

Does International Law Protect the Unborn Child?

Patrick J. Flood

ABSTRACT

In the debate on whether international law upholds an unborn child's right to live or, conversely, a pregnant woman's right to abort, this essay argues that the weight of the evidence in the relevant universal and regional legal instruments supports the former view. In addition to direct references to unborn life in some agreements, several instruments also call for certain kinds of state action that by their nature provide practical protection for the unborn child's life. In short, the conclusion is that the available evidence points more often, more clearly, and with more weight to a preference for life. This is true of both universal agreements and all but one of the several regional human rights instruments. However, the new Protocol on Women's Rights in Africa contains a paragraph on abortion that, while unsupported by other parts of that text as well as by universal and other African instruments, nonetheless represents a departure from the general pattern. The essay therefore analyzes the Protocol at somewhat greater length and suggests several ways to address its unusual provision on abortion. Finally, the essay outlines three concrete proposals to clarify, strengthen and complement existing international provisions for protection of unborn human life: (1) An African Protocol on the Rights of the Unborn Child, (2) A UN Declaration on the Protection of Unborn Children, and (3) Appointment by the Human Rights Council of a Special Rapporteur on the Protection of Unborn Children.

INTRODUCTION: LAWS AND NORMS OF INTERPRETATION¹

The international protection of human life has three principal elements: laws, institutions, and implementation. The laws most relevant to the subject of this article are "international conventions, whether general or particular, establishing rules expressly recognized" by the states parties,

¹ The author thanks Robert John Araujo, S.J. for helpful comments on an earlier version of this essay.

whether they are called treaties, conventions, covenants, or protocols.²

These laws are made by states—not by individual states acting in isolation but by states acting together as a community after deliberating and negotiating on what the laws should say. States ordinarily do this through permanent associations they have themselves established, such as the United Nations and regional intergovernmental organizations. This is an important point, because at times the UN and other intergovernmental organizations are portrayed as detached entities possessing their own powers and motives and policies, as if the UN, for example, were an alien empire from a distant galaxy pursuing objectives and policies opposed to those of its member states, and trying to impose abortion on demand on the whole world. But in reality the UN *is* nothing more than all the countries of the world, and only they can impose legal obligations on themselves. They do this in an arena—a place of contestation—where the process of trying to forge agreement occurs through debate and persuasion.

It is quite true that some actors in the UN arena are promoting creation of a right to abortion or a duty of states to legalize it. These include some states (depending on who is governing them at the time), officials of international agencies (depending on who is leading these agencies at the time), and lobbyists for some of the thousands of non-governmental organizations with consultative status. The latter two groups can exercise influence, but only states vote, and states determine their foreign policies at home.

At the level of implementation are courts, commissions, committees, agencies and other UN or regional mechanisms created by the community of states through the lawmaking process just described. These bodies are given specific responsibilities and the staff and material resources to carry

² Article 38, para.1 of the Statute of the International Court of Justice: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; [and] d. ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm.

them out, and they are meant to act impartially. As will be seen briefly below, some (not all) of these bodies have at times departed from this standard, and have sought instead to influence public and governmental opinion and thereby to persuade the international lawmaking bodies to enact anti-life laws.

Article 31 (1) of the Vienna Convention on the Law of Treaties³ establishes the general rule of interpretation to be followed in ascertaining the meaning of a binding international instrument: “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.” The “context of the treaty” embraces the text, including preamble and annexes, and “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.” The “object and purpose” are ordinarily stated in the preamble and sometimes also in the opening articles.

DECLARATIONS

“Declarations,” along with “codes of conduct,” “guidelines,” “standard rules” and similar documents adopted by the highest policy-making bodies of intergovernmental organizations, are important documents because they express agreement by the community of states on principles that should guide state activity regarding a particular matter. However, they are not laws and they do not legally bind states; they are neither signed nor ratified.

A declaration also usually contains a definition or concrete description of its subject, a result that may have required years of multilateral negotiation to produce and that by itself often makes the document worthwhile.

Declarations are also intended to promote wider understanding, acceptance, and observance of their principles, rights, and moral obligations. In a sense a declaration can be thought of as an element of a common international framework of moral norms. As such, it can legitimately be cited in diplomatic approaches to other states. Acting

³ Vienna Convention on the Law of Treaties, signed at Vienna 23 May 1969. Entry into force: Jan. 27, 1980. <http://fletcher.tufts.edu/multi/texts/BH538.txt/>.

through their normal decision-making procedures, the community of states can also establish an office to monitor implementation of the declaration, to engage in contacts with governments to promote better observance, and to report on a regular basis to the organization.

Sometimes a declaration later becomes a basis for negotiating a binding international convention, as occurred with the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, discussed below.

The Universal Declaration of Human Rights

The Universal Declaration has inspired all of the human rights conventions and subsequent declarations adopted since it was proclaimed by the General Assembly in 1948. It speaks in its Preamble of the “equal and inalienable rights of *all members of the human family*,” and it states in Article 3 that “*Everyone* has the right to life...” and in Article 6 that “*Everyone* has the right to recognition everywhere as a person before the law.” Article 7 adds the notion of equality: “*All* are equal before the law and are entitled without any discrimination to every protection of the law” (italics added).

These affirmations are not qualified as to age or limited to the born, and it would be difficult to understand them as *not* including the living-but-not-yet-born. The “all members of the human family” of the Preamble, for instance, can only mean all members of the human species, and the “everyone” of Articles 3 and 6 has to mean “every human being,” i.e., every living member of the species. Similarly, the “all” who in Article 7 are declared to be equal to each other must refer to “all members of the human family.” Abortion was not a major political or legal issue in 1948, and very few countries allowed it on any but the most serious grounds, notably when necessary to prevent the death of the mother. Although the drafters of the Declaration decided not to deal directly with the unborn, they opted for the broadest and most inclusive language possible to describe the subjects of human rights.⁴

⁴ William Schabas reports that “many delegations to the United Nations would have preferred some mention that the right to life began ‘from conception,’ thereby protecting the foetus. On this point, too [as with the death penalty], compromise dictated silence.” William A. Schabas, *The Abolition of the Death*

The Declaration was intended to provide a rationale and a stimulus for the conclusion of binding conventions to carry out the general human rights provisions of the UN Charter, which mentions no specific rights. As will be shown, one finds evidence in subsequent instruments to support the argument that the international community of states has taken the view that an unborn “member of the human family” is included in the protection of international law.

UNIVERSAL INSTRUMENTS AND INSTITUTIONS

The International Covenant on Civil and Political Rights (1966)

The Covenant, one of the two principal binding instruments foreshadowed by the Universal Declaration, says in Article 6, paragraph 1 that “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.” As in the Declaration, the scope of “every human being” is not defined but neither is it limited, and certainly the ordinary meaning of the term is unambiguous. Further, in the next sentence, “no one” must mean “no human being” or it means nothing. Paragraph 5 of the same article provides in part that “Sentence of death shall not be carried out on pregnant women.” To underscore the importance of the right to life, Article 4 of the Covenant provides that not even “in time of public emergency threatening the life of the nation” may a state derogate from any part of Article 6.

The foregoing provisions, and particularly the ban on execution of a pregnant woman, are clear expressions of a shared understanding that the unborn child is a human being who, as such, has an independent claim to protection and merits official recognition and intercession. These provisions otherwise make little sense. The ban on execution of a pregnant woman, which is unqualified and without exception, can have only one foundation, namely, to spare the life of an innocent human being, her child. Moreover, it is only the fact that the woman is carrying an innocent child that exempts her from being put to death. She need not file any appeal or take other action to gain this exemption. The basis of all systems

Penalty in International Law, 2nd ed. (Cambridge UK: Cambridge Univ. Press, 1997), p. 25.

of criminal justice is that the guilty shall be punished and the innocent shall not, and international human rights instruments reflect this logic.

In his definitive study of international efforts to abolish capital punishment, William Schabas devotes considerable attention to the widespread acceptance of the norm against executing pregnant women.⁵ Writing of the debate on the Covenant in the Human Rights Commission, he says

With respect to the exclusion [from execution] of pregnant women, the Secretary-General's Annotations suggest that the provision was added out of 'consideration for the interests of the unborn child.' The drafters of the Covenant studiously avoided pronouncing themselves on the difficult issue of when the right to life begins. The [Civil and Political Rights] Covenant does, however, protect the unborn child, something that is completely compatible with provisions in the International Covenant on Economic, Social and Cultural Rights.⁶

Schabas also notes that “[f]or the pregnant woman, it is the unborn child’s protection that is envisaged, and the sentence may well be ‘imposed’ although it may not be ‘carried out’.” He later observes that a 1962 study for the United Nations by French jurist Marc Ancel had “concluded that most legal systems protected juveniles and pregnant women from the death penalty and that, in practice, a stay of execution for pregnant women nearly always led to commutation of the sentence.”⁷

Convention on the Rights of the Child (1989)

Like the Covenant, the Convention on the Rights of the Child (CRC) was preceded by a declaration, the Declaration of the Rights of the Child

⁵ *Ibid.*, esp. pp. 120-25.

⁶ *Ibid.*, at pp. 122-23. In n223 Schabas cites Articles 10 (2) and 12 (2) (a) of the latter Covenant as the compatible provisions. The first provides in part that “special protection should be accorded to mothers during a reasonable period before and after childbirth,” and the second calls upon States Parties to take steps necessary for “the provision for the reduction of the stillbirth rate and of infant morality and for the healthy development of the child.”

⁷ Marc Ancel, *Capital Punishment*, UN Doc. ST/SOA/SD/9, Sales No. 62.IV.2, at 13, 25. Cited in Schabas, p. 150.

(1959), which includes in its Preamble a significant affirmation of the rights of the unborn:

Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, [and] whereas the need for such special safeguards has been... recognized in the Universal Declaration of Human Rights and in the statutes of specialized agencies and international organizations concerned with the welfare of children..., the General Assembly... calls upon... national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken....”⁸

The Preamble to the *Convention*, adopted thirty years later, refers three times to the Universal Declaration and twice to the 1959 Declaration, and reiterates in Paragraph 9 that

[A]s indicated in the Declaration of the Rights of the Child, ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

Article 1 of the Convention defines a child as “every human being below the age of eighteen years unless under the laws applicable to the child, majority is attained earlier.” During negotiations on this Article, some members of the Human Rights Commission Working Group would have defined a child as every human being from the moment of birth. However, other members, noting that this would conflict with the Declaration of the Rights of the Child (1959), as well as with the laws of many member states, proposed as a definition “every human being from the moment of conception.” Both formulations attracted strong support as well as

⁸ Jude Ibegbu, S.J., *Rights of the Unborn Child in International Law*, Vol. 1 (London UK: Edwin Mellen Press, 2000), pp. 132-39. During General Assembly debate on the Declaration in 1959, the Assembly defeated two proposals to insert the words “from the moment of conception,” partly because of objections that it was impossible to determine the exact moment of the event. The initial vote to reject, in the Preamble, was 40-20, with 9 abstentions, after which the Committee voted 58-1, with 10 abstentions to adopt “before as well as after birth.” A further effort to insert “from the moment of conception” in another section of the Declaration was defeated on a motion to reject, 34-28, with 10 abstentions.

opposition in the drafting group; because the group operated on the basis of consensus, it settled on the language finally adopted.

“Every human being below the age of eighteen years” clearly does not exclude the unborn, as it *does* exclude human beings who have attained the age of eighteen. Again, applying the rules of interpretation of the Vienna Convention on the Law of Treaties concerning “the ordinary meaning of the words in their context” and the “context of the treaty including...the preamble,” one finds strong grounds for States Parties to maintain that the Convention *does* guarantee protection to the unborn child. There is in fact a chain of logic extending from the Preamble through Articles 1 and 6. In the Preamble, it is “the child” that needs “appropriate legal protection before as well as after birth.” In Article 1 “the child” is “every human being below the age of eighteen years.” And in Article 6 it is “every child” who in para. 1 “has the inherent right to life” and in para. 2 it is “the child” whose “survival” States Parties “shall ensure to the maximum extent possible.”⁹ Who are they talking about here, if not the unborn as well as the born child?¹⁰

Several delegations entered into the record of the Commission their understanding that the definition of a child does in fact apply to unborn children, since they are mentioned in the Preamble as needing legal protection, and the object and purpose of the Convention is to protect the

⁹ Article 6 states that “States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child.”

¹⁰ Yet, the *ad hoc* committee of the Commission Working Group that had agreed on the pro-unborn child preambular paragraph also inserted a statement in the *travaux préparatoires* (legislative history) of the Convention that “in adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of Article 1 or any other provision of the Convention by States Parties.” The UN Legal Counsel gave an opinion that the insertion was problematic and most unusual, since under the Vienna Convention rules for interpretation the *travaux préparatoires* are merely supplementary sources of interpretation, not to be used to detract from the object and purpose of the document as stated in the Preamble, which this particular insertion appears to do. Thus any statement in the *travaux* could be ignored if found to be in conflict with the Preamble, as was likely in this instance, in which case the insertion would have no legal effect. E/CN.4/1989/48, March 2, 1989, cited in Ibegbu, p. 145.

rights of children.¹¹ Additionally, several states attached reservations or understandings regarding the status of the unborn when signing or ratifying the Convention.¹²

Thus, while Articles 1 and 6 do not *explicitly* endorse a right to life for the unborn child and a state's obligation to protect that right, the weight of these articles taken together with the Preamble provides solid ground for a claim that the unborn child is entitled to legal protection under the Convention. There is no evidence in the Convention of a right to abort. Indeed, there is instead a distinct *preference for life* for the unborn as well as the born.

Commentators differ in their interpretation of Articles 1 and 6, but on balance favor the argument of a preference for life. Glenn Mower has written that “[t]he question of whether ‘child’ was to include the unborn as well as the born was, in effect, left to be answered by implication through a compromise version of Article 1.... The possibility that this includes the unborn child as well as the born is suggested by the language of paragraph 9 of the Preamble.... An even clearer indication that the obligations assumed by States Parties in regard to the child's inherent right to life extend to the unborn child is given in Article 24, para. 2(d), which commits the parties to ensuring appropriate prenatal care for mothers.”¹³

On the other side, Philip Alston grants that “there is no basis for

¹¹ For instance, the representative of the Federal Republic of Germany told the Human Rights Commission in 1989 that including the ninth preambular paragraph was “a great success, because it was the first time that the right to life of the unborn child had been recognized in an international convention.” Cited in Ibegbu, p. 146, n205. Malta and Senegal inserted statements in the Commission's record that in their view the Convention protected the unborn from the moment of conception.

¹² Argentina, Guatemala, and the Holy See signed or ratified the Convention with reservations or declarations affirming that it applies from the moment of conception. By contrast, France, Tunisia and China, when ratifying the Convention said that their national laws relating to abortion would not be affected, and the UK declared that it would consider that the Convention applies “following a live birth.”

¹³ A. Glenn Mower, *The Convention on the Rights of the Child: International Law Support for Children* (Westport CT: Greenwood Press, 1997), p. 29.

asserting [that the] unborn child has been authoritatively rejected by international human rights law” as a subject of the law, but he asserts that “there has been a consistent pattern of avoiding any explicit recognition of such rights, thereby leaving the matter to be dealt with outside the international legal framework.” Alston further claims that “neither the text of the Convention itself, nor any of the relevant circumstances surrounding its adoption, lend support, either of a legal or other nature, to the suggestion that the Convention requires legislators to recognize and protect the right to life of the fetus.”¹⁴ But the argument is strained. The text of the Convention refers directly to the Declaration, which, as noted above, states that “the need for such special safeguards has been...recognized in the Universal Declaration of Human Rights...” Surely Alston is not advocating repudiation of the Universal Declaration. Moreover, the Convention definition of “child” can clearly embrace the unborn. What the Convention requires of states parties is to give effect to its provisions, as is the case with all international legal agreements. In this case, the obligation would be to give meaningful legislative effect to the established need for “appropriate legal protection...before as well as after birth.”

Manfred Nowak takes a more non-committal approach by noting that the drafters of the Convention decided to include the preambular statement on the “need for appropriate legal protection, before as well as after birth,” but deliberately “[left] open the starting point of childhood.” He notes that the Committee charged with implementing the Convention (hereinafter the CRC Committee) has emphasized repeatedly that laws on abortion are within the discretion of individual States to enact, i.e., there

¹⁴ Cited in Lawrence LeBlanc, *The Convention on the Rights of the Child*: (Lincoln: Univ. of Nebraska Press, 1995), p. 71. In January 2006 Alston was listed by the Center for Reproductive Rights (CRR) as a member of its International Litigation Advisory Committee, which “supports the Center’s work to enforce internationally recognized reproductive rights in courts and other human rights fora...” (www.crlp.org/ww_litigation) For a fuller critique of Alston’s reading of the Convention, see Winston L. Frost, “Is Abortion an International Right?” in *Life and Learning VII*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: University Faculty for Life, 1999), pp. 71-81.

is no international right to abort but nations can permit or restrict it.¹⁵

Like other treaty-based human rights implementation bodies, the CRC Committee consists of experts elected by an assembly of States Parties whose tasks are to review state reports and to “make suggestions and general recommendations based on information received” from a State Party or UN agency, and to transmit these to “any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties” (Article 45). The members serve in their individual capacity and receive no instructions from governments.

In 1997 the Committee took a clear stand in favor of disabled unborn children when it urged states to amend “discriminatory laws on abortion affecting disabled children...”¹⁶ Additionally, it has also urged states to study “factors which lead to practices such as female infanticide and selective abortions, and to develop strategies to address them.”¹⁷ The Committee has also criticized high rates of (legal) abortion and the use of abortion as a method of family planning in some states while expressing concern over “clandestine abortions “elsewhere.”

These analyses, a careful reading of the Convention itself, and the Committee’s practice over the years, can be read as supporting a preference for unborn life.

The Geneva Conventions

Evidence of the international community’s intention to include the unborn as beneficiaries of international protection began to appear very soon after the adoption of the Universal Declaration.¹⁸ In the Fourth

¹⁵ Manfred Nowak, *Commentary on the United Nations Convention on the Rights of the Child, Article 6: the Right to Life, Survival and Development* (Boston MA: Martinus Nijhoff Publishers, 2005), pp. 26-27.

¹⁶ Cited in Nowak, p. 29.

¹⁷ Ibid.

¹⁸ The Genocide Convention, adopted by the General Assembly one day earlier, incorporates in the definition of genocide (Article II) “imposing measures intended to prevent births within the group.” The Nazi practice of forced sterilization is certainly part of what is covered here, although Nazi policy also included abortion in regard to certain religious and ethnic groups.

Geneva Convention (Protection of Civilian Persons in Time of War) of 1949, states included expectant mothers among those who “shall be the object of particular protection and respect (Article 16), who shall be included in hospital and safety zones (Art. 14), and who shall be beneficiaries of the free passage to civilians in occupied territory of “essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases” (Art. 23).¹⁹ Article 38 guarantees to alien pregnant women any preferential treatment granted to pregnant women who are nationals of an occupied state, and Article 50 prohibits reducing for nationals of an occupied state any preferential measures for pregnant women that pre-existed the occupation. Article 89 provides that expectant (and nursing) internee mothers and children shall be given additional food, and Article 132 includes them among groups of internees whom the Parties are to try to repatriate even while hostilities are still underway. Thus mothers and their unborn (as well as newborn) children are meant to be the beneficiaries of special measures of protection and support.

Article 70 of Protocol I to the Geneva Conventions (1977) mentions expectant mothers among those persons to be given priority in the distribution of relief consignments, as they are among the groups to be “accorded privileged treatment or special protection” under the Fourth Convention as well as the Protocol. Article 76 of Protocol I provides that Parties to an armed conflict “shall endeavor to avoid the pronouncement of the death penalty on pregnant women and mothers having dependent infants.... The death penalty shall not be executed...on such women.” Protocol II (1977) to the Conventions states in Art. 6 that “the death penalty shall not be carried out on pregnant women or mothers of young children.”

These provisions in the Fourth Convention and the two Protocols, and the prohibitions on executing pregnant women in the Covenant on Civil and Political Rights, the American Convention on Human Rights,²⁰

¹⁹ Articles 17, 18, and 20-22 also refer to protective and other measures related to “maternity cases.”

²⁰ <http://www.cidh.org/Basicos/Basicos2.htm>.

the African Charter on the Rights and Welfare of the Child,²¹ and the Arab Charter on Human Rights,²² provide strong evidence of a widespread international commitment to protecting unborn human beings.

The Statute of the International Criminal Court (1998)

The Statute of the International Criminal Court specifically excludes any interpretation that could provide a basis for asserting an international right to abortion. In the definition of crimes against humanity, one finds that “‘forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy” (Article 7(2)(f)). Articles 8(2)(b) (xxii) and 8(2)(e)(vi), regarding war crimes, incorporate this definition by reference. The second sentence does not, of course, establish by itself an international right to life for the unborn, but it has a protective effect insofar as it upholds national legislation that safeguards human life before birth.

Summit Outcome Document (2005)

Advocates of abortion have worked hard but unsuccessfully in the discourse wars of international thematic conferences to “re-imagine” or “re-conceptualize” family planning to include abortion.²³ The most recent

²¹ OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

²² [Revised] Arab Charter on Human Rights, Art. 7.2, hei.unige.ch/~clapham/hrdoc/docs/arabcharter.html.pdf.

²³ For instance, Paige Whaley Eager, *Global Population Policy: From Population Control to Reproductive Rights* (Aldershot UK: Ashgate Publishing Limited, 2004). International thematic conferences as, for example, the 1993 World Conference on Human Rights and similar conferences held during the 1990s on population, women, food, housing and the environment each concluded with a document seeking to articulate areas of agreement among the participating states, including principles and goals in the given subject area. For an extended treatment of these conferences from a pro-life perspective, see Richard G. Wilkins and Jacob Reynolds, “International Law and the Right to Life,” *Ave Maria Law Review* 4 (2006), reprinted in *Life and Learning XV*, ed. Joseph W. Koterski, S.J.

authoritative statement of the international community at the highest *political* level, the Summit Outcome Document approved at the meeting of Heads of State and Government at the United Nations in September 2005, is notable for what it does *not* say on the subject. A recommendation in the Millennium Development Goals section of the Secretary-General's preparatory document, "In Larger Freedom," would have had the Heads of State and Government declare support for "ensuring access to reproductive health services," which abortion advocates sometimes claim as being tantamount to legalizing abortion on demand.²⁴

Under the heading "National Investment and Policy Priorities," the Secretary-General's report had wanted the Summit to assert that "ensuring access to sexual and reproductive health services" is "essential" for meeting the Millennium Development Goals, although this view is not found in the original formulation of the Millennium Development Goals themselves (at the Millennium Summit in 2000) and is in no way logically required in furtherance of them. The Heads of State and Government did not accept it, and all such references were deleted from the final Summit document. While a concluding document from the Summit is not a binding convention, in view of its adoption by consensus at the highest intergovernmental level it can be regarded as a "super-declaration" and is intended by the community of States to be accorded particular deference.²⁵

Declaration on Human Cloning

In the Declaration on Human Cloning, adopted 84-34 on March 3, 2005, the UN General Assembly called upon Member States "to adopt all measures necessary to protect adequately human life in the application of life sciences... [and] to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human

(Washington, D.C.: University Faculty for Life, 2006), pp. 3-60.

²⁴ *In Larger Freedom*, A/59/2005, March 21, 2005 rec. 5 (j), also para. 40.

²⁵ Summit Outcome Document A/RES/59/314, adopted September 16, 2005.

life....”²⁶ The Declaration is thus a clear affirmation that human life even at its earliest stages is deserving of legal protection. Other operative paragraphs call on States to adopt measures “to prohibit the application of genetic engineering techniques that may be contrary to human dignity [and]... to take measures to prevent the exploitation of women in the application of life sciences.” As it had not been possible to achieve consensus on an international convention on the subject, the Assembly called upon all Member States “to adopt and implement without delay national legislation to bring into effect” the foregoing paragraphs.²⁷

Not All Experts Are Impartial

As observed earlier, the Committee on the Rights of the Child has generally taken an impartial approach in interpreting the Convention and in evaluating state reports. This has not always been the case with other expert committees that monitor implementation of international human rights agreements. Advocates of legalized abortion who have strained to find aspects of a right to abort hidden in existing international legal instruments have focused in the main on the work of two bodies: the Human Rights Committee of the Covenant on Civil and Political Rights (CCPR)—not to be confused with the Human Rights Council, an intergovernmental body established under the direct authority of the General Assembly to carry out the human rights provisions of the Charter—and the Committee on the Elimination of All Forms of Discrimination against

²⁶ Resolution 59/280, paras. a) and b), Doc. A/RES/59/280, March 23, 2005. Also, seven additional delegations subsequently informed the Secretariat that had they been in the room they would have voted in favor of the Declaration, one additional delegation would have voted no, and two would have abstained. If these statements are taken into account in determining the Assembly’s overall attitude, the total would be 91 in favor and 35 against, with 39 abstentions. Doc. A/59/PV.82, at 2-3 (2005).

²⁷ Ibid. Para.(e). A final paragraph (f) called upon states to take into account global health issues such as HIV/AIDS, tuberculosis, and malaria when reaching decisions on financing medical research.

Women (the CEDAW Committee).²⁸

The work of these and other committees has been the subject of extended pro-life analysis by Richard Wilkins and Jacob Reynolds.²⁹ The Human Rights Committee consists of 18 experts elected by the Assembly of States Parties to the Covenant to examine periodic state reports and to submit comments on these reports as well as any general comments to the States Parties and to the UN Economic and Social Council. The members serve in their individual capacity and receive no instructions from governments. The Committee also reports annually to the UN General Assembly. Additionally, the Committee can receive, examine, and attempt to resolve a complaint brought by one State Party against another (Art. 41) and by an individual against a State Party (Optional Protocol 1), providing the State(s) concerned have formally accepted the respective procedure.

As with any binding agreement, in ratifying the Covenant States Parties accepted a genuine legal obligation to observe its provisions. In no sense, however, does the Covenant grant the Committee authority to order a state to carry out its recommendations or to do anything beyond fulfilling its obligation to submit reports in accordance with Article 40.³⁰

Nevertheless, the Committee in recent years has taken an expansive

²⁸ See, for instance, CRR, *Briefing Paper: Beijing and International Law: UN Treaty Monitoring Bodies Uphold Reproductive Rights* (Feb. 2005), pp. 3-4 and notes, www.reproductiverights.org/pub_bp.html. A great deal of the academic studies taking this line were published during the mid-1990s, around the time of the Cairo and Beijing conferences and shortly thereafter. For instance, Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: Univ. of Penn. Press, 1994). Corinne A.A. Packer, *The Right to Reproductive Choice: A Study in International Law* (Turku, Finland: Institute for Human Rights, Abo Academi Univ., 1996), esp. chs. V and VI. More recent advocacy pieces include Maja Kirilova Eriksson, "Making International Law More Responsive to Women's Needs," and Rebecca Cook and Mahmoud Fathalla, "Advancing Reproductive Rights Beyond Cairo and Beijing," in Kelly D. Askin and Doreen M. Koenig, *Women and International Human Rights Law*, vol. 3 (Ardsey NY: Transnational Publishers, 2001).

²⁹ Richard Wilkins and Jacob Reynolds, "International Law and the Right to Life," cited in n23 above.

³⁰ The Covenant does not authorize the Committee to call upon the political or other organs of the United Nations to take measures to compel action by a state.

attitude toward its responsibilities and thereby stimulated considerable controversy over the rights of the unborn. For instance, in General Comment 28 it requested that in their reports to the Committee states include data on measures to “ensure that [pregnant women] do not have to undertake clandestine abortions.”³¹ In its comments on the state reports of Poland, Nepal, Chile, Peru, and Malta, among others, the Committee found these states in breach of the Covenant for not legalizing abortion or expanding the grounds on which it is legal, and urged them to change their national laws to do so.³²

Regarding Poland, for example, it asserted in 2004 that the “restrictive abortion laws in Poland may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health.” The Committee made this statement despite the fact that Poland’s law permits abortion in cases of threat to the mother’s life or health, cases of rape or incest, and serious and irreversible damage to the fetus. The Committee nevertheless declared that “the State Party should liberalize its legislation and practice on abortion.”³³

This writer attended a number of sessions of the Committee during the early 1980s, when its members resisted the temptation, to which some of their successors have yielded, to interpret the Covenant to suit their personal agendas. In his view, the Committee would do well to resume its former policy.

Committee of the Convention on the Elimination of All Forms of Discrimination Against Women (1979).

The Convention on the Elimination of All Forms of Discrimination

³¹ As reported in Sarah Joseph et al., *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed. (New York NY: Oxford Univ. Press, 2005), p. 187. Full text in UN Doc. CCPR/C/21/Rev.1/ Add. 10 (2000).

³² *Concluding Observations of the Human Rights Committee: Poland*, 82nd Session, UN Document CCPR/CO/82/POL/Rev.1 (2004) As of Nov.2006, Poland has maintained its legislation intact, as have Chile, Malta and Peru. In Sept. 2002 Nepal legalized abortion on demand during the first three months.

³³ *Concluding Observations of the Human Rights Committee: Poland*, 82nd Session, UN Document CCPR/CO/82/POL/Rev.1 (2004).

Against Women (CEDAW) established its own expert committee of 23 members, with functions and responsibilities similar to those of the Human Rights Committee. Like the latter, their main task is to review periodic reports submitted by States Parties on their implementation of the agreement, and their members serve in their individual capacity, not as government representatives.

The Convention does not mention abortion and seems to regard unborn children as worthy of consideration and care. Article 4, paragraph 2 says that “[a]doption by States Parties of measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.” Article 11, on the right to work, provides in paragraph 2 that “States Parties shall take appropriate measures (a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave..., (b) to introduce maternity leave with pay or with comparable social benefits..., and (d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.” While the last-named of these provisions does not add “or to their unborn children,” the protective effect of the provision would benefit child as well as mother from workplace risks.

Despite the pro-child (and pro-mother) thrust of the foregoing provisions, CEDAW Committee General Recommendation 24 (m) said that “States Parties should ensure that measures are taken to ... ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.” This recommendation, adopted in 1992, has been reflected in some of the experts’ subsequent comments on country reports, as for example in 1998 when the Committee criticized Croatia for “the refusal, by some hospitals, to provide abortions on the basis of conscientious objection of doctors. The Committee considers this to be an infringement of a woman’s reproductive right.” Later in the same report, the Committee “strongly recommends that the Government take steps to secure the enjoyment by women of their reproductive rights by, *inter alia*, guaranteeing them access to abortion services in public hospitals.”³⁴ But the Convention does not define “reproductive rights,” nor does it empower

³⁴ UN Doc. (A/53/38/Rev.1), paras. 91-119.

the Committee to define them or to specify their content. The Convention also specifically permits reservations and establishes a dispute settlement procedure as well as an opportunity, when ratifying, not to accept the latter.

An Optional Protocol, to which reservations are not permitted, empowers individuals and groups, including NGOs, to bring complaints before the Committee. The Committee is authorized to “take such interim measures as may be necessary to avoid possible irreparable damage to the victim...” Its procedures include the possibility of designating “one or more of its members to conduct an inquiry and to report urgently to the Committee...[and]...with the consent of the state Party, the inquiry may include a visit to its territory.” The Protocol thus permits a more activist role for this Committee than for most treaty implementation bodies, but only with respect to States that have acceded to the Protocol. However, States may opt out of the aforementioned inquiry procedures by making a declaration at the time of accession to the Protocol. The Protocol, but not the Convention, requires States to publicize the work of the Committee, “in particular, on matters involving that State Party.” The net effect of this publicity, when abortion is the subject, has usually been to provide pro-abortion NGOs with superficially “official” material for their own publicity and advocacy. As of December 2006, 83 countries had ratified the Protocol, which entered into force in 2000.

UN SPECIALIZED AGENCIES AND PROGRAMS

Some UN institutions try to influence state policies, programs, and regulations affecting the right to life of the unborn through adopting “strategy documents,” “programs,” “technical and policy guidance,” and similar papers. These are not binding international instruments.

World Health Organization

In April 2004 the 57th World Health Assembly, the senior policy-making body of WHO, adopted a “Reproductive Health Strategy to accelerate progress toward the attainment of international development goals and targets”³⁵ that calls attention to the consequences of unsafe

³⁵ WHA A57/13, April 15, 2004, adopted without a vote.

abortion, which it defines as “a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards, or both” (para.17, note 1, citing WHO/MSM/92.5, 1992). The Strategy document reaffirms the definition of “reproductive health” adopted in the Program of Action of the International Conference on Population and Development (ICPD) at Cairo in 1994, and its description of “reproductive rights” as “embrac[ing] certain human rights that are already recognized in national laws, international human rights documents, and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health....”³⁶ But the Cairo definition mentions neither abortion nor equivalent terms such as voluntary termination or interruption of pregnancy, and in paragraph 8.25 the Cairo Program of Action specifically *excludes* abortion as a method of family planning.³⁷

International staffs also sometimes try to influence national policy and regulations affecting unborn children. In 2003 WHO published a 110-page document entitled “Safe Abortion: Technical and Policy Guidance for Health Systems.” Prepared by the WHO Secretariat, it reports on what it would take to establish systems and services to provide safe abortion in countries where it is already legal. But it also openly urges states to abolish all regulations and procedures that might in any way slow down or complicate the performance of abortion, including waiting periods, authorization by medical boards, parental or spousal authorization or notification, requirements that only doctors can perform abortions, requirements that abortions can be performed only in hospitals, age limits,

³⁶ UN document A/CONF.171/13: Report of the ICPD, Paragraph 7.3; the definition of “reproductive and sexual health” is at Para. 7.2.

³⁷ A consensus statement adopted by a conference of ministerial-level government representatives is meant to convey a generally shared understanding of the matters addressed therein. A program of action is intended to represent broad political (not legal) agreement on recommended actions. States often qualify their acceptance of a consensus text by entering interpretive statements into the record, as occurred at Cairo and Beijing.

requirements to use ultrasound, conscience clauses for health professionals, and limitations as to abortion methods, unless these are rules explicitly required by law in a particular country.³⁸ As a set of recommendations, the document obviously does not have the status of law and cannot impose obligations on states, although the intent of its drafters is clear.

The UN Fund for Population Activities (UNFPA).

UNFPA has been active in promoting and funding abortion wherever it is legal in the world and is one of WHO's three partners, with the World Bank and the UN Development Program, in the Special Program on Research, Development and Research Training in Human Reproduction, whose purpose is specifically "to address the problem of unsafe abortion" through, *inter alia*, "develop[ing] safe alternative approaches to pregnancy termination" and "formulat[ing] evidence-based technical and policy guidance on safe abortion."³⁹ The "Technical and Policy Guidance" described above is clearly meant to further these goals.

The claim continues to be repeated by abortion advocates that making or keeping abortion illegal contributes to increased maternal mortality. This claim is typically accompanied by fictitious "estimates" based on scattered anecdotes, or on the imagination of the estimator, that millions of women die annually from illegal abortions, coupled with the implication that all of them would still be alive if only abortion were made legal and accessible and (therefore) safe. The UN Human Rights Committee, the CEDAW Committee, the UN Fund for Population Activities, and non-governmental organizations such as CRR, the Women's Economic Development Organization, and the International Women's Health Coalition have all engaged in this type of advocacy over the years, citing each other's foundationless estimates as the foundation

³⁸ "Safe Abortion: Technical and Policy Guidance for Health Systems," World Health Organization, 2003 www.who.int/reproductive-health/publications/safe_abortion/safe_abortion.pdf.

³⁹ www.who.int/reproductive-health/unsafe_abortion/index.html.

for their own. Pro-abortion academics have also sought to make the case.⁴⁰ But in January 2006, the UN Population Division issued a report showing that nations that have legalized abortion have not seen a corresponding drop in the maternal death rate, nor do they have lower maternal mortality rates than states that have adopted laws restricting abortion.⁴¹ In fact, even the aforementioned WHO Strategy says in para. 36 that “central to reducing maternal morbidity and mortality, and perinatal mortality, are the attendance of every birth by skilled health personnel and comprehensive emergency obstetric care to deal with complications.”⁴²

REGIONAL INSTRUMENTS AND INSTITUTIONS

Human rights conventions were in force for three regions as of April 2006: the Americas, Europe and Africa, discussed below.

A fourth regional instrument, the Arab Charter on Human Rights, was adopted by the League of Arab States in May 2004. While not yet in force, the Charter merits a brief discussion. Three of its provisions are relevant to the subject of this essay. Article 5 states: “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.” Article 7 provides that “[t]he death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases the best interests of the infant shall be the primary consideration.” And Article 43 coordinates the Charter with other legal instruments:

Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments

⁴⁰ A good example is Rebecca J. Cook, “Human Rights Dynamics of Abortion Law Reform,” *Human Rights Quarterly* 25 (2003): 1-59, which makes this argument explicitly as part of a broader case for legalization. Professor Cook is a member of the Center For Reproductive Rights Litigation Committee.

⁴¹ *World Mortality Report: 2005*. ST/ESA/SER/A/252. Department of Economic and Social Affairs. Population Division. New York: UN, 2006.

⁴² WHA 57/13, April 15, 2004.

which the States Parties have adopted or ratified, including rights of women, *the rights of the child* and the rights of persons belonging to minorities.”⁴³
(italics added)

These provisions also appear in universal and other regional instruments and are discussed elsewhere in connection with those agreements.

THE INTER-AMERICAN SYSTEM

The American Convention on Human Rights (1969), which entered into force in 1978, contains the following provisions relevant to the right to life of the unborn:

Article 1. Obligation to Respect Rights. For the purposes of this Convention, “person” means every human being.⁴⁴

Article 3. Right to Juridical Personality. Every person has the right to recognition as a person before the law.⁴⁵

Article 4. Right to Life. 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. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

The American Declaration of the Rights and Duties of Man (1948), which applies to members of the Organization of American States that have not ratified the Convention, does not mention a right to legal protection from the moment of conception or, indeed, from any specific point, nor does it recognize a right to abortion. Article I states: “Every human being has the right to life, liberty, and the security of his person.”

⁴³ <http://hei.unige.ch/~clapham/hrdoc/docs/arabcharter.html.pdf>.

⁴⁴ The Spanish text reads “Para los efectos de esta Convencion, persona es todo ser humano,” i.e., literally, “*is* every human being” <http://www.cidh.org/Basicos/Basicos2.htm>.

⁴⁵ The Spanish text reads “Toda persona tiene derecho al reconocimiento de su personalidad juridica,” literally “Every person has the right to recognition of his legal personhood.” The meaning is, of course, the same in both languages, but the Spanish text conveys the idea somewhat more directly.

In 1981 the Inter-American Human Rights Commission rejected a complaint under the Declaration brought against the U.S. Government by two Americans who asserted that the legalization of abortion by the U.S. Supreme Court in 1973, and a subsequent application of that decision in a case in Massachusetts, violated the Declaration. The petitioners argued that the Convention should be read as spelling out more precisely the provisions of the Declaration and that Article 1 of the Declaration should therefore be understood as applying from the moment of conception. The Commission ruled that, since the U.S. was not a Party to the Convention at the time the petition was filed, and since the Convention itself had not entered into force at the time the alleged violations occurred, it could not apply the Convention in the case.⁴⁶

The Commission noted, however, that in preparing its draft of the future Convention in 1968, the Commission had itself included the phrase “in general, from the moment of conception” and that the San Jose Diplomatic Conference had approved this formulation by majority vote in the process of adopting the Convention the following year. The Commission had rejected the simpler phrase “from the moment of conception” because it wanted to accommodate the domestic legislation of states that permitted abortion “*inter alia*, to save the mother’s life, and in case of rape.”⁴⁷ From this it is clear that the Commission and the San Jose Conference both saw a need to include some protection for the unborn child. They did not define precisely the length of time in pregnancy during which protection was to be afforded; in fact, the reason for including the qualifying phrase “in general” does not seem to have

⁴⁶ IACHR Resolution No. 23/81, Case 2141. The decision was adopted 5-2, with the two dissenting Commissioners filing detailed legal, scientific, and medical arguments that the Declaration could and should be interpreted as covering the unborn. A third Commissioner wrote that, while he agreed with the majority that the U.S. did not violate the Declaration and that the Convention was not applicable to the U.S. because it was not a party thereto, he “completely shares the judgment” of the dissenters that “human life begins at the very moment of conception and ought to warrant complete protection from that moment, both in domestic law as well as international law.” www.cidh.org/annualrep/80.81eng/USA2141.htm.

⁴⁷ *Ibid.*, paragraph 25.

referred to time limits but rather to finding a formula that would allow some flexibility for narrow exceptions on substantive grounds. The legislative history also indicates that the words “*inter alia*” were not to be understood broadly.⁴⁸ As of January 2006, the Inter-American Commission had not ruled in any other abortion case. The Inter-American Court of Human Rights, which has jurisdiction over matters covered by the Convention, has not heard any case involving abortion nor has it issued any advisory opinion on the matter.

THE EUROPEAN SYSTEM

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, entered into force 1953) and its various Protocols say nothing specifically about the right to life of the unborn child or about abortion. Article 2 of the Convention provides that “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

Although pregnant women were not exempted by the Convention itself from execution, Protocol 6 in 1983 abolished capital punishment in peacetime; as of February 2006, 45 of the 46 member states of the Council of Europe had taken the death penalty off their statute books and the remaining country, Russia, had instituted a moratorium. Protocol 13, adopted in 2002, aims to abolish the death penalty absolutely, and is in force for the 35 countries that have ratified it.⁴⁹ All candidate members of the European Union must abolish the death penalty as a condition of

⁴⁸ In its 1981 review of the Declaration, the Commission said that in 1948 eleven states plus Puerto Rico allowed abortion to save the mother’s life, and six in cases of rape. Only four states permitted abortion for reasons other than these: Peru (to save the mother’s health), Cuba (to prevent transmission of a contagious disease), Nicaragua and Uruguay (“to protect the honor of an honest woman”), and Uruguay (economic reasons, if done in the first three months). *Ibid.*, paragraphs 18 (b), subparas. (e) and (f).

⁴⁹ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=1DF=&C:=ENG>.

membership, a provision that has acted as a powerful incentive.⁵⁰ As a result of these measures, there are no executions of pregnant women in Europe.

Until 1998, the Council of Europe utilized a two-stage human rights system, with cases heard first by a Commission and then, if not fully resolved and under certain conditions, by a Court. Both were part-time institutions. In November 1998, Protocol 11 abolished the Commission and converted the Court into a full-time institution to which individuals as well as states have direct access.

In perhaps the earliest case in the European system involving the rights of the unborn, the Commission ruled in 1977 that a West German statute banning abortion after twelve weeks did not violate a woman's right to privacy under Article 8 of the European Convention.⁵¹ This ruling is still in effect. In two subsequent cases, the Commission ruled against a husband in the UK (1980) and a domestic partner in Norway (1992) who argued that Article 2 of the Convention protected the unborn children of which they were the fathers. In the British case the Commission ruled: "If Article 2 were to cover the fetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the fetus would be regarded as being of a higher value than the life of the pregnant woman."⁵² The Commission here seemed to want to preserve a balancing test in which abortion would be permissible to save a pregnant woman's life; it did not find that the unborn child has no rights. In the Norwegian case, the Commission held that Norwegian law, which permitted abortion on demand within 12 weeks, and up to 18 weeks with approval by a medical

⁵⁰ http://europa.eu.int/comm/external_relations/human_rights/adp/index.htm; all European Union member states are parties to Protocol No. 6 and signatories of Protocol 13.

⁵¹ *Bruggemann and Scheuten v. Federal Republic of Germany*, App. No. 6959/75, 10 European Commission on Human Rights *Decisions and Reports*, 100 (1977).

⁵² *Paton v. United Kingdom*. App. No 8416/78, 3 Eur. H.R. Reports 408 (1980).

board, fell within the legitimate legislative authority of the state.⁵³ Again, the Commission did not declare that the fetus has no rights; but instead of invoking a balancing test in this case, it simply deferred to the primacy of national legislation. In the most recent case, *Vo. v. France* (2004), by vote of 14-2 with one abstention, the court also deferred to national primacy in this area, holding that “the issue of the protection of the fetus [under the Convention] has not been resolved within the majority of the Contracting States themselves....”⁵⁴

The Commission and the Court have thus affirmed that the central principle of European human rights law on the rights of the unborn is deference to national legislation. Neither the Court nor the Commission before it has found a right to abort within the Convention, nor has it found a right to life for the unborn child, but it has at times noted that national laws seek to balance the interests of the pregnant woman and her child. In so doing, they have seemed to want to do two things: first, to uphold the principle of democratic self-government, and second, to promote a general acceptance of a balance-of-interests approach.

When the European Parliament narrowly approved a resolution in 2003 calling for legalization of abortion in European Union member states, opponents roundly criticized the recommendation on the grounds that neither the Parliament nor any other European Union institution has authority in this area, which is reserved exclusively to national jurisdiction.⁵⁵ Additionally, in November 2005 Austria, Germany, Malta, Poland, Slovakia and Italy formally objected to proposals that the European Union fund human embryonic stem cell research, urging that such decisions must be left exclusively to national legislation. As European countries continue to debate the issues involved in abortion and to develop their national legislation, the pattern of democratic diversity is likely to continue. Had the draft European Constitution been ratified, its weakened provisions on

⁵³ *R.H. v. Norway*, App. No. 17004/90, Eur. Comm. on Human Rights (1992).

⁵⁴ *Vo v. France*, App. No. 53924/00. European Court of Human Rights (2004).

⁵⁵ See, for instance, statements by European Parliament members Emilia Muller (Germany), Maria Antonia Aviles (Spain), Teresa Almeida Garrett (Portugal) and Regina Bastos (Portugal), epp-ed.europarl.eu.int/Activities/pday02/day086, May 26, 2003.

subsidiarity, added to the inclusion of a Charter of Human Rights that overlapped with the Convention and the vastly increased powers of the Court of Justice, may have led to imposition of a uniform abortion law on all Europeans regardless of the jurisprudence of the Court of Human Rights. But as of this writing, each country can address the issue through its own democratic process.

THE AFRICAN SYSTEM

The *African Charter on Human and Peoples' Rights* (1981) entered into force in 1986. The Charter says nothing directly about abortion or the rights of the unborn but uses inclusive language in key provisions:

Article 3. Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.

Article 4. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 18. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

The reference in the last-named article would include the 1959 UN Declaration on the Rights of the Child, which (as noted earlier) recognizes the child's need for "appropriate legal protection, before as well as after birth."⁵⁶

African Charter on the Rights and Welfare of the Child (1990), entered into force in 1999.⁵⁷ In the Preamble, the States Parties refer explicitly to the "principles of the rights and welfare of the child" contained in the UN Convention on the Rights of the Child⁵⁸ and in Article 1 they affirm:

⁵⁶ General Assembly resolution 1386 (XIV), November 20, 1959, third preambular paragraph.

⁵⁷ OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

⁵⁸ "Reaffirming Adherence to the principles of the rights and welfare of the child contained in the declarations, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the

Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.

The Charter adopts the definition of “child” in the UN Convention: “Article 2. For the purposes of this Charter, a child means every human being below the age of 18 years.” One should therefore understand the following provisions in the light of the Preamble and Articles 1 and 2:

Article 5. Every child has an inherent right to life. This right shall be protected by law. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child. Death sentence shall not be pronounced for crimes committed by children.

Article 30. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular: (e) ensure that a death sentence shall not be imposed on such mothers.

Protocol on the Rights of Women in Africa (2003), entered into force in 2005. The Protocol on Women’s Rights in Africa is the sole exception to the pattern of expressing an explicit or implied preference for life, and it does this in a single sentence. Article 14, Para. 2(c) of the Protocol provides that “States Parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.”

When analyzed within the context of the Protocol itself and the broader context of other international conventions relevant to the unborn child to which African states are parties, the provision fails in several respects.

The Center for Reproductive Rights greeted ratification of the Protocol with the following announcement: “The Protocol is the *first*

United Nations Convention on the Rights of the Child; and the OAU Heads of State and Governments Decl.on the Rights and Welfare of the African Child.”

human rights instrument to expressly articulate a woman's right to abortion in specified circumstances. *No other* human rights treaty explicitly articulates women's right to abortion"⁵⁹ (italics added). CRR is correct that no other international instrument articulates a right to abort; but neither does this one. The second sentence is accurate, but the first is not. Those who inserted the paragraph may have hoped to articulate such a right, but whatever this paragraph does, it does not do this. Abortion or equivalent terms (voluntary termination/ interruption of pregnancy) are not included among the rights "to health of women, including sexual and reproductive health" in Paragraph 1 of the same Article, nor do they appear anywhere in the Protocol except in 14 (2) (c).

Further, the term "reproductive rights" in this sentence is assumed rather than defined, and has no reference point anywhere else in the Protocol. Article 1 defines key terms; "reproductive rights" cannot be found there or in the Charter to which the Protocol is appended. Nor is this term linked with the elements of sexual and reproductive health in Paragraph 1 of Article 14. One must look outside the Protocol, indeed outside the African regional legal framework, even for a *description* of "reproductive rights" with any international history. Language in the non-binding Program of Action of the Cairo International Conference on Population and Development, subsequently re-affirmed in two follow-up conferences as well as in the Beijing Women's Conference and its follow-ups, uses the term in the context of family planning; the Cairo Program of Action speaks of a right of "couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health," i.e., family planning, which the same document in another place says explicitly excludes abortion: "In no case should abortion be promoted as a method of family planning."⁶⁰

⁵⁹ Center for Reproductive Rights Briefing Paper "The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights," New York, June 2005, p. 6. Available at www.crr.org or www.reproductiverights.org.

⁶⁰ A/CONF/.171/13, Para. 7.3. The statement on abortion is found in Para 8.25 See also n26 above on the International Conference on Population and Development.

The Protocol is an attempt to create a new international right in a backhanded way by specifying what states would have to do to observe such a right in practice, if it existed, rather than by defining and then asserting the right itself. Placing it in the context of “reproductive rights” has little value, for the reasons above.

The phrase “where the continued pregnancy endangers the mental and physical health of the mother” is a further example of the difficulty of giving a rational and coherent meaning to Article 14 (2)(c). As written, it would indicate that physical health risks alone or mental health risks alone would be *insufficient* grounds on which to require the state to authorize abortion. That is exactly what it says, and one should ordinarily conclude that this is what the drafters meant, but doubts persist. On the substantive issue, while a state has obligations to take measures to protect the health of all who live under its jurisdiction, this obligation is not founded on an undefined “reproductive right.” Moreover, it is not self-evident that a vague catch-all category of risks to health should automatically outweigh the very specific and concrete right to life of the already-living child. In the case of mental health, it has been the experience of many countries and several of the U.S. states that laws permitting abortion for reasons of mental health quickly evolved into abortion-on-demand, with the vast majority of abortions being recorded as performed on this basis.

Even though the Protocol fails to articulate a right to abortion, it nonetheless seeks, in 14 (2) (c) at least, to impose on ratifying states an obligation to authorize abortion in some cases. But this paragraph conflicts with other provisions of international law to which the same African states are party, such as the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, which state clearly and directly that *every* child has an inherent right to life and that the state is obliged to protect this right. Both documents define a child as “every human being below the age of eighteen years,” and in its preamble the UN Convention recognizes the child as “needing appropriate legal protection before as well as after birth.”

The incompatibility between the Women’s Protocol and other international human rights instruments could be resolved through judicial interpretation by the new African Court on Human and People’s Rights, which has been given responsibility to interpret “any...relevant human

rights instrument ratified by the States concerned.”⁶¹ But alternative solutions are available to states that find the abortion clause troublesome. These are discussed in the following paragraphs.

First, as the Women’s Protocol does not prohibit reservations, it might be possible for future acceding states to avoid successful challenges to their pro-life laws by attaching an unambiguous reservation to their instrument of ratification to the effect that the state does not accept any obligation under Article 14 (2) (c) that would be incompatible with its domestic legislation on pregnancy and on the rights of the unborn. Article 19 of the Vienna Convention on the Law of Treaties permits reservations as long as they are not expressly prohibited or “incompatible with the object and purpose of the treaty.”⁶² Neither the Preamble nor the operative paragraphs of the Women’s Protocol provide grounds for concluding that abortion is part of the object and purpose of the document.

In fact, one element of the Protocol’s object and purpose is to benefit unborn children. For instance, it conforms with the African Charter on the Rights and Welfare of the Child and with the International Covenant on Civil and Political Rights in prohibiting the execution of pregnant women. With whom (or what) is such a woman pregnant? If the provision means anything, it has to mean that the woman is pregnant with someone who has a right to life that is independent of the mother’s rights.⁶³ Also, another paragraph of Article 14 of the Women’s Protocol calls upon states to “establish and strengthen existing pre-natal and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.” As the unmentioned baby is inevitably one of the two beneficiaries of these health and nutritional services, it can be said that the baby is an object of protection and care in this Protocol. If the baby were not already physically present before birth, the woman would not have use

⁶¹ Protocol on the African Court of Human and People’s Rights, Article 3 (1).

⁶² Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p.331. www.un.org/law/ilc/texts/treaties.htm.

⁶³ Article 4, paragraph 2 (j) of the African Charter on the Rights and Welfare of the Child. Article 6 (5) of the Covenant.

for specifically “pre-natal” services.⁶⁴ Again, Article 13 (i) provides that States Parties shall “guarantee adequate and paid pre-and post-natal maternity leave”; the mother benefits, but so does someone else.

Article 26 obliges states to ensure implementation at national level and to adopt all necessary measures to that end, and to include in their periodic human rights reports an indication of the steps they have taken. Finally, Article 27 designates the African Court on Human and Peoples’ Rights to deal with “matters of interpretation arising from the application or implementation” of the Protocol.

The Protocol on the African Court on Human and Peoples’ Rights

Under Article 3 its own founding Protocol,⁶⁵ the African Court can consider actions brought under any international human rights instrument to which the State(s) concerned in a particular matter are parties. Moreover, the Court can apply as sources of law any relevant human rights instrument ratified by the State(s) concerned (Article 7). Thus, actions can be brought under, say, the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the International Covenant on Civil and Political Rights, and so forth. Article 5 designates who can bring a case to the Court: (1) the African Human Rights Commission; (2) the State Party which has lodged a complaint to the Commission; (3) the State Party against which the complaint has been lodged at the Commission; (4) the State Party whose citizen is a victim of a human rights violation; and (5) African intergovernmental organizations. Additionally, when a State Party has an interest in a case, it may submit a request to the Court to be permitted to join in that case.

Article 5(3) adds that the Court may entitle relevant non-governmental organizations with observer status before the African Commission, and individuals, to institute cases directly before it, but only

⁶⁴ Many international agreements contain language imposing on states obligations to promote health care and nutrition for all women, pregnant or not.

⁶⁵ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, OAU/LEG/AFCHPR/PROT (III), adopted June 1998, entered into force 2004, hereafter the “Court Protocol.”

in accordance with Article 34(6). The latter Article narrows this entitlement by specifying that states *may* make declarations accepting the competence of the Court to receive cases under Article 5(3), but that the Court may *not* receive any petition involving a State Party which has *not* made such a declaration.

Of the first 16 states to ratify the Court Protocol, only Burkina Faso made a declaration under Art. 34(6). Were Burkina Faso to accede to the Women's Protocol without entering a reservation as to its domestic law concerning abortion, an NGO with observer status before the African Commission or an individual could bring a case before the African Court aiming to force Burkina Faso to conform its national legislation on abortion with Pgh 14(2) (c) of the Women's Protocol. This explains why the Center for Reproductive Rights has urged that "advocates seeking to ensure that the Protocol [on Women's Rights] is adequately implemented can...pressure governments to ratify the [Court] Protocol...and to make declarations accepting the jurisdiction of the African Court over cases brought by individuals and NGOs."⁶⁶ Conversely, pro-life groups in Africa could urge their governments *not* to make such declarations.

As reservations to the Court Protocol are not prohibited, States could attach a reservation to the effect that the state does not recognize the competence of the Court to interpret the African Charter on Human Rights or the Protocol on Women's Rights, or other international instruments "in ways that would require actions inconsistent with national laws relating to pregnancy."⁶⁷ Such a reservation would appear not to be incompatible with the object and purpose of the Court Protocol, which is to make more effective the practical observance of the rights spelled out in the African Charter on Human and People's Rights and other international human rights instruments to which African states are parties. These instruments, it has been argued here, are on balance clearly favorable to the right of the unborn child to go on living, and therefore supportive of national protective laws with this purpose.

⁶⁶ Center for Reproductive Rights, "Briefing Paper: The Protocol on the Rights of Women in Africa," June 2005, p. 18. www.reproductiverights.org.

⁶⁷ The suggested language is adapted from a similar provision in Articles 7 (2) (f), 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Statute of the International Criminal Court.

In October 2006, African ministers of health rejected an attempt by a few pro-abortion governments and non-governmental organizations to establish a continent-wide policy urging all governments to provide abortions, train abortionists, and equip abortion clinics. Instead, the ministers re-affirmed that abortion policy in the health care field would remain a matter for national decision.⁶⁸

CONCLUSION AND NEW PROPOSALS

This essay has argued that existing human rights and humanitarian legal instruments and high-level intergovernmental declarations provide important recognition of the right to life of an unborn child and a degree of protection to that child. They add up to a decided preference for life, even in provisions where unborn children are not mentioned directly but are inevitably among the beneficiaries. These children may be silent and unnamed, but they are there.

Moreover, there is general agreement that international law does *not* affirm an international right to obtain an abortion. There is no indication of a right to abortion, even by implication, in any of the foregoing international legal instruments, with the exception of the Protocol on the Rights of Women in Africa, and even that exception is ambiguous and conflicts with other legal provisions. In 2005 Barbara Stark wrote that “[u]nlike reproductive rights in general, there is no international consensus on abortion.”⁶⁹ Further, “absent national legislation or adherence to the Optional Protocol to the Women’s Convention [CEDAW] there are no legal mechanisms through which [the enhancement of women’s sexual

⁶⁸ Catholic Family and Human Rights Institute, “Letter from the UN Front,” November 2006. Also, “Friday Fax,” October 26, 2006 at www.c-fam.org.

⁶⁹ Barbara Stark, *International Family Law* (Aldershot UK: Ashgate, 2005), pp. 138-39. Stark also offers a definition of “reproductive rights” that distinguishes them clearly from abortion: “reproductive rights generally refer to the cluster of rights which enable an individual to decide on the number and spacing of children by preventing unwanted pregnancies. These rights, which include education about family planning, access to contraception, and freedom from gender discrimination, are widely recognized throughout the world.... Abortion, the termination of an unwanted pregnancy, is more problematic” (p. 137).

and reproductive health and rights] can be implemented.”⁷⁰ And, as noted, the unreservedly pro-abortion Center for Reproductive Rights (CRR) confirmed this point in its statement welcoming the African Women’s Protocol.

However, because the pro-life provisions of existing agreements and declarations continue to be challenged, the struggle within international organizations continues.

New Proposal – Africa

The provision on abortion in the Protocol on the Rights of Women in Africa, despite the textual and contextual difficulties and ambiguities discussed above, does seek to impose on ratifying states an obligation to permit abortion in certain cases. Any future ratifying states can attach reservations to the Women’s Protocol and the Court Protocol, as discussed above, and they can decline (as most have) to allow individuals and NGOs to bring cases to the Court.

But these steps may not be sufficient to forestall harm to unborn African children, particularly in states that are now parties to the Women’s Protocol. In all African states, pro-life individuals and groups might want to ask their governments to develop a new African Protocol on the Rights of the Unborn Child, to clarify and strengthen the provisions of the Charter on the Rights and Welfare of the Child (African Children’s Charter). The central operative paragraph of the new Protocol could be based on the language of the ninth paragraph of the Preamble to the UN Convention on the Rights of the Child, “the child, by reason of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” This concept, but not the language, is incorporated in the African Children’s Charter by preambular reference to the “principles” of the UN Convention and, arguably, also by the savings clause in Article 1(2).⁷¹ However, the

⁷⁰ *Ibid.*, p. 152.

⁷¹ Preamble: “Reaffirming adherence to the principles of the rights and welfare of the child contained in the declarations, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child...”. Article 1 (2): “Nothing

subsequent adoption of the Women's Protocol generates a need to make this principle explicit in the African Children's Charter, and to state it in the form of a right of the unborn child to legal protection and as an obligation of states to provide such protection.

The *scope* of "appropriate legal protection before...birth" was not defined in either the UN Declaration or Convention on the Rights of the Child. As noted earlier, the legislative history makes clear that it does not mean "from the moment of conception," but it does not spell out what it does mean.⁷² It has to mean something, or it means nothing; and states do not include language in international agreements that are intended to mean absolutely nothing.

Philip Alston has chosen the narrowest possible reading, namely, that the phrase merely authorizes states to protect the unborn child.⁷³ But states already had this authority, and almost all of them already had laws in place to provide prenatal protection. They did not need an international agreement to give them permission, or even to remind them that they had the authority. This interpretation fails to explain why the drafters thought it important to insert the phrase, and why states voted overwhelmingly to include it.

So, what does the phrase mean? Bearing in mind the object and purpose of the convention and the ordinary meaning of the words in their context, one needs first to discard absurd readings, for instance that "before birth" means one minute before delivery, or even during the act of delivery. "Before" must mean some substantial period of time; since the General Assembly and the Human Rights Commission did not limit the phrase except by rejecting a proposal that legal protection extend "from the moment of conception," a logical reading would be "during most of pregnancy." It could without difficulty be read as meaning "from right after conception," for instance. As the purpose of the paragraph is to extend "appropriate legal protection" to an unborn child, the most logical

in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State."

⁷² See n11 above.

⁷³ Ibegbu, p. 147.

approach would be to extend the period of protection for the longest possible time during pregnancy. The burden of proof should be on those who want to specify any period shorter than “right after conception.” Moreover, it should be borne in mind that if one were negotiating the text of the UN Convention today, a stronger case could be made for “from the moment of conception,” since science and medicine can now establish the date of conception with considerably greater precision than in 1959 or even 1989, and *in vitro* fertilization can even be observed directly. African states developing a new Protocol would thus have a sound basis on which to start legal protection even from conception.

The modifier “appropriate” before “legal protection” is also undefined; however, since what is obviously at stake here is the life of the unborn child, “appropriate legal protection” must refer to laws to protect this value. The life of an unborn child needs legal protection principally against one peril: induced abortion. Every legal rule embodies and is motivated by a value or values that the rule is intended to protect or promote. Find the value(s), and you can then assess whether a proposed exception is justifiable. Any exception should be motivated and supported by that same value or a higher one. As the value at stake is a human life, logic would suggest that the only valid ground for an exception would be to save the life of another, that is, the child’s mother. Whether or not the new Protocol should establish a region-wide exception or leave decisions on possible exceptions to national legislation, it is important that the document clearly endorse the principle that the unborn child has an inherent right to life, and that states have an obligation to take legislative and other measures to protect this right; incorporating this principle in the text can itself serve to protect the child, as guidance for national lawmakers when they consider proposed legislation, and for national courts and the African Court in evaluating national laws in the light of international standards.

The African Committee of Experts on the Rights and Welfare of the Child, which was established by the African Children’s Convention, could be charged with the implementation of the new Protocol.

New Proposals – Universal

(1) Pro-life governments and organizations should now develop a Declaration on the Protection of the Unborn Child for adoption by the UN

General Assembly. The Declaration would take as its point of departure and reflect in its Preamble the protective provisions of existing international instruments, as discussed throughout this essay—for instance, the acknowledgment in several agreements of the need for “special safeguards and care, including appropriate legal protection, before as well as after birth”; the American Convention’s affirmation that the right to life “shall be protected by law and, in general, from the moment of conception”; the flat prohibition in several agreements on the execution of pregnant women; the provisions in several agreements, including the Geneva Conventions and Protocols, requiring states to provide prenatal health and nutritional care (and in the Geneva law, also special protection) to expectant mothers; and the Declaration on Human Cloning. As noted above, in Article 4 of the American Convention on Human Rights, the phrase “in general” before “the moment of conception” seems to be an effort to provide room for flexibility in national legislation on the grounds for abortion rather than time-limits, i.e., protection should extend from conception, but with exceptions for, say, threats to the mother’s life.

The operative paragraphs would clarify, make more precise, and add specificity to these provisions so that the humanity of the unborn child would find fuller and more direct expression and the child’s right to continue living would find more explicit recognition. States would be called upon to honor this right through enacting appropriate legislative or other measures (including protection, assistance, education) for the well-being of the mother as well as her child. The Declaration should recognize and emphasize the seamless continuity of life by linking the welfare of the born to that of the unborn, and of pre-natal to post-natal care, for both mother and child.

(2) Additionally, the United Nations Human Rights Council should appoint⁷⁴ a Special Rapporteur on the Protection of Unborn Children

⁷⁴ In the introduction to volume 1 of his projected two-volume study, *Rights of the Unborn Child in International Law*, Jude Ibegbu calls for establishment of a UN special rapporteur on the rights of the unborn child, though he does not outline any particular functions or responsibilities for the position. (Introduction at pp. xxv, xxx, and xxxiv; text at p. 613.) I am happy to support and add something to this very constructive proposal. Volume 2 of Dr. Ibegbu’s project, which is to deal with the impact of modern developments in biotechnology on the right to life

whose task would be to monitor observance of the principles contained in relevant international instruments, to investigate and call the attention of states to any serious problems observed in this regard and to discuss with them possible solutions, to provide or arrange for appropriate technical assistance requested by states to promote observance of the principles, and to report orally and in writing to the Council at least annually. The Rapporteur's report would be forwarded to the General Assembly, together with a summary of the Council's discussion and any resolutions or decisions adopted by the Council relating thereto, including any Council recommendations for Assembly action. Establishment of the rapporteurship need not and should not await action on the proposed new declaration.

of the unborn, had not appeared as of the date of preparation of the present essay.