter-American Court of Human Rights. The question the court faced was "whether State action to restrict individual access to measure in favor of family planning and childbearing is compatible with the terms of the American Convention" in light of "the general right to found a family set forth in the American Convention and other international human rights treaties, as well as in many constitutions, along with the right to protection for private and family life in light of the issues raised in the present petition."[32]

The petitioners did not claim that any of the provisions in the ACHR contained explicit language of a right to create children through IVF, but rather, they argued that this right was compatible with the treaty protections against "arbitrary or abusive interference with private life, [and] family," and the rights of "men and women . . . to raise a family" and "to equal protection of the law."[33] Thus, they alleged that Costa Rica was impermissibly infringing on their human rights.

While the Court itself focused its discussion mainly on the rights to privacy and equal protection, in a painfully convoluted opinion, characterized as riddled with "linguistic deconstruction,"[34] it neglected to articulate its reasoning on the right to found a family. It was on the basis of this right specifically that the Court decided that IVF was indeed a right for the nine couples involved in the litigation.

In doing so, the Court went against its own precedent of giving OAS States a wide margin of appreciation in applying the provisions of the convention having to do with protections for the right to life. The Court actually circumvented the ACHR's provision on the protection of life "from conception" altogether with semantics.[35] The court decided that conception does not take place when an egg is fertilized, but when

29 Murillo, *supra* note 1, at ¶ 67. Note, however, that the European Court of Human Rights asserted in a case relating to the unborn that "consensus cannot be a decisive factor in the Court's examination. *See* Brief of Alliance Defense Fund, Centre for Legal Studies at C-Fam, & Americans United for Life in Support of the Republic of Costa Rica, Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica, No. 257, at *39 (Nov. 28, 2012) [hereinafter Brief of C-Fam], *quoting* A, B & C v. Ireland (App. No. 25579/05) Eur. Ct. H.R. ¶ 237 (Dec. 16, 2010).

30 Brief of C-Fam, *supra* note 35, at *40.

31 Subsequently, some of these couples traveled abroad to undergo IVF—with one couple successfully conceiving a child this way—and others adopted, became pregnant naturally, or did not end up having children at the time this case was brought. See Murillo, *supra* note 1, at ¶¶ 88, 95, 100, 105, 111, 115, 118, 121, 125.

32 Brief of Asociación para la Defensa de la Vida, *supra* note 14, at *1.

33 *Id*. at *2.

34 Piero Tozzi, *The Inter-American Court of Human Rights Strikes Down Costa Rica's In Vitro Fertilization Ban*, LifeSiteNews (Dec. 21, 2012) http://www.lifesitenews.com/news/the-inter-american-court-of-human-rights-strikes-down-costa-ricas-in-vitro (last visited Mar. 02, 2014).

35 ACHR 4.1: "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."

that fertilized egg is implanted in the uterus.

The Court justified its opinion as an "evolving interpretation" of the convention, an approach to interpreting treaty provisions "whose contours are as yet quite unclear" that the court has previously used.[36] But, as will be shown presently, the contours of the treaty provisions on the right to marry and found a family are not open-ended concepts. Though evolving interpretations may assist in defining the bounds of a particular right, they are still subject to the express wording of the treaty, and must only interpret obligations that are "already explicit or implicit in the wording of the text."[37]

Honesty in Treaty Interpretation

International law is generally based on two sources: treaty law, which is binding when "a sovereign state has given its free consent to the contractual terms of a treaty it negotiated in good faith and upon due ratification,"[38] and customary law, which refers to "a general and consistent practice of states followed by them from a sense of legal obligation."[39] In treaty interpretation, the guiding principle of interpretation is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[40] This requires an examination of the words and their context.

Respecting the boundaries of a treaty is of paramount importance in treaty interpretation. In addition, an often-overlooked aspect of treaties is their "inherently moral" nature, "for they concern promises made and to be kept." [41] In other words, treaties, though serving their role as one of the foundations of our international legal system, can theoretically be subject to international fads. If nations do not adhere to the meaning of the agreed-upon language of the treaties, then these treaties are rendered meaningless:

> [I]f language has no fixed meaning and words are inherently malleable, then they become weapons to be wielded by the glib and powerful… Rather, it betrays contempt for the notion that Truth exists, and that relations can be based on anything more lasting than the assertion of raw political will.[42]

Thus, when the Inter-American Court found a right to IVF compatible with the right to found a

36 *Id*. at *16, *quoting* Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 LAW & PRAC. INT'L CTS. & TRIBUNALS 443, n.5 444 (2010) (Neth.).
37 *Id*., *quoting* Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 66 (1990).
38 Piero Tozzi, *International Law and the Right to Abortion* at 5, C-FAM (2010), *available at* http://c-fam.org/docLib/20100420_Intern._Law_FINAL.pdf, *citing* Black's Law Dictionary 1109 (6th ed. 1990) ("Agreements (and stipulations) of the parties (to a contract) must be observed.").
39 *Id*. at 8, *quoting* Restatement (Third) § 102(2).
40 Vienna Convention on the Law of Treaties, Art. 31.1 UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).
41 Piero A. Tozzi, *Meaning, Relativism, Pickled Herring, Tyranny…*, TURTLE BAY AND BEYOND (Blog) (Oct. 26, 2011) https://c-fam.org/turtle_bay/meaning-relativism-pickled-herring-tyranny/ (last visited Mar. 02, 2014).
42 *Id*.

family and practice family planning, it was not only a disappointing breach of international trust, but also an ominous warning-sign to this trend of unraveling treaty language in order to find room for new "rights" under the pretense of "evolution" or "development." Honesty in interpretation is crucial to accurate analysis. These treaties must be considered in the context in which they were created and signed.

The court appears to have presumed that stretching the bounds of science authorizes a stretching of the bounds of international law. The history and context in which the treaty was negotiated thus become irrelevant.

The Right to Marry and Found a Family

As a matter of basic treaty interpretation, none of the treaties enunciating rights to marry and found a family or to family planning leave any room for compatibility with an obligation for states to permit IVF. Moreover, while the right to marry and found a family implicates the right of couples to not have any government interference in the procreative act, it does not implicate a right for couples to create children outside the procreative act.

The family has traditionally been a cornerstone of human rights. The UDHR, adopted in the inaugural days of the United Nations at the 1948 U.N. General Assembly, mentions specifically "the right to life" and "the right to marry and found a family."[43] Numerous other human rights treaties, such as the ACHR,[44] the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[45] and the ICCPR,[46] reiterate these universally accepted rights.

The sources of the right to marry and found a family—the ACHR, ICESCR,[47] and ICCPR[48]—were all adopted and ratified by Costa Rica before the successful birth of the first child created through IVF.[49] If one interprets the treaty provisions in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, this fact alone should lead to the inevitable conclusion that there is "simply no factual basis for any claim that the right to marry and raise a family under Article 11 (2) of the ACHR was intended to include a right to create a child through IVF

43 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at arts. 3, 16(1), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR] (Art. 3: "Everyone has the right to life, liberty, and security of the person;" Art. 16 (1): "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family.").

44 Organization of American States, American Convention on Human Rights arts. 11(2), 17, Jul. 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]. Article 11 (2) provides for the right to privacy ("No one may be the object of arbitrary or abusive interference with his private life, his family, his home."), and Article 17 provides for the rights of the family ("The right of men and women of marriageable age to marry and raise a family.").

45 International Covenant on Economic, Social, and Cultural Rights art. 10, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] ("The widest possible protection and assistance should be accorded to the family . . . particularly for its establishment.").

46 International Covenant on Civil and Political Rights art. 23(2), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] ("The right of men and women . . . to marry and to found a family.").

47 ICESCR, *supra* note 4, at art. 10.

48 ICCPR, *supra* note 5, at art. 23.

49 The ACHR was ratified in 1970 and both the ICESCR and the ICCPR were ratified in 1976

at the time the Convention was adopted and ratified."[50]

Taking a closer look, in addition to the fact that IVF was not a fully functioning technology at the time, the right to marry and found a family cannot have been intended to encompass a right to engage in assisted reproductive techniques.

Article 10 of the ICESCR concerns the States' obligations to secure the physical and economic wellbeing of families with a focus on providing adequate care for mothers. In calling for the "widest protection and assistance [to be] accorded to the family . . . for its establishment and while it is responsible for the care and education of dependent children,"[51] it discusses the States' obligation to provide assistance throughout the start and continued duration of the family. It does not allude to any obligation on the part of the State to provide the means to procreate, as is currently being proposed with the push for guaranteed access to IVF. The ICESCR simply obliges state parties to ensure that the economic, social and cultural conditions that will allow a family to form and exist.

In 1990, the United Nations Human Rights Committee, which monitors the implementation of the ICCPR interpreted Article 23 (2) of that treaty, which guarantees "[t]he right of men and women of marriageable age to marry and to found a family" to mean that the "right to found a family implies, in principle, the possibility to procreate and live together."[52] This presumes that while this provision prohibits government interference in procreative marital intercourse, it does not require states to guarantee access to assisted reproductive techniques.[53] An obligation for States to provide access to means that may assist in the natural conception of children, such as various methods of natural family planning or NaPro technologies, might even be implied here,[54] but the provision does not oblige States to assist couples or individuals in attempting to have children through artificial methods.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[55] is also often mentioned with regard to the right to found a family and engage in family planning. This Convention, however, is directed at achieving equality between men and women and mainly purports to oblige states to ensure that contraception is equally available to men and women. IVF is not contraception, and so CEDAW is largely irrelevant in the question of whether or not a right to IVF inheres in the right to marry and found a family.[56]

The silence on the issue of assisted reproductive technologies in international law does not mean

50 Brief of Asociación para la Defensa de la Vida, *supra* note 14, at *3.
51 ICESCR, *supra* note 4, at art. 10.
52 Office of the United Nations High Commissioner for Human Rights, *General Comment No. 19: Protection of the Family, the Right to Marriage, and the Equality of Spouses (Art. 23)*, ¶ 5 (July 27, 1990), *available at* http://www.equalrightstrust.org/ertdocumentbank/general%20comment%2019.pdf (last visited Mar. 02, 2014).
53 Brief of Asociación para la Defensa de la Vida, *supra* note 14, at *5.
54 *See, e.g.*, NaProTECHNOLOGY, http://www.naprotechnology.com/ (last visited Mar. 03, 2014) (a means of monitoring a woman's fertility with treatments that cooperate with a woman's reproductive health).
55 Convention on the Elimination of All Forms of Discrimination against Women, art. 16(1)(e), *available at* http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (last visited Mar. 02, 2014) [hereinafter CEDAW]. Ratified by Costa Rica on May 4, 1986.
56 Brief of Asociación para la Defensa de la Vida, *supra* note 14, at * 6; CEDAW, *supra* note 52, at art. 16(1)(e).

that the right to marry and found a family can be arbitrarily expanded to accommodate new technologies. As already mentioned, expansion in this context would be inappropriate due to the treaties' lack of ambiguity and the clear intent at the time of their adoption.

The Right to Family Planning

The right to family planning is problematic on its own.[57] But even assuming such a right—grounded in the phrase the "right to freely determine the number and spacing of children,"[58] which is taken from CEDAW and commonly used in non-binding instruments issuing from United Nations conferences and understood to be part of the right to marry and found a family, as well as the right to health[59]—such a right would not encompass IVF.

UN resolutions and conferences began referencing family planning almost fifty years ago. In 1968, the International Conference on Human Rights in Tehran agreed that "[p]arents have a basic human right to determine freely and responsibly the number and spacing of their children."[60] This right was reaffirmed in the 1986 Mexico City Declaration on Population and Development, where family planning is defined largely in terms of contraception. Though the declaration calls for increased research to solve problems of infertility and subfecundity, it does not presume any rights with respect to IVF.[61]

Similarly, the Vienna Report of the World Conference on Human Rights in 1993 refers to "acceptable methods of family planning" for "regulation of fertility."[62] That conference was also silent about IVF. IVF does not regulate fertility, but rather offers an alternative means of reproduction. Though a woman may have a child, her ability to bear children is unaltered.

The right to family planning was the nexus of the 1994 Cairo Program of Action and the 1995 Beijing Program for Action.[63] These conferences turned the population control establishment of the 1960s and 1970s into the sexual and reproductive health establishment that is still in place today and emphasized the development of "acceptable" means of regulating fertility and protecting against sexually transmitted diseases.[64] Both conferences are markedly silent about any obligation to alter domestic laws to provide for

57 *See generally* Susan Yoshihara, *Lost in Translation: The Failure of the International Reproductive Rights Norm*, 11 Ave Maria L. Rev. 367 (2013) (describing the recognition of the right to family planning and the false notion of a right to contraception).

58 CEDAW, *supra* note 52, at art. 16(1)(e).

59 The right to health is not discussed in this essay, but see Brief of Asociación para la Defensa de la Vida, *supra* note 14, at *5 (describing why there is no right to IVF inherent in the right to health).

60 United Nations, *Final Act of the International Conference on Human Rights, Tehran*, art. 16, 13 (May 13, 1968), *available at* http://www.unhcr.org/refworld/docid/3ae6b36f1b.html (last visited Mar. 02, 2014).

61 *Mexico City Declaration on Population and Development* (Aug. 1984), *available at* http://www.apda.jp/en/pdf/declarations/1984_MexicoCity.pdf (last visited Mar. 02, 2014).

62 World Conference on Human Rights, Report of the World Conference on Human Rights, ¶ 223, U.N. Doc.A/CONF.157/24 (Oct. 13, 1993), *available at* http://www1.umn.edu/humanrts/instree/l1viedec.html (last visited Oct. 22, 2008).

63 Mary Ann Glendon, *What Happened at Beijing*, First Things (Jan. 1996); George Weigel, *What Really Happened at Cairo*, First Things (Feb. 2005)

64 United Nations, Report of the Fourth World Conference on Women, Beijing, China, 4-15 Sept. 1995, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), available at http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en (last visited Mar. 03,

access to artificial reproduction.

It has been noted that

> the silence of the[se] document[s] should not be interpreted as permitting the inclusion of artificial technology within its terms. Nothing in the terms, the preparatory work of the Conference and the circumstances of its conclusion suggest any intention on the part of the delegates to approve international norms in this legally and ethically controversial area.[65]

In addition, Costa Rica joined in collective reservations in both the Cairo and Beijing conferences. In the Cairo Conference, it joined the Central American countries when they expressed for the record to the conference that nothing in the Cairo outcome would supersede any protections of human life from conception until death present in their domestic laws: "The family must be founded on respect for life from the moment of conception, and the union of man and woman, as defined by our traditions."[66] This was the same with regard to the Beijing conference, in which Costa Rica also joined with the eight Latin American and Caribbean states that submitted reservations to the Beijing documents regarding the nature and extent of "sexual and reproductive health."[67] The States understood that undertaking the political commitments contained in the documents would not require any changes to their domestic laws relating to the right to life of unborn children.

If we assume that the right to family planning is indeed established in international law, such a right might oblige states to permit access to contraception, but not to alternative reproduction techniques. IVF is not a "procreative act." It is not contraception. Consequently, access to IVF cannot be implicit in any of the political commitments contained in UN resolutions and conferences.

A Universal Call to Faithfulness

The Inter-American Court is wrong about IVF. There is no right to IVF, under the ACHR or any UN treaty. The indifference to the dignity of human life in its embryonic stage that the court displayed is alarming, and its disregard of basic rules of interpretation has been egregious. This should signal for all of us the need for increased vigilance as activists seek rights to abortion, contraception, and other reproductive health matters.[68] Like the Cairo and Beijing conferences, this decision has "ominous implications for universal

2014).

65 Brief of Asociación para la Defensa de la Vida, *supra* note 14, at *17.

66 Note verbale dated 94/09/09 from the delegation of Costa Rica to the International Conference on Population and Development addressed to the Secretary-General of the Conference Cairo, Egypt, 5-13 Sept. 1994, U.N. Doc A/CONF.171/9 (Sept. 9, 1994), attached as Appendix B to Brief of Asociación para la Defensa de la Vida, *supra* note 14.

67 Report of the Fourth World Conference on Women, Sep. 4-15, 1995, ch. v, ¶¶ 6-32, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), *available at* http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en (last visited Mar. 03, 2014).

68 Yoshihara, *supra* note 54, at 381, *quoting Round Table of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health with a Focus on Sexual and Reproductive Health Rights: Summary of Proceedings and Recommendations*, U.N. Population Fund 4 (1996).

human rights"[69] and "will remain, at bottom, a moral struggle: about the dignity and value of human beings, about the rights and responsibilities of women and men, about the relationship between marriage, sexuality, and the rearing of children."[70]

The truth and authenticity of human rights are at stake. Rights do not and cannot evolve. The very nature of a universal human right is that it is inherent and cannot compete with other rights. It is true that infertility is a burden and is never something to be belittled. But IVF is not the answer, for "[b]y turning the most intimate aspects of human activity into essentially public, commercial processes supervised from beginning to end by third parties, one thereby cedes dominion of one's character as parent."[71]

Moreover, we risk creating a system of competing rights that will end up hurting the most vulnerable among us. In this very case, proponents of a right to IVF argued that Costa Rica has an obligation to "balance and give effect to the competing rights at issue",[72] claiming:

> [t]he balance of interests between citizens with obligations, rights and duties, and potential life needs to be reasonable; that is, the right of a man and a woman to form a family must prevail over other state interests that can be safeguarded by clear regulations on IVF techniques, as is done in all countries that allow these techniques.[73]

Both the right to life and the right to found a family are universally accepted human rights, and the right to life is a precondition of all other human rights. Instead of recognizing this, the Court relied on a redefinition of life that excluded the unimplanted human embryo, and accepted the notion that its protection is a lesser "state interest."

Governments need to be reminded of their roles in safeguarding human rights lest they fall victim to the pervasiveness of the relativism that is tainting treaty interpretation and infiltrating court systems, and the integral dignity of the human person be forgotten altogether.

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69 Glendon, *supra* note 60.
70 Weigel, *supra* note 60.
71 Brief of Asociación para la Defensa de la Vida, *supra* note 14, at *21, *quoting* Jacqueline A. Laing & David S. Oderberg, *Artificial Reproduction, the 'Welfare Principle', and the Common Good*, 13 Med. L. Rev. 328, 338 (2005).
72 Brief of Yale Law School, *supra* note 17, at *23.
73 Brief of The Center for Reproductive Rights as Amicus Curiae on behalf of Petitioners, Artavia Murillo et al. ("*in vitro* fertilization") v. Costa Rica, No. 257, at *4 (Nov. 28, 2012).

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