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## Protecting the Unborn Child: The Current State of Law Concerning the So-Called Right to Abortion and Intervention by the Holy See

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# Protecting the Unborn Child: The Current State of Law Concerning the So-Called Right to Abortion and Intervention by the Holy See

## TABLE OF CONTENTS

I. Introduction .....	1133
II. Abortion: Current State of Legal Affairs .....	1135
A. International System of Human Rights .....	1135
1. Universal Declaration of Human Rights .....	1135
2. International Covenant on Civil and Political Rights .....	1137
3. Covenant on the Elimination of All Forms of Discrimination against Women .....	1138
4. The 1994 Cairo Conference and the 1995 Beijing Conference .....	1138
B. Current State of Law .....	1139
1. Complete Ban on Abortion .....	1140
2. Middle-of-the-Road: Maternal Interests v. Fetal Interests .....	1141
3. Unfettered Access to Abortion .....	1153
C. Regional Systems of Human Rights .....	1156
1. European Convention on Human Rights .....	1156
2. Organization of American States .....	1157
III. Abortion: Holy See Intervention .....	1159
A. Overview of Catholic Teaching on Abortion .....	1159
B. Roman Catholic Involvement in Human Rights ....	1160
1. Historical Development .....	1160
2. Current Involvement .....	1163

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\* Tom Venzor, Doane College, B.A., Philosophy, Political Science, and Religious Studies, 2007; University of Nebraska College of Law, J.D. expected May 2011. I would like to thank Prof. Brian Lepard for his input and encouragement on this Comment, since it developed out of his International Human Rights Law Seminar. And, of course, none of this could have ever come about without the loving support of my parents, Armando and Lynette Venzor. A.M.D.G.

C. What Can the Holy See Offer Human Rights Discourse in the Future? .....	1165
IV. Conclusion .....	1170

## I. INTRODUCTION

Arguments for the right to have an abortion range from allowing abortions only when necessary to save a woman's life to, most broadly, allowing abortions for socio-economic reasons or simply upon request. The most liberal arguments support a "right to voluntary motherhood."<sup>1</sup> Under these arguments, the right to obtain an abortion is "arguably integral to a constellation of other fundamental human rights such as women's right of equality, life, health, security of person, private and family life, freedom of religion, conscience and opinion, and freedom from slavery, torture and cruel, and inhuman and/or degrading treatment."<sup>2</sup> Furthermore, "women's right to self determination falls under the overarching freedom in decision-making about private matters. Such provisions include protections of the right to physical integrity, the right to decide freely and responsibly the number and spacing of one's children and the right to privacy."<sup>3</sup>

Although there are a number of different arguments that may be raised in support of a right to abortion, the most convincing arguments focus on three different sets of circumstances. The first is when the mother invokes her right to life over that of her unborn child. The second set of circumstances occurs when a mother invokes her abortion rights on the preservation of her health. In such situations, the mother's interest in her own well-being competes with the unborn child's right to life. The third situation in which abortion rights have their strongest hold in international law is when the woman seeks an abortion for a pregnancy resulting from rape or incest. Interests in voluntary motherhood and the right to reproductive health usually underlie this situation.

This Comment proposes that outside of these three situations, any argument that access to abortion is a human right is groundless. Furthermore, although these three situations present the best arguments for a right to abortion, it remains difficult to claim that even these situations rise to the level of a right under international law.

Part II of this Comment discusses the current state of legal affairs regarding the so-called right to abortion in two sections. Section II.A discusses the current international system of human rights under the United Nations (UN). This Comment analyzes the relevant UN

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1. Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 287 (2008).  
 2. *Id.*  
 3. *Id.*

materials pointing to the state of a right to abortion under international law. This Comment concludes that although there is ample discussion of a right to abortion, such a right does not yet exist under international law. At best, the UN has, in certain situations, repeatedly urged Member States to recognize exceptions to their general prohibitions of abortion. Of course, the UN has not expressly stated that there is *not* a right to abortion. However, certain UN agencies have urged that abortion not be used as a method of family planning.<sup>4</sup>

Section II.B examines the current state of affairs concerning regional systems of human rights, namely, the European Convention on Human Rights and the Organization of American States (OAS). The European Court of Human Rights has noted that there is much controversy as to when the legal right to life ought to begin.<sup>5</sup> Because of this controversy, the Court has taken a hands-off approach on the issue of when life begins,<sup>6</sup> leaving the question to the discretion of the individual State.<sup>7</sup> However, the Court has acknowledged that the same exceptional cases for access to abortion seem to exist as under the UN.<sup>8</sup> The situation is somewhat different under the OAS system. The OAS system formally protects the right to life starting at conception.<sup>9</sup> However, in practice the OAS does not fully uphold this protection, as it allows for similar exceptions as provided by the European system and the UN.<sup>10</sup> Under both the European and OAS systems, allowing for abortion in exceptional cases might ultimately be something on which both sides of the issue can compromise.

Part III of this Comment will discuss the role of the Holy See in international human rights. The Roman Catholic Church has been one of the leading developers of a system of human rights within the Western world, in part due to its long institutional history and its mission to love as Christ loved. This Comment will analyze the role of the Catholic Church in three ways. First, it will give a general overview of the Catholic Church's cohesive and immutable teaching on abortion according to its magisterial power based on Scripture and Sacred Tra-

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4. See Jill M. Bracken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 *IND. INT'L & COMP. L. REV.* 197, 228 (1995).
  5. *Tysiac v. Poland*, 45 *Eur. Ct. H.R.* 42, ¶ 104 (2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=814538&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.
  6. See *infra* notes 90–91 and accompanying text.
  7. *Tysiac*, 45 *Eur. Ct. H.R.* ¶ 74 (noting that “legislative provisions as to when life commenced fell within the State’s margin of appreciation”).
  8. *Id.* ¶ 107 (discussing the mother’s physical integrity); *id.* ¶ 119 (discussing the mother’s health interest); *id.* ¶ 50 (discussing restrictive laws on abortion pertaining to situations of rape).
  9. Organization of American States, *American Convention on Human Rights* art. 4, § 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 *U.N.T.S.* 123.
  10. See *infra* notes 102–03 and accompanying text.

dition. Second, it will provide a brief overview of the history of the Church and human rights by highlighting the influence and progress during the late-Middle Ages by individuals such as Bartolomé de las Casas, Francisco Suárez, and Francisco de Vittoria; noting the involvement of Vatican City as a sovereign nation in the early organized human rights dialogue; discussing the influence of Jacques Maritain, a prominent Catholic and French philosopher, on international human rights; and by providing background on the Church's current involvement. Finally, this Comment will analyze what the Holy See, as a Permanent Observer to the United Nations, can offer the human rights discourse concerning the issue of abortion.

## II. ABORTION: CURRENT STATE OF LEGAL AFFAIRS

### A. International System of Human Rights

#### 1. *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in December 1948.<sup>11</sup> The UDHR was the “first comprehensive human rights instrument to be proclaimed by a global international organization.”<sup>12</sup> The document can be categorized into two broad categories of rights, namely, civil and political rights and social, economic, and cultural rights.<sup>13</sup> Examples of civil and political rights are “the right to life, liberty, and security of person; the prohibition of slavery, of torture and cruel, inhuman or degrading treatment . . . freedom of speech, religion, assembly and freedom of movement.”<sup>14</sup> Examples of cultural, social, and economic rights are “the individual’s right to social security, to work, and to ‘protection against unemployment,’ to ‘equal pay for work,’ and to ‘just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection,’”<sup>15</sup> as well as the “right ‘to rest and leisure’” and the right “to a standard of living adequate for the health and well-being of himself and of his family.”<sup>16</sup>

Although the UDHR is not a treaty and it lacks binding legal force, its legal effect is not questioned, and at least some of its provisions have the force of customary international law.<sup>17</sup> Rather, the dispute

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11. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

12. THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS: IN A NUTSHELL 35 (3d ed. 2002).

13. *Id.* (citing UDHR, *supra* note 11, arts. 3–5, 13, 18–20).

14. *Id.*

15. *Id.* (quoting UDHR, *supra* note 11, arts. 22–23).

16. *Id.* at 37 (quoting UDHR, *supra* note 11, art. 24).

17. *Id.* at 39 (stating that “few international lawyers would deny that the Declaration is a normative instrument that creates or at least reflects some legal obligations

over its legal effect concerns which provisions are binding and under what circumstances they are said to be binding. There is also dispute as to whether the document derives its binding effect from its “authoritative interpretation of the human rights obligations contained in the UN Charter, its status as customary international law, or its status as a general principle of law.”<sup>18</sup>

The UDHR contains no explicit reference to a right to abortion. However, scholars have argued that various articles of the Declaration, implicitly or when interpreted as an integral whole, contain a right to abortion.<sup>19</sup> The articles that are pertinent to a dialogue on this issue are: Article One (all humans born free and equal in dignity and rights); Article Two (prohibits discrimination based on sex); Article Three (right to life); Article Five (freedom from torture or cruel, inhuman, or degrading treatment or punishment); Article Twelve (right to privacy); Article Eighteen (freedom of thought, conscience, and religion); Article Nineteen (freedom of opinion and expression); Article Twenty-five (special care of motherhood and childhood); Article Twenty-nine (prohibits exercise of the rights and freedoms listed contrary to the purpose and principles of the UN); and Article Thirty (no activity or performance can aim at the destruction of the rights or freedoms listed).<sup>20</sup> However, each one of these provisions of the UDHR point in different directions. Some, such as Articles One or Ten, seem to point in favor of protecting the unborn child. Still others, such as Articles Two or Twelve, seem to apply directly in favor of the mother. Others cut both ways, such as Article Twenty-five. In addition, Article Eighteen could involve considerations involving additional parties, since it could be read as prohibiting the enforcement of a right where it is contrary to a person’s belief, conscience, or religion. For instance, a mother seeking to invoke a right to abortion might face the countervailing right of a medical professional who objects to performing the procedure based on Article Eighteen.

This quick glance at the many different human rights provisions relevant to a right to abortion gives a clear example of the diverse views in which the rights may be used for and against the arguments on a right to abortion. Most of these rights contained in the UDHR

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for the Member States of the UN”). Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT]; see also Bracken, *supra* note 4, at 207–10 (explaining the sources and nature of customary international law).

18. *Id.* at 39–40; see also *id.* at 41–43 (discussing three different arguments about the UDHR’s binding legal effect).

19. See, e.g., Tatyana A. Margolin, *Abortion as a Human Right*, 29 WOMEN’S RTS. L. REP. 77, 82 (2008) (arguing that the right is implicit in different articles of the UDHR).

20. UDHR, *supra* note 11, arts. 1–3, 5, 12, 18, 19, 25, 29, 30.

exist in other UN documents either explicitly or by implication, and this Comment will mostly analyze these rights under other human rights documents.

## 2. *International Covenant on Civil and Political Rights*

As an international treaty, the International Covenant on Civil and Political Rights (ICCPR) has binding legal force on the state parties that have ratified the Covenant.<sup>21</sup> Issues that pertain to “compliance with and the enjoyment of the rights guaranteed by the [ICCPR] are matters of international concern and thus are no longer exclusively within their domestic jurisdiction.”<sup>22</sup> It is also arguable that even states that are not parties to the ICCPR may be bound, to some degree, to the extent that the Covenant merely codifies existing principles of customary international law.<sup>23</sup>

Article Twenty-Eight of the ICCPR establishes the Human Rights Committee (HRC).<sup>24</sup> The HRC was created to ensure that States Parties to the treaty meet their obligations under the ICCPR.<sup>25</sup> The main function of the HRC is to review the reports of States Parties; in return, the HRC provides general comments on the state of human rights within that State.<sup>26</sup> These reports and general comments carry different degrees of authority and sometimes no authority at all.<sup>27</sup> In recent years, the reporting system has evolved and expanded, transforming the ICCPR into a much more effective document.<sup>28</sup> An important source of authority that this Comment will analyze below is the effect of the HRC’s reports as “soft law” and their potential effect on human rights.<sup>29</sup>

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21. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

22. BUERGENTHAL ET AL., *supra* note 12, at 44.

23. See RESTATEMENT, *supra* note 17, § 102 cmts. f & i.

24. See ICCPR, *supra* note 21.

25. BUERGENTHAL ET AL., *supra* note 12, at 49.

26. See ICCPR, *supra* note 21, art. 40.

27. See, e.g., BUERGENTHAL ET AL., *supra* note 12, at 52–56; Lise Johnson, “You Can Violate The Rights of Undocumented Persons With Impunity”: *The Shocking Message Arizona’s Constitution Sends and Its Inconsistency With International Law*, 13 J. GENDER RACE & JUST. 491 n.110 (2010) (explaining that the interpretations of the HRC, “while non-binding, are authoritative interpretations” of the ICCPR).

28. BUERGENTHAL ET AL., *supra* note 12, at 51 (e.g., use of conclusions concerning the state of human rights in individual States in the annual committee reports, reporting of major violations to the UN Secretary General, and providing general comments or interpretations of provisions within the Covenant).

29. For further discussion of the HRC, see *infra* notes 38–85 and accompanying text. In the context of international law, “soft law” refers to the “[g]uidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding.” BLACK’S LAW DICTIONARY 1519 (9th ed. 2009).

### 3. *Covenant on the Elimination of All Forms of Discrimination against Women*

The Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW) is another document that does not specifically address abortion.<sup>30</sup> However, the CEDAW Committee<sup>31</sup> has approached the issue of abortion and its effect on women's health and equality. The CEDAW Committee has mostly focused on the correlation between restrictive abortion laws and high rates of unsafe abortions that can endanger a woman's life and health.<sup>32</sup> The Committee has also approached the issue of abortion with regard to women who have suffered physical or sexual violence.<sup>33</sup> This was addressed under Article Twelve of the Covenant, which protects women's right to health and well-being.<sup>34</sup> Overall, the Committee's call for access to abortion must be read narrowly to pertain to the limited situations that have been addressed, such as pregnancies resulting from physical or sexual violence. It would be a stretch to argue, as some do,<sup>35</sup> that the CEDAW could be used to create a right to abortion on demand or for socio-economic reasons. Furthermore, access to abortion, under the circumstances that have been recommended, should not be misunderstood to be a method of family planning.<sup>36</sup>

### 4. *The 1994 Cairo Conference and the 1995 Beijing Conference*

The 1994 International Conference on Population and Development in Cairo, Egypt, is another instance where an international right to abortion was denounced.<sup>37</sup> The Conference reaffirmed the existence of an international right to reproductive choice,<sup>38</sup> but one would be remiss to think that the term "reproductive choice" stands for an international right to abortion.<sup>39</sup> The 1994 Conference confirmed that abortion should not be a method of family planning and that unwanted pregnancies should be avoided in order to eliminate the need

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30. See Covenant on the Elimination of All Forms of Discrimination against Women, Mar. 1, 1980, 1249 U.N.T.S. 14 [hereinafter CEDAW].

31. Article Seventeen of the CEDAW creates the Committee on the Elimination of Discrimination against Women. See *id.* art. 17.

32. Zampas & Gher, *supra* note 1, at 259.

33. See, e.g., *id.* at 281-82.

34. See CEDAW, *supra* note 30, art. 12.

35. See, e.g., Zampas & Gher, *supra* note 1, at 287.

36. *Id.* at 272.

37. See International Conference on Population and Development, Sept. 5-13, 1994, *Programme of Action of the Conference*, U.N. Doc. A/CONF.171/L.4 (May 13, 1994).

38. See Bracken, *supra* note 4, at 211-15 (discussing the history of the right to reproductive choice and noting that, by the 1994 Conference, the right was "well-defined").

39. See *id.* at 224-32.



for abortion.<sup>40</sup> In fact, many countries stated reservations on the issue of abortion,<sup>41</sup> including the Holy See, whose main advocacy was seeking consensus at the theoretical level.<sup>42</sup>

The 1994 Conference itself was not intended to create any new international rights but rather “affirms the application of universally recognized human rights standards to all aspects of population programmes.”<sup>43</sup> The document that came out of the Conference is not strictly binding, but the “statements contained in these documents are persuasive and indicative of the world community’s growing support for reproductive rights, and are often used to support legislative and policy reform, as well as interpretations of national and international law.”<sup>44</sup> This understanding of the 1994 Conference very strongly suggests that there is no international right to abortion.

Similar issues arose in the 1995 World Conference on Women.<sup>45</sup> This conference eventually turned to the issue of pregnancy, which resulted in a “fierce debate” and an ambiguous paragraph 94 on “reproductive health” in the conference’s “Platform for Action.”<sup>46</sup> Even though these ambiguities might create a basis for arguing for a right to abortion, nothing in the 1995 Conference’s Platform for Action establishes such an international right.<sup>47</sup> In fact, the Platform used language similar to that used in the 1994 Conference concerning abortion and national governments. The 1995 Platform for Action stated that “[a]ny measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process.”<sup>48</sup>

These two conferences clearly demonstrate that the issue of abortion as an international right is and will continue to be a contentious issue. Moreover, the conferences are strong evidence that there is no right to abortion under international law.

## B. Current State of Law

The current state of the law is disputed and nuanced because of the interrelation between the various human rights documents, only some

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40. *Id.* at 228–32.

41. *Id.* at 228–32.

42. William Joseph Wagner, *Universal Human Rights, the United Nations, and the Telos of Human Dignity*, 3 AVE MARIA L. REV. 197, 218 (2005).

43. International Conference on Population and Development, *supra* note 37.

44. Zampas & Gher, *supra* note 1, at 253.

45. See Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20/Rev.1 (Oct. 17, 1995) [hereinafter *Beijing Platform for Action*].

46. Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123, 152 (2006).

47. *Id.* at 152–53 (discussing *Beijing Platform for Action*, *supra* note 45, ¶ 94).

48. *Id.* at 153 (quoting *Beijing Platform for Action*, *supra* note 45, ¶ 106(k)).

of which are binding, and the lack of guidance from the international courts. However, three different views on abortion as a right under international law may be ascertained. First, there is the view that a complete ban on abortion is permissible and necessary in order to protect the life of the unborn child.<sup>49</sup> This protection of the unborn child ensures that the right to life, the most important of all rights, is not violated. Under this view, the human person ought to be protected from conception until natural death. Any attempt to take the life of unborn children is a grave crime against those people and a threat to their inherent dignity and rights.

Second, there is the moderate view, which arguably espouses the current state of international law.<sup>50</sup> This view is predominantly concerned with protecting the mother's interests in cases where carrying to term might result in death or bodily injury or when the pregnancy is the result of rape or incest. Under these circumstances, the mother's right to life often prevails over any possible right to life of the unborn child. Outside of these circumstances, however, the right to life of an unborn child is largely uncertain. This understanding of the law permits for more deference to states to balance the rights of the mother and unborn child as they see fit. This understanding of the law is ambiguous by its very nature. It refrains from definitively answering the question of whether an unborn child has a right to life.

The third view is that the law ought to do what is necessary to knock down any barriers to unfettered access to abortion.<sup>51</sup> This understanding of the law envisions and advocates for a progressive and liberalized reading of the right to life, which would inevitably grant the mother a free license to seek an abortion at any time she desires—whether for health concerns or for other reasons.

### 1. *Complete Ban on Abortion*

Under the international system of human rights, countries that maintain complete bans on abortion in order to protect life from conception to natural death have been unpopular and criticized as violations of women's human rights.<sup>52</sup> Many of these countries will be identified below in the various reports of the HRC from the last twenty years.<sup>53</sup> Basically, the criticism of states that have formal laws banning abortion on all grounds is that they violate women's rights to life and health and force women into unwanted pregnancies,

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49. For further discussion of this view, see *infra* subsection II.B.1.

50. For more information on this view, see *infra* subsection II.B.2.

51. For further discussion of this view, see *infra* subsection II.B.3.

52. See *infra* text accompanying notes 93–132.

53. *Id.*

even when they result from rape or incest.<sup>54</sup> Other states, while formally allowing for certain exceptions to prohibitions on abortion, in effect have complete bans on abortion.<sup>55</sup> The UN has been fairly harsh in its criticism of these countries. For example, as will be discussed below, Poland has been highly criticized for its minimal access to abortion and the alleged abuse of conscience clauses by doctors, which have combined to create a de facto prohibition on abortion.<sup>56</sup> Certain South American countries (e.g., Venezuela and Paraguay), as will be discussed later on, have also been criticized for their restrictive views towards abortion.<sup>57</sup> Overall, the international system of human rights does not condone such prohibitions and harshly criticizes countries that place criminal sanctions on abortions.

## 2. *Middle-of-the-Road: Maternal Interests v. Fetal Interests*

Although the law itself is quite ambiguous, this section will attempt to analyze what is arguably the current state of law under the international human rights system. To begin this analysis, it is helpful to understand how the right to life of an unborn child has been defined (or not defined) under the relevant UN documents. Christina Zampas and Jaime Gher argue that any assertion that unborn children have a right to life under international human rights law is “incompatible with women’s fundamental human rights to life, health, and autonomy” and “such contentions have been defeated on various occasions within both international and regional human rights forums.”<sup>58</sup>

Some scholars have supported this argument with an historical analysis of the UDHR, ICCPR, and the Convention on the Rights of the Child (CRC). They argue that Article Three of the UDHR, which guarantees a right to life, is limited by Article One, which specifically refers to all human beings who have been “born.”<sup>59</sup> This reading is affirmed by the drafting history of the UDHR: an amendment was proposed and rejected which would have removed the word “born” in or-

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54. See *infra* text accompanying notes 93, 103, 108–09 (discussing Chile, Kuwait, and Peru).

55. See *infra* note 63 and accompanying text.

56. See *infra* text accompanying notes 98–99. A “conscience clause” is a provision designed to “protect health care providers’ rights to refuse to provide or participate in certain procedures to which they have moral or religious objections.” Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 177 (1993).

57. See *infra* text accompanying notes 110, 125–26

58. Zampas & Gher, *supra* note 1, at 262.

59. See Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPROD. HEALTH MATTERS, Nov. 2005, at 120, 121–22 (discussing UDHR, *supra* note 11, arts. 1, 3).

der to protect pre-natal life.<sup>60</sup> Similarly, the negotiation history of Article Six of the ICCPR reveals that a similar amendment suggesting that life should be protected from the moment of conception was proposed and rejected.<sup>61</sup> Manfred Nowak affirms that “life in the making was not (or not from the point of conception) to be protected” under the ICCPR.<sup>62</sup> However, Nowak also states that the fact that protection “was not to begin at the moment of conception does not permit one to draw the conclusion that the unborn child is not protected whatsoever by Art. 6.”<sup>63</sup> Furthermore, as will be discussed below,<sup>64</sup> the HRC has called upon a number of states that are parties to the ICCPR to reform their abortion laws to conform to the current state of human rights law.

Additionally, Zampas and Gher refer to the Preamble of the CRC and its *travaux préparatoires*.<sup>65</sup> They point to paragraph nine of the Preamble to the CRC, which states that “[b]earing in mind that, as 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.’”<sup>66</sup> They state that, “[a]t most, this language recognizes a state’s duty to promote a child’s capacity to survive and thrive after birth, by targeting the pregnant woman’s nutrition and health.”<sup>67</sup> This “pre-natal language” is not meant “to infringe on any women’s right to access abortion.”<sup>68</sup> They point to two final reasons why the CRC does not embrace a right to life beginning at conception.<sup>69</sup> The first is a failed amendment by the Holy See that attempted to protect life “before as well as after birth.”<sup>70</sup> However, this argument is not convincing, as the Preamble to the CRC, by its own terms, grants “le-

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60. *Id.*

61. Zampas & Gher, *supra* note 1, at 262–63. Article Six of the ICCPR proclaims, “Every human being has the inherent right to life.” International Covenant, *supra* note 21, art. 6.

62. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 154 (2d ed. 2005).

63. *Id.*; *see id.* at 153–55.

64. *See infra* notes 38–73 and accompanying text.

65. Zampas & Gher, *supra* note 1, at 263–64. “*Travaux préparatoires*” means the legislative or drafting history of international law. BLACK’S LAW DICTIONARY 1538 (8th ed. 2004).

66. Zampas & Gher, *supra* note 1, at 263 (quoting Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49, pmb. ¶ 9 (Nov. 20, 1989)).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (quoting U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Question of a Convention on the Rights of a Child: Report of the Working Group*, U.N. Doc. E/CN.4/L/1542 (1980)).

gal protection, before as well as after birth.”<sup>71</sup> Second, Zampas and Gher point to the Concluding Observations of the CRC, which state that the definition of child does not include a fetus.<sup>72</sup>

Abby Janoff also argues against a right to life for the unborn child, pointing to the ambiguity that exists within the CRC.<sup>73</sup> She seizes upon this ambiguity and makes a textual argument, but she cannot point to any historical evidence or negotiation history that backs her position. She states that any right to life interest of a fetus “conflicts directly with the rights guaranteed to a pregnant girl under the Convention, which safeguard her right to health, to life, and to consideration of her best interests if the pregnancy threatens her physical or mental health.”<sup>74</sup> However true such an argument may be, this observation only alleviates part of the definitional problem of when an unborn child’s right to life begins. If Janoff’s argument were accepted, it would only touch on those situations where the pregnant mother may run a risk to her life or physical or mental health. This utilitarian balancing of the rights of the mother and unborn child fails to answer the questions of whether an unborn child has a right to life starting at conception and whether the right to life of an unborn child has any claim over any interest the mother might have in an abortion.

Because of this textual ambiguity regarding whether an unborn child has a right to life from conception, it may be helpful to turn to methods of treaty interpretation contained within the Vienna Convention on the Law of Treaties.<sup>75</sup> It is true that a preamble, such as that contained in the CRC, is not legally binding.<sup>76</sup> However, Article Thirty-One of the Vienna Convention on the Law of Treaties states that preambles provide an important context for interpretation.<sup>77</sup> In this case, the Preamble to the CRC provides that “the child . . . needs special safeguards and care, including appropriate legal protection, before as well as after birth.”<sup>78</sup> This provision provides reasonable grounds for extending the right to life to unborn children. At a bare minimum, this should at least afford the unborn child a right to life

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71. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49, pmb. ¶ 9 (Nov. 20, 1989).

72. Zampas & Gher, *supra* note 1, at 263–64.

73. Abby F. Janoff, Note, *Rights of the Pregnant Child vs. Rights of the Unborn Child Under the Convention on the Rights of the Child*, 22 B.U. INT’L L.J. 163, 164–65 (2004).

74. *Id.*

75. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

76. Karen A. McSweeney, Note, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B.C. INT’L & COMP. L. REV. 467, 473 (1993) (stating that “the preamble does not create binding legal duties on states parties”).

77. See Vienna Convention on the Law of Treaties, *supra* note 75, art. 31.

78. Convention on the Rights of the Child, *supra* note 66, pmb. ¶ 9.

under certain circumstances. It would be necessary to recognize this right to life as beginning absolutely where the conflicting right of a pregnant child's right to life, to health, and to consideration of her best interest if the pregnancy threatens her physical or mental health ends. Unfortunately, then, this understanding is still quite ambiguous.

Another option, as stated by the International Committee of the Red Cross during the drafting process of the CRC, is to embrace ambiguity. The Red Cross noted that while the notion of what a "child" is was not made clear, "[t]his silence seems wise and will facilitate universal application of the Convention irrespective of local peculiarities."<sup>79</sup> By not defining the term "child," individual states will have room to adopt a meaning of the term that best fits their cultural circumstances. There is no doubt, however, that such a case-by-case interpretation of "child" would still fall under the scrutiny of international human rights standards. Nonetheless, this type of reading at minimum allows countries to define these terms within their cultural traditions and history. The problem with this approach is that, although a floor would be created below which States Parties<sup>80</sup> would not be able to diminish women's rights, there would be no comparable floor for the rights of unborn children. Thus, such an understanding of international human rights would still not prevent potentially grave abuses of the dignity of human life.

The ambiguity that would remain under such a reading can be best understood by comments made by Austria during the drafting of Article One of the CRC. Austria noted that "[t]here is a possible inconsistency between 'the child's right to adequate pre-natal care and the possibilities for legal abortion provided in some countries.'"<sup>81</sup> Additionally, Barbados posed the questions, "How far should [the child's right to life] go? Does the child include the unborn child, or the foetus [sic]?"<sup>82</sup> New Zealand asked similar questions, such as, "Does the definition [of a child] begin at conception, at birth, or at some point in

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79. Janoff, *supra* note 73, at 170 (quoting THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 58 (Sharon Detrick ed., 1992) [hereinafter GUIDE TO THE "TRAVAUX PRÉPARATOIRES"]).

80. A 'State Party' is "a State which has consented to be bound by the treaty and for which the treaty is in force." Vienna Convention on the Law of Treaties *supra* note 75, art. 2(g); *cf. id.* art. 2(h) (defining "third state" as "a State not a party to the treaty").

81. Janoff, *supra* note 73, at 171 (quoting U.N. Secretary-General, *Report of the Secretary-General*, U.N. Doc. E/CN.4/1324 (1978), reprinted in GUIDE TO THE "TRAVAUX PRÉPARATOIRES," *supra* note 79, at 36, 61).

82. *Id.* (quoting U.N. Secretary-General, *Report of the Secretary-General*, add. 4, U.N. Doc. E/CN.4/1324/Add.4 (1978), reprinted in GUIDE TO THE "TRAVAUX PRÉPARATOIRES," *supra* note 79, at 36, 83).

between?”<sup>83</sup> Janoff suggests that the “silence on the controversial issue of when childhood begins likely facilitated [the CRC’s] widespread ratification, as the Red Cross predicted, since the laws of the states parties incorporate vastly differing notions regarding the legal status of the unborn.”<sup>84</sup>

As can be seen, at least under the CRC, the legal understanding of when the right to life begins is fairly ambiguous. Janoff concludes that under the CRC it is unclear whether a child’s right to life “begins at birth, at conception, or at some point in between.”<sup>85</sup> She also observes that “[t]he international law that has emerged from the Convention’s ambiguity might be used . . . to strike down laws restricting the legality of and access to abortions . . . when abortion would protect a girl’s life, health, or best interests.”<sup>86</sup> In contrast to Janoff’s conclusion, the ambiguity that remains may also cut the other way, namely, that there is some play in the joints when issuing abortion legislation which would permit for protection of the unborn child in the face of ambiguity in international human rights law.

Another avenue for understanding the legal context of abortion is examining the reports of the HRC under the ICCPR. The reports of the HRC from 1987 to 1998 on abortion were fairly sparse. In 1987, considerations regarding abortion pertained to the criminalization of assisting and performing abortions.<sup>87</sup> This was also the case in the 1988 report concerning Colombian laws which noted that Colombian views on abortion were due to cultural traditions of Catholicism.<sup>88</sup> A 1992 report on Austria noted that members of the HRC asked the country “when it was planned to legalize abortions.”<sup>89</sup> The same report referred to Ecuador’s policy of prosecuting women for having abortions.<sup>90</sup> Also, it briefly stated its concerns with the “legality of abortion” in Peru.<sup>91</sup> In 1996, the HRC expressed concern with Zambia’s high rate of maternal mortality resulting from abortion.<sup>92</sup>

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83. *Id.* (quoting U.N. Secretary-General, *Report of the Secretary-General*, add. 4, U.N. Doc E/CN.4/1324/Add.4 (1978), reprinted in GUIDE TO THE “TRAVAUX PRÉPARATOIRES,” *supra* note 79, at 36, 83).

84. *Id.* at 174–75.

85. *Id.* at 187.

86. *Id.* at 187–88.

87. Rep. of the Human Rights Comm., 30–32, U.N. Doc. A/42/40; GAOR, 42d Sess., Supp No. 40 (Aug. 28, 1987).

88. Rep. of the Human Rights Comm., ¶ 523, U.N. Doc. A/43/40; GAOR, 43d Sess., Supp No. 40 (Sept. 28, 1988).

89. Rep. of the Human Rights Comm., ¶ 94, U.N. Doc. A/47/40; GAOR, 47th Sess., Supp No. 40 (Oct. 9, 1992).

90. *Id.* ¶ 234.

91. *Id.* ¶ 309.

92. Rep. of the Human Rights Comm., ¶ 195, U.N. Doc. A/51/40 (Vol. I); GAOR, 51st Sess., Supp No. 40 (Apr. 13, 1997).

The comments from 1999 to 2008 have been much more numerous, with the exception of 2002, when no comments were made. In a 1999 report, the HRC for the first time issued its recommendation on maternal death rates. The HRC recommended to the Chilean government that its “law be amended so as to introduce *exceptions* to the general prohibition of all abortions and to protect the confidentiality of medical information.”<sup>93</sup> In the report on Lesotho, the HRC noted that Lesotho made abortion illegal except where the woman is of unsound mind or the pregnancy is the result of rape or incest.<sup>94</sup> The Committee recommended that Lesotho “review the abortion law in order to provide for situations where the life of the woman is in danger.”<sup>95</sup> Referring to Costa Rica, the HRC also noted with concern “the consequences for women of the continuing criminalization of all abortions, including the danger to life involved in clandestine abortions.”<sup>96</sup> The Committee recommended that the law be “amended to introduce *exceptions* to the general prohibition of all abortion.”<sup>97</sup> Reporting on Poland, the Committee noted concerns with “strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to the life and health of women.”<sup>98</sup> The HRC stated that Poland “should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning.”<sup>99</sup>

A 2000 report concerning Morocco noted that the country’s strict prohibition on abortion resulted in clandestine, unsafe abortions.<sup>100</sup> The HRC urged Morocco to “ensure that women have full and equal access to family planning services and to contraception.”<sup>101</sup> The Committee also noted Ireland’s practice, which allowed for abortions when the woman’s life was in danger, but not when the pregnancy was the result of rape.<sup>102</sup> Furthermore, the HRC noted with concern Kuwait’s law, which made abortion a crime and contained no “exceptions on humanitarian grounds.”<sup>103</sup> Also, the Committee noted that “[s]tate parties should give information on any measures taken by the State to

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93. Rep. of the Human Rights Comm., ¶ 211, U.N. Doc. A/54/40 (Vol. I); GAOR, 54th Sess., Supp No. 40 (Oct. 21, 1999) (emphasis added) [hereinafter 1999 Human Rights Committee Report].

94. *Id.* ¶ 254.

95. *Id.*

96. *Id.* ¶ 280.

97. *Id.* (emphasis added).

98. *Id.*

99. *Id.* ¶ 344.

100. Rep. of the Human Rights Comm., ¶ 100, U.N. Doc. A/55/40 (Vol. I); GAOR, 55th Sess., Supp. No. 40 (Oct. 10, 2000) [hereinafter 2000 Human Rights Committee Report].

101. *Id.*

102. *Id.* ¶ 444.

103. *Id.* ¶ 466.



help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.”<sup>104</sup>

In 2001, the HRC reported that abortion practices in Trinidad and Tobago should be reappraised and that risks that violate women’s rights should be “removed from the law, by legislation if necessary (arts. 3, 6.1 and 7).”<sup>105</sup> The HRC also noted that in Argentina medical professionals were deterred from providing abortion services when a woman’s life was in danger or the pregnancy resulted from rape, because abortion is a crime in that country.<sup>106</sup> The Committee recommended that “in cases where abortion procedures may lawfully be performed, all obstacles to obtaining them should be removed.”<sup>107</sup> Reporting on Peru, the Committee stated its recurring concern that abortion continues to be “subject to criminal penalties, even when pregnancy is the result of rape.”<sup>108</sup> The HRC also noted that such provisions are “incompatible with articles 3, 6, and 7 of the Covenant and recommend[ed] that the legislation should be amended to establish exceptions to the prohibition and punishment of abortion.”<sup>109</sup> Pertaining to Venezuela, the HRC once again reported that exceptions ought to be created to the “general prohibition of all non-therapeutic abortion[s].”<sup>110</sup>

In 2003, the HRC noted the practice of clandestine abortions in Mali as a violation of Article Six.<sup>111</sup> The Committee recommended that Mali “should help women avoid unwanted pregnancies, including by strengthening its family planning and sex education programmes, and ensure that they are not forced to undergo clandestine abortions, which endanger their lives.”<sup>112</sup>

In 2004, the HRC reported its concern with Sri Lanka’s criminalization of abortion except where it is performed to save the life of the mother.<sup>113</sup> It also noted its concern with “high number of abortions in unsafe conditions, imperiling the life and health of the women concerned, in violation of articles 6 and 7.”<sup>114</sup> The HRC recommended

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104. *Id.* at 134, ¶ 10.

105. Rep. of the Human Rights Comm., ¶ 72(18), U.N. Doc. A/56/40 (Vol. I); GAOR, 56th Sess., Supp. No. 40 (Oct. 26, 2001).

106. *Id.* ¶ 74(14).

107. *Id.*

108. *Id.* ¶ 76(20) (emphasis added).

109. *Id.*

110. *Id.* ¶ 77(19).

111. Rep. of the Human Rights Committee, ¶ 81(14), U.N. Doc. A/58/40 (Vol. I), GAOR, 76th–78th Sess., Supp. No. 40 (Oct. 24, 2003) [hereinafter 2003 Human Rights Committee Report].

112. *Id.*

113. Rep. of the Human Rights Committee, ¶ 66(12), U.N. Doc. A/59/40 (Vol. I), GAOR, 79th–81st Sess., Supp. No. 40 (Jan. 10, 2004) [hereinafter 2004 Human Rights Committee Report].

114. *Id.*

that “the State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant (article 7 and general comment No. 28), and repeal the provisions criminalizing abortion.”<sup>115</sup> It also stated that, in Colombia, “legislation applicable to abortion [should be] revised so that no criminal offences [sic] are involved in . . . cases in which “women . . . have been victims of rape or incest or whose lives are in danger.”<sup>116</sup> In its report on Equatorial Guinea, the Committee noted its “concern that legal restrictions on the availability of family planning services give rise to high rates of pregnancy and illegal abortion[s], which are one of the principal causes of maternal mortality.”<sup>117</sup> The HRC recommended that Equatorial Guinea “do away with the legal restrictions on family planning so as to reduce maternal mortality (articles 23, 24 and 6 of the Covenant).”<sup>118</sup>

In 2005, the Committee made a remarkable statement about Albania. It noted its concern with the “high rate of infant mortality and of abortion and the apparent lack of family planning and social care in some parts of the State party.”<sup>119</sup> It recommended that “the State party should take steps to ensure that *abortion is not used as a method of family planning* and take appropriate measures to reduce infant mortality.”<sup>120</sup> The Committee also noted the criminalization of abortion in Morocco.<sup>121</sup> It recommended that Morocco “should ensure that women are not forced to carry a pregnancy to full term where that would be incompatible with its obligations under the Covenant (arts. 6 and 7) and should relax the legislation relating to abortion.”<sup>122</sup> In its report on Poland, the Committee was chiefly concerned with the “unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions.”<sup>123</sup> The Committee recommended that “[t]he State party . . . should provide further information on the use of the conscientious objection clause by doctors” as well as “liberalize its legislation.”<sup>124</sup>

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115. *Id.*

116. *Id.* ¶ 67(13).

117. *Id.* ¶ 77(9).

118. *Id.*

119. Rep. of the Human Rights Committee, ¶ 82(14), U.N. Doc. A/60/40 (Vol. I), GAOR, 82nd–84th Sess., Supp. No. 40 (Mar. 10, 2005) [hereinafter 2005 Human Rights Committee Report].

120. *Id.* (emphasis added).

121. *Id.* ¶ 84(29).

122. *Id.*

123. *Id.* ¶ 85(8).

124. *Id.*

In 2006, the HRC noted the restrictive laws in Paraguay, which lead “women to seek unsafe, illegal abortions, at potential risk of their life and health.”<sup>125</sup> The recommendation was, as usual, the revision of legislation concerning abortion to “bring it into line with the Covenant.”<sup>126</sup>

In 2007, the HRC noted the practices of both Honduras and Madagascar, where abortion was “especially [limited] in cases where the life of the mother is in danger.”<sup>127</sup> The recommendation was the usual call for compatibility of abortion laws with the Covenant.<sup>128</sup> The same was said of Chile.<sup>129</sup> Reporting on Zambia, the HRC was concerned with the “requirement that three physicians must consent to an abortion may constitute a significant obstacle for women wishing to undergo legal and therefore safe abortion[s].”<sup>130</sup>

In 2008, the HRC pointed out its concern with Panamanian law, which placed a limitation on access to abortion within the first two months of pregnancy resulting from rape.<sup>131</sup> The Committee recommended that “the State party should amend its legislation so that it effectively helps women avoid unwanted pregnancies and so that they do not have to resort to illegal abortions that could endanger their lives.”<sup>132</sup>

In its *Compilación de observaciones finales del Comité de Derechos Humanos sobre países de América Latina y el Caribe (1977–2004)* [Compilation of Final Observances of the Committee of Human Rights concerning Latin American and Caribbean States (1977–2004)], the HRC basically asserted the same types of concerns on abortion access that were highlighted in other reports.<sup>133</sup> However, there were a couple interesting notations. One was an inquiry why Mexico had never considered abortion as a form of family planning.<sup>134</sup> Also inter-

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125. Rep. of the Human Rights Comm., ¶ 77(10), U.N. Doc. A/61/40 (Vol. I), GAOR, 85th–87th Sess., Supp. No. 40 (Jan. 1, 2006).

126. *Id.*

127. Rep. of the Human Rights Comm., ¶ 79(8), 84(14), U.N. Doc. A/62/40 (Vol. I), GAOR, 88th–90th Sess., Supp. No. 40 (Jan. 11, 2007) [hereinafter 2007 Human Rights Committee Report].

128. *Id.*

129. *Id.* ¶ 84(8).

130. *Id.* ¶ 86(18).

131. Rep. of the Human Rights Comm., ¶ 79(9), U.N. Doc. A/63/40 (Vol. I), GAOR, 91st–93d Sess., Supp. No. 40 (Jan. 10, 2008).

132. *Id.*

133. OFICINA DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS REPRESENTACIÓN REGIONAL PARA AMÉRICA LATINA Y EL CARIBE, COMPILACIÓN DE OBSERVACIONES FINALES DEL COMITÉ DE DERECHOS HUMANOS SOBRE PAÍSES DE AMÉRICA LATINA Y EL CARIBE (1977–2004) 55–56, 64, 75, 81, 87, 99, 106, 107, 162, 169, 196–97, 213, 217, 227, 248, 298, 327–28, 363, 411, 431, 433, 438, 442–43, 492, 495, 515–16, 541 (translation by author), available at [http://www2.ohchr.org/english/bodies/hrc/docs/publications/HRC-Compilacion\(1977-2004\).pdf](http://www2.ohchr.org/english/bodies/hrc/docs/publications/HRC-Compilacion(1977-2004).pdf).

134. *Id.* at 363.

esting was the Committee's noted awareness of Uruguay's policy that "not all abortions are considered of the same criminal degree and there exists different gradations of punishment for the respective crime."<sup>135</sup>

Although the above excerpts of various HRC reports merely frame in general terms the state of abortion in international human rights law, certain key elements can be extrapolated from these reports. First, there seems to be an emphasis on making "exceptions" to general prohibitions of abortion laws. These exceptions are to be carved out for circumstances where the mother's life or health is in danger and when the pregnancy is the result of rape or incest. These exceptions seem to indicate that the general rule is that parties to the Convention may protect human life from conception. Additionally, it is arguable whether these exceptions would rise to the level of customary international law, which is binding.<sup>136</sup> In order for that to occur, two elements would be necessary. First, there would need to be a uniform state practice.<sup>137</sup> Second, there would need to be a sense of legal obligation (otherwise known as *opinio juris*).<sup>138</sup> The excessive encouragement by the HRC that countries make exceptions to their general prohibition of abortion could create the occasion for finding not only uniform state practice of exceptions to general prohibitions of abortion, but it could also create the impression that a country is under a legal obligation (*opinio juris*) to create legal exceptions to a general prohibition on abortion.<sup>139</sup> In addition, because it is not necessary that every state participate in the uniform state practice for it to rise to the level of customary international law, the requirement that a state have exceptions to general abortion prohibitions could still be

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135. *Id.* at 516 (translation by author).

136. See RESTATEMENT, *supra* note 17, § 701(b).

137. *Id.* §102(2); see also Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757 (2001) ("State practice refers to general and consistent practice by states").

138. RESTATEMENT, *supra* note 17, at § 102; see also Roberts, *supra* note 137, at 757 ("[O]*pinio juris* means that the practice is followed out of a belief of legal obligation.")

139. See also Roberts, *supra* note 137, at 758 (stating that the modern trend tends to focus on *opinio juris* more than uniform state practice).

[M]odern custom is derived by a *deductive* process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes *opinio juris* rather than state practice because it relies on statements rather than actions. Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international for a such as the General Assembly, which can declare exciting customs, crystallize emerging customs, and generate new customs.

*Id.*

applied *erga omnes*.<sup>140</sup> Nonetheless, most of the exceptions to general prohibitions on abortion for which the HRC calls probably do not impose any actual legal obligations (*opinio juris*), so they do not rise to the level of customary international law. The HRC repeatedly discourages and somewhat castigates the countries for their restrictive laws on abortion, but it is not altogether conclusive that this has any legal binding force on these countries.<sup>141</sup> Nonetheless, the existence of this “exceptions-talk” provides an avenue for states to continue protecting human life from conception, with a few exceptions.

Second, two distinct shifts can be identified in the language that is used by the HRC throughout the years. The first shift occurs in the HRC’s reports from 1999 and 2000. In these reports, abortion begins to be discussed alongside family planning programs and increased accessibility to contraception.<sup>142</sup> However, the HRC refrains from stating whether such family planning programs and accessibility to contraception involve greater access to abortion.<sup>143</sup> This problem is potentially alleviated in light of the 2005 recommendation to Albania that abortion should never be used as a family planning method.<sup>144</sup> The second shift occurs in 2003 and 2004, where language discussing liberalization of abortion policies becomes much stronger, yet highly ambiguous. For example, the Committee uses such language in the contexts of helping pregnant women avoid “unwanted pregnancies”<sup>145</sup> or advising that States Parties must revise laws because they are “incompatible with obligations arising under the Covenant” (usually in

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140. OPPENHEIM, L., 1 OPPENHEIM’S INTERNATIONAL LAW 4 (Robert Jennings & Arthur Watts eds., 9th ed. 1992), reprinted in HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 168 (2007) “Rights and obligations *erga omnes* may even be created by the actions of a limited number of states.”. “*Erga omnes*” means valid against all states, whether they consent to be bound by it or not. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW xli (6th ed. 2003); see also RESTATEMENT, *supra* note 17, § 703 cmt. b (“Since the obligations of the customary law of human rights are *erga omnes* (obligations to all states), . . . any state may pursue remedies for their violation . . . .”); *id.* § 902 cmt. a (“Thus, any state may . . . pursue a remedy for a denial of human rights in violation of customary international law . . . .”).
141. Roberts, *supra* note 137, at 758 (“Whether [a text] become[s] custom depends on factors such as whether they are phrased in declaratory terms, supported by a widespread and representative body of states, and confirmed by state practice.”); see also RESTATEMENT, *supra* note 17, § 701 reporters’ notes 1 (1987) (“There is a disposition to find legal obligation in indeterminate language about human rights in international agreements.”).
142. 1999 Human Rights Committee Report, *supra* note 93, ¶ 211; 2000 Human Rights Committee Report, *supra* note 100, ¶ 100.
143. 1999 Human Rights Committee Report, *supra* note 93, ¶ 211; 2000 Human Rights Committee Report, *supra* note 100, ¶ 344.
144. 2005 Human Rights Committee Report, *supra* note 119, ¶ 82(14).
145. 2003 Human Rights Committee Report, *supra* note 111, ¶ 81(14); 2004 Human Rights Committee Report, *supra* note 113, ¶ 66(12).

reference to Articles Six and Seven).<sup>146</sup> However, this type of language does not offer any definitive guidance. If compatibility with Articles Six and Seven requires a state to allow abortion in certain circumstances—namely, when the mother’s life or health is in danger and when conception is the result of rape or incest—then it seems that the Committee recommendations are fairly narrow. On the other hand, if the nebulous language of the HRC is intended to broaden the scope of abortion rights, then the use of such ambiguous language could potentially do what it is intended to do by providing avenues of textual support for those who advocate an unfettered access to abortion.

Additionally, there is discontinuity between the HRC’s various recommendations and General Comment Twenty-Eight. For example, one of the Committee Reports from 2004 recommends that “[t]he State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant.”<sup>147</sup> General Comment Twenty-Eight states that “State parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.”<sup>148</sup> Once again, if “unwanted pregnancies” is meant to refer to those that arise from rape and incest, then there seems to be consistent application of the HRC’s recommendations in various reports. However, if this term is meant to have a more liberal application, then it can be argued that there exists some greater right to abortion than has previously been warranted by the exceptions. This ambiguity is a disservice to both sides of the issue, but it is particularly problematic for those who advocate legislation that protects human life from conception, since the language can be construed broadly to provide for a potential human right in the unfettered access and right to abortion.

Finally, the Committee Reports contain conclusions that are made without any foundation or support—in other words, they are assertions to be blindly accepted. For example, in a 2007 Committee Report it was implied that if abortion is legal, it is therefore safe.<sup>149</sup> This claim amounts to an unwarranted axiomatic truth claim. Just because abortion is legal, it is not necessarily safe. In fact, abortions—even if they are safe—may still have a detrimental effect on the wo-

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146. 2003 Human Rights Committee Report, *supra* note 111, ¶ 81(14); 2004 Human Rights Committee Report, *supra* note 113, ¶ 66(12).

147. *See* 2004 Human Rights Committee Report, *supra* note 113, ¶ 66(12).

148. *See* 2000 Human Rights Committee Report, *supra* note 100, 134, ¶ 10.

149. 2007 Human Rights Committee Report, *supra* note 127, ¶¶ 79(8), 84(14).

man's physical, mental, and even spiritual well-being.<sup>150</sup> Though reasonable minds could differ on this conclusion, the HRC seems to adopt a "legal, therefore safe" view as a type of axiom.

### 3. *Unfettered Access to Abortion*

The understanding that international human rights law provides an unfettered access to abortion is based on a number of human rights provisions requiring a mother to have a free license to seek an abortion at any time she desires whether it is because of health interests or it is purely a personal request based on self-interests.<sup>151</sup>

Professor Richard Wilkins sees this evolutionary process of the unfettered right to abortion as a product of the rapid change of "soft law" into "hard law."<sup>152</sup> Wilkins states that the "modern UN system churns out soft law norms at an ever-increasing rate."<sup>153</sup> This soft law can come in the form of various UN meetings or documents (for example, the Committee Reports that were analyzed above).<sup>154</sup> Wilkins notes that every year the UN examines questions on "virtually every conceivable social issue."<sup>155</sup> "As a result . . . various reports, platforms, agendas, and declarations are issued, updated, and expanded."<sup>156</sup> He further states, "Not long ago, these soft law documents were considered little more than helpful—or, perhaps, even irrelevant—suggestions. Today, they are more than mere words."<sup>157</sup>

In fact, many of these soft law norms "generated at UN meetings can rapidly attain a status approximating hard law."<sup>158</sup> Wilkins states that this transformation occurs because various national governments, non-governmental organizations, and legal scholars attach great importance to these soft law norms.<sup>159</sup> He also points out:

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150. See *New Study Affirms Link Between Abortion and Mental Health Problems*, POST-ABORTION REV. (Elliot Inst., Springfield, Ill.), Spring 2010, at 3, available at <http://www.afterabortion.org/PAR/v17/v17n1.pdf>; *Physical Effects of Abortion*, ABORTIONRISKS.ORG, [http://www.abortionrisks.org/index.php?title=physical\\_Effects\\_of\\_Abortion](http://www.abortionrisks.org/index.php?title=physical_Effects_of_Abortion) (last visited Feb. 25, 2011); *Rachel's Vineyard - About Us*, RACHELSVINEYARD.ORG, <http://www.rachelsvineyard.org/aboutus/ourstory.htm> (last visited Feb. 25, 2011).

151. Zampas & Gher, *supra* note 1, at 287 ("The right to voluntary motherhood and thus the right to decide to obtain an abortion is arguably integral to a constellation of other fundamental human rights such as women's right to equality, life, health, security of person, private and family life, freedom of religion, conscience and opinion, and freedom from slavery, torture and cruel, and inhuman and/or degrading treatment."); see Wilkins & Reynolds, *supra* note 46, at 143–45.

152. Wilkins & Reynolds, *supra* note 46, at 128–31.

153. *Id.* at 128.

154. See *supra* notes 87–132.

155. Wilkins & Reynolds, *supra* note 46, at 128

156. *Id.* at 128–29.

157. *Id.* at 129.

158. *Id.*

159. *Id.*

At one time, customary law was formed over the course of centuries because such law was developed through the uniform, consistent practice of nations over time. More recently, and largely because of the exploding number of international meetings, some legal scholars argue that binding international norms develop—at least in significant part—through the mere repetition of agreed language at UN conferences.<sup>160</sup>

The speed at which these documents come out and the absence of responses on the part of many countries may be enough for some of these soft laws to gain the momentum to be posited as hard law.<sup>161</sup> Wilkins states that, because of these factors, namely, “the growing reach of international treaties, the explosive growth of international soft law norms, and the willingness of judges and others to enforce international pronouncements,” those who are interested in protecting human life from conception must pay particular attention not only to the development of national law, but also to “international treaties, UN conference declarations, and the opinions of jurists from [other] legal systems.”<sup>162</sup> For example, it is argued that the General Comments have “evolved into a type of quasi-judicial instrument in which the Committee spells out its interpretation of different provisions of the Covenant.”<sup>163</sup> These “Comments are relied upon by the Committee in evaluating compliance by States with their obligations under the Covenant.”<sup>164</sup> In other words, the General Comments have a potential binding effect on States Parties. In this regard, it is of utmost importance for legal scholars interested in the protection of human life from conception to pay particular attention to these malleable soft law norms.

Wilkins, speaking from personal experience, finds that those who argue for unfettered access to abortion do so, at least initially, in a covert fashion.<sup>165</sup> He states that these diplomats and scholars rarely use the term “abortion” to advocate for this right.<sup>166</sup> Rather, they promote the unfettered access to abortion under the guise of providing the “full range of reproductive health care services,” claiming that such access is “the necessary lynchpin for environmental preservation, empowerment of women, access to health care, elimination of gender-based violence, and the promotion of human dignity.”<sup>167</sup> He argues that they also use “ambiguous and potentially expansive terms” to broaden the horizon for access to this so-called right to abortion.<sup>168</sup> However, he also states that, at least to date, such language has not

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160. *Id.* at 130–31.

161. *Id.*

162. *Id.* at 133.

163. BUERGENTHAL ET AL., *supra* note 3, at 55.

164. *Id.*

165. Wilkins & Reynolds, *supra* note 46, at 142, 146.

166. *Id.* at 146.

167. *Id.* at 145.

168. *Id.* at 149.



“expressly and unequivocally recognize[d] an international right to abortion.”<sup>169</sup> Nonetheless, “the impact that the broad wording of . . . [a document] might have on the unborn life is unknown.”<sup>170</sup>

Unfettered access to abortion might be most easily refuted by Article Eighteen of the ICCPR, which states that “[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching.”<sup>171</sup> In other words, those doctors or medical practitioners who would wish not to participate or assist in an abortion would be able to refuse based on conscience. There is one limitation to this, however, under section three of Article Eighteen of the ICCPR, which states, “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>172</sup>

Professor Bernard Dickens states that such conscientious objections should be read narrowly so as to protect the patient, noting that some legislation “protects religious, moral, or ethical preferences” at the cost of depriving patients of their “reproductive and other rights, and often empowers health service providers and institutions in effect to impose their will at patients’ cost, including the cost their health.”<sup>173</sup> However much this statement may be true within the realm of current international human rights law, great ambiguity still exists as to what constitutes a “fundamental right” or “freedom of others” under the ICCPR. In other words, there still exists that question of the hierarchy of rights: do certain rights (i.e., freedom of conscience and religion) trump other rights (i.e., so-called right to abortion)? Under current law, as has been previously analyzed, it is clear that the only possible exceptions to complying with the Covenant are when the mother’s life or health is in danger or the pregnancy is the result of rape or incest. Outside of this context, it is unclear whether conscientious objections by doctors or medical practitioners would not prevail over other so-called unfettered rights to abortion that have not been defined clearly by the international human rights system.

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169. *Id.* at 149.

170. *Id.* at 157.

171. International Covenant, *supra* note 21, art. 18(1).

172. *Id.* art. 18(3).

173. Bernard M. Dickens, *Legal Protections and Limits of Conscientious Objection: When Conscientious Objection is Unethical*, 28 *MED. & L.* 337, 340 (2009).

## C. Regional Systems of Human Rights

### 1. *European Convention on Human Rights*

The European Convention on Human Rights (ECHR) became effective on September 3, 1953.<sup>174</sup> Its Member States are limited to those who have already become “parties to the European Convention.”<sup>175</sup> As stated earlier, the ECHR does not provide for an explicit protection of life from conception, much like the UDHR. In fact, the mission and goal of the ECHR is to carry out the enforcement of the UDHR.<sup>176</sup> The ECHR created two institutions to carry out its mission: the European Commission of Human Rights and the European Court of Human Rights (European Court).<sup>177</sup> The European system’s outlook on abortion is best enshrined in a case entitled *Tysiac v. Poland*, which the European Court decided in 2007.<sup>178</sup>

In its decision, the European Court began its assessment by noting that it was not the “Court’s task in the present case to examine whether the Convention guarantees a right to have an abortion.”<sup>179</sup> This reading avoided any requirement to interpret the Convention’s right to life provision. Instead, the European Court focused on Article Eight’s provision concerning privacy.<sup>180</sup> The European Court stated that the “essential object of Article 8 is to protect the individual against arbitrary interference by public authorities.”<sup>181</sup> The European Court noted that a state’s regulation on abortion “relate[s] to the traditional balancing of privacy and public interests.”<sup>182</sup> However, in the case of a therapeutic abortion, the European Court insisted that “the positive obligations of the State to secure the physical integrity of the mothers-to-be” must also be balanced.<sup>183</sup> In this case, the European Court found that the State’s refusal to allow an abortion “amounted to an interference with [the mother’s] rights guaranteed by Article 8.”<sup>184</sup> However, it should be noted, once again, the primary concern of European Court was with Article Eight and the denial of rights incident thereto that could have led to “possible negative consequences of [the mother’s] pregnancy and upcoming delivery for her

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174. BUERGENTHAL ET AL., *supra* note 3, at 136.

175. *Id.*

176. *Id.* at 139.

177. *Id.* at 140.

178. *Tysiac v. Poland*, 45 Eur. Ct. H.R. 42 (2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?key=28071&table=F69A27FD8FB86142BF01C1166DEA398649&portal=hbkm&action=html&source=external-click&highlight=&sessionid=66281263&skin=hudoc-en>.

179. *Id.* ¶ 104.

180. *Id.* ¶ 106.

181. *Id.* ¶ 109.

182. *Id.* ¶ 107.

183. *Id.*

184. *Id.* ¶ 108.

health.”<sup>185</sup> Thus, on the one hand, it could be argued that the right to abortion was not at the forefront of this case, since arguably central to the European Court’s holding was the health of the mother. On the other hand, abortion was certainly the pivotal issue of the case and, construed broadly, this case could be interpreted as promoting a right to abortion.

Interestingly, in his dissenting opinion, Judge Borrego stated that “[a]ccording to [the majority’s] reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention.”<sup>186</sup> Judge Borrego’s outlook on the case proposes a mind-boggling dilemma. It could be said that the reasoning of the majority, taken to its logical conclusion, ultimately has to affirm the statement by Judge Borrego. If a mother should not have been inhibited from having an abortion, then it follows that the unborn child never had a legitimate right to be born. Overall, this case portrays well the issue of abortion in the international legal setting.

## 2. *Organization of American States*

The Organization of American States (OAS) came into existence when its charter was adopted in 1948, but the OAS has roots dating back to 1889.<sup>187</sup> The OAS currently contains thirty-five Member States and has granted Permanent Observer status to over sixty-three states, along with the European Union.<sup>188</sup>

In 1969, the OAS adopted the American Convention on Human Rights.<sup>189</sup> Article Four of this document states, “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.”<sup>190</sup> On its face, this provision generally outlines a “right to life.”

However, it was not until 1981 that the Inter-American Commission ruled on the scope of the “right to life” provision.<sup>191</sup> The ruling pertained to a denunciation by various groups of the United States on the basis that its abortion laws were “incompatible with U.S. human rights obligations as a member of the Organization of American States.”<sup>192</sup> The Commission predominantly ruled on the scope of Arti-

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185. *Id.* ¶ 124.

186. *Id.* ¶ 15 (Borrego, J., dissenting).

187. *Who We Are*, ORG. OF AM. STATES, [http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp) (last visited Feb. 12, 2011).

188. *See id.*

189. *Our History*, ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/en/about/our\\_history.asp](http://www.oas.org/en/about/our_history.asp) (last visited Feb. 12, 2011).

190. American Convention on Human Rights, *supra* note 9, art. 4(1).

191. Brian J. Leslie, *Poland, Abortion, and the Roman Catholic Church*, 17 B.C. INT’L & COMP. L. REV. 453, 471 (1994).

192. *Id.*

cle Four of the American Convention on Human Rights through Article One of the American Declaration on the Rights and Duties of Man.<sup>193</sup> The Commission ultimately decided that the United States' abortion laws did not violate the United States' obligation under the American Declaration.<sup>194</sup> It did not specifically rule on the American Convention on Human Rights because the United States was not a party to it.<sup>195</sup> The Commission stated that the right to life did not extend to a fetus "partially because a number of U.S. states allowed abortion rights at the time the American Declaration was drafted."<sup>196</sup>

In the Inter-American Commission's discussion of Article Four, it also "concluded that the provision protecting life from conception" was, in essence, "a compromise between pro- and anti-abortion factions."<sup>197</sup> However, it is somewhat difficult to comprehend how an explicit right to protection of life from conception can in any way be equivalent to a compromise between factions. The Commission also stated that protecting life from "conception, or at any time [before] . . . birth" was to be a determination of domestic law.<sup>198</sup> This argument, as opposed to the compromise argument, makes more sense, especially in light of the reservation made by Mexico, at the time of its ratification, that the first paragraph of Article Four "does not constitute an obligation to adopt, or keep in force, legislation to protect life 'from the moment of conception,' since this matter falls within the domain reserved to the States."<sup>199</sup>

Overall, it is interesting that the only human rights document that purports to protect life from conception, in theory, does not actually do so as a practical matter. Rather, the Commission delegates Article Four's interpretation to the individual nations.

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193. *Id.* "Every human being has the right to life, liberty and the security of his person." Organization of American States, American Declaration of the Rights and Duties of Man art. 1, May 2, 1948, O.A.S. Res. XXX, available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm>.

194. Leslie, *supra* note 191, at 471.

195. *Id.*

196. *Id.*

197. Leslie, *supra* note 191, at 471-72.

198. *Id.* at 472.

199. Organization of American States, American Convention on Human Rights, Declarations/Reservations/Denunciations/Withdrawals, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.oas.org/juridico/english/signs/b-32.html#Mexico>.

### III. ABORTION: HOLY SEE INTERVENTION

#### A. Overview of Catholic Teaching on Abortion

A simple overview of the *Catechism of the Catholic Church* (CCC)<sup>200</sup> provides the necessary groundwork for understanding the Church's human rights position concerning the right to life. In its opening words about abortion, CCC paragraph 2270 states, "Human life must be respected and protected absolutely from the moment of conception. From the moment of conception, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life."<sup>201</sup> One of the earliest written proclamations of this teaching for the Catholic Church exists in the *Didache*, which was written in approximately A.D. 140.<sup>202</sup> This early teaching document stated that "you shall not procure abortion, nor destroy a new-born child."<sup>203</sup> The CCC states that this "teaching has not changed and remains unchangeable."<sup>204</sup> Furthermore, CCC paragraph 2273 states that an "inalienable right to life of every innocent human individual is a *constitutive element of a civil society and its legislation*."<sup>205</sup> Citing another ecclesiastical document, *Donum Vitae* (meaning the "Gift of Life"), issued in 1987, CCC paragraph 2273 states that the human right to life from conception "depend[s] neither on a single individual . . . nor on parents; nor do they represent a concession made by society and the state; they belong to human nature and are inherent in the person by virtue of the creative act from which the person took his origin."<sup>206</sup> In this sense, the language of the UDHR Preamble closely resembles that of the Catholic Church. Furthermore, *Donum Vitae* emphasizes a point that is at the center of all Catholic social teaching, namely, that people have inherent dignity because God creates them in God's image (*imago Dei*).<sup>207</sup> Finally, it is

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200. See CATECHISM OF THE CATHOLIC CHURCH (1995), available at [http://www.vatican.va/archive/ENG0015/\\_INDEX.HTM](http://www.vatican.va/archive/ENG0015/_INDEX.HTM).

201. *Id.* ¶ 2270.

202. 1 FAITH OF THE EARLY FATHERS 2 (W.A. Jurgens ed. & trans., 1970).

203. *Id.*

204. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 200, ¶ 227.

205. *Id.*

206. *Id.* ¶ 2273.

207. Congregation for the Doctrine of the Faith, *Donum Vitae [Instruction on Respect for Human Life and on the Dignity of Procreation: Replies to Certain Questions of the Day]* (1987), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html) ("From the moment of conception, the life of every human being is to be respected in an absolute way because man is the only creature on earth that God has 'wished for himself' and the spiritual soul of each man is 'immediately created' by God; his whole being bears the image of the Creator. Human life is sacred because from its beginning it involves 'the creative action of God' and it remains forever in a special relationship with [the] Creator, who is its sole end." (internal citations omitted)).

worth noting that the Church teaches that the law should provide penal sanctions for “every deliberate violation of the child’s rights.”<sup>208</sup>

## B. Roman Catholic Involvement in Human Rights

### 1. Historical Development

Professor William Wagner argues that “[o]n the level of theory, the concept of human rights also enjoys a demonstrable relationship with Catholicism, viewed as a tradition of intellectual and moral reflection.”<sup>209</sup> He further states that from its earliest days, “[t]he Church championed the rescue of abandoned infants, prostitutes, and slaves . . . . Catholic clergy officiated at marriages between slaves and free individuals in violation of state prohibition.”<sup>210</sup> Wagner also notes that international law and human rights have their roots in early canon law, particularly that developed by St. Augustine and St. Thomas Aquinas.<sup>211</sup> Wagner further links the influence of three particular clergymen—Francisco Suárez, Francisco de Vittoria, and Bartolomé de las Casas—with contemporary international law and human rights.<sup>212</sup>

Wagner points out briefly the role each clergyman played in international law and human rights development.<sup>213</sup> In particular, Suárez “advanced the cause of international law by his insight into the positive character of international-law norms” and also through the role he played in “argu[ing] for natural rights of life, liberty, and property.”<sup>214</sup> De Vittoria “defended the rights of indigenous people to property, self-rule, and free consent in the choice of religion.”<sup>215</sup> His voice on this matter was one of great moral authority in a time when Native Americans were facing grave violations of human rights by those who had arrived in the New World.<sup>216</sup> Similarly, de las Casas advocated on behalf of indigenous people of the Caribbean in front of the Spanish Crown.<sup>217</sup> Although he ultimately lost on the issue of

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208. *Id.*

209. William J. Wagner, *Catholicism*, in 1 ENCYCLOPEDIA ON HUMAN RIGHTS 260, 263 (David Forsythe ed., 2009).

210. *Id.*

211. *Id.* at 264–65.

212. *Id.* at 265.

213. *Id.*

214. *Id.*

215. *Id.*

216. See Ernest Nys, *Introduction to FRANCISCUS DE VICTORIA, THE CLASSICS OF INTERNATIONAL LAW: DE INDIS ET DE JURE BELLI RELECTIONES BEING PARTS OF RELECTIONES THEOLOGICAE XII* 66, 85–91, 100 (Ernest Nys ed., John Pawley Bate trans., Oceana Publ'ns 1964) (1557).

217. *Id.*

slavery, his stance had a great influence on the development of human rights.<sup>218</sup>

Within this historical context, Wagner states that the Church has been an “undeniable force in the historical dialectic by which human rights came, over time, to be acknowledged.”<sup>219</sup> Furthermore, the Church’s “original witness in favor of the dignity of the person . . . must be considered elements helping to explain subsequent progress with respect to human rights under Western institutions.”<sup>220</sup>

However, amidst all the positive influences the Church has had, it has not been afraid to acknowledge its failures, both within the historical context and contemporaneously. Wagner points to a speech of Pope John Paul II, on March 12, 2000, in which he called “for repentance by Catholics for the sins of the Catholic Church against human rights, specifically against ‘the service of truth,’ ‘members of other Christian denominations,’ ‘the people of Israel,’ ‘the peoples of other cultures and religions,’ ‘the dignity of women,’ and ‘the fundamental rights of the person.’”<sup>221</sup> Additionally, Wagner states that “[s]uch a critique must itself be tempered by awareness of the polemical influence on popular impressions of counter religious, political, and intellectual movements, which are themselves no less fair game for moral critique.”<sup>222</sup> He also highlights a master theologian of the Church, Hans Ur von Balthasar, who pointed to the “unparalleled ‘weight of history’ that rests upon the Catholic Church with its unequalled continuity, ensuring that it alone among contemporary institutions must account for practices that were once contemporaneous with institutions that vanished a millennium ago.”<sup>223</sup>

Another significant point for the Catholic Church has been the Church’s involvement in formation of modern international human rights. Professor Robert John Araujo, of the Society of Jesus, notes that although the Holy See did not become a Permanent Observer of the United Nations until 1964, “its role and participation in the work of this international organization began shortly after the United Nations was founded in 1945.”<sup>224</sup> He notes that initially the UN was intended to limit itself to larger states, whereby the Holy See could not enter into the organization.<sup>225</sup> Nonetheless, the “Holy See was invited to participate in UN activities shortly thereafter.”<sup>226</sup> The Holy

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218. *Id.*

219. *Id.*

220. *Id.* at 266.

221. *Id.* at 268.

222. *Id.*

223. *Id.*

224. Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291, 346 (2001).

225. *Id.*

226. *Id.*

See became a Permanent Observer in 1964 and has had extensive participation in UN activities.<sup>227</sup>

One last important point of Catholic influence within the human rights context is the prominent role that Jacques Maritain, a Catholic and French philosopher, played in the early development of the UN and the UDHR. Maritain's main objective, in his role of helping shape and draft the UDHR, was to make the document one of universal applicability.<sup>228</sup> Maritain's answer to universal applicability was the notion that people can agree on practical conclusions while disagreeing on the theoretical means for justifying those conclusions.<sup>229</sup>

Renato Raffaele Cardinal Martino, Permanent Observer of the Holy See to the United Nations from 1986 to 2002, states that the work of Maritain can help with understanding the nature of human rights and the UDHR.<sup>230</sup> Cardinal Martino begins by emphasizing Maritain's principle that the creation of such a universally applicable document as the UDHR had to sacrifice the investigation of independent philosophical notions in attaining general principles.<sup>231</sup> In Maritain's own words, the agreement was possible "on the condition that no one asks . . . why?"<sup>232</sup> Rather than attempt to agree on "philosophical principles or speculative ideals," it was more important to "achieve a consensus on common practical ideals that would apply to all."<sup>233</sup>

Furthermore, Maritain saw two differing schools of thought when it came to fundamental human rights. First, human beings have "certain fundamental and inalienable rights antecedent in nature, and superior to society."<sup>234</sup> Second, "rights are relative to the historical development of society, and are themselves constantly variable and in the state of flux."<sup>235</sup> Cardinal Martino notes that although this might have been the case as to different philosophical notions of the existence of rights, this did not deter Maritain from "presenting his own

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227. *Id.* at 347–53.

228. Bradley R. Munro, *Maritain and the Universality of Human Rights*, in *PHILOSOPHICAL THEORY AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 109, 121–24 (William Sweet ed., 2003).

229. *Id.* at 122 ("In the domain of practical assertion . . . an agreement on a common declaration is possible by means of an approach that is more pragmatic than theoretical, and by a collective effort of comparing, recasting, and perfecting the drafts in order to make them acceptable to all as points of practical convergence, regardless of the divergence in theoretical perspectives." (internal citation omitted)).

230. Renato Raffaele Cardinal Martino, *John Paul II and the International Order: Human Rights and the Nature of the Human Person*, 21 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 51, 57 (2007).

231. *Id.* at 58.

232. *Id.* (quoting Jacques Maritain, *Introduction to HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 9 (UNESCO ed., 1949)).

233. *Id.*

234. *Id.* at 59.

235. *Id.* at 58–59.



views that strongly reflected a Christian perspective on fundamental rights.”<sup>236</sup> Additionally, Maritain recognized the “positive contribution of the diversity of views about human rights.”<sup>237</sup> However, because of this diversity, Maritain recognized that “humanity should not expect too much from the Declaration.”<sup>238</sup>

Overall, Maritain was able to recognize the diversity of views without changing his own views on rights—views that were deeply seated in the natural law tradition of St. Thomas Aquinas. Maritain was concerned with views that over-emphasized the rights of the individual.<sup>239</sup> This type of rights-talk would inevitably place human rights “outside the social and relationship context which was so essential so that ‘universal norms of right and duty’ could be properly understood and practiced.”<sup>240</sup> Liberty was not to be severed from the common good.<sup>241</sup>

## 2. *Current Involvement*

Every Pope since the inception of the United Nations has lauded the efforts of an international human rights regime and has urged protecting the rights most fundamental to human life, including life itself.<sup>242</sup> Perhaps one of the clearest and authoritative ecclesial statements comes from the *Dignitatis Humanae* (Dignity of the Human Person) of the Second Vatican Council: “the council intends to develop the doctrine of recent popes on the inviolable rights of the human person and the constitutional order of society.”<sup>243</sup> However rich and insightful these authoritative texts of the Church may be, they are more completely understood in their actual application. Thus, the interventions of the Holy See by the Permanent Observers to the UN will be the focus of this subsection.

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236. *Id.* at 59.

237. *Id.*

238. *Id.*

239. *Id.* at 60.

240. *Id.*

241. *Id.* at 59–60.

242. See generally Wagner, *supra* note 210, at 260–63 (“Pope John XXIII expressly endorsed both the creation of the United Nations and the promulgation of its Universal Declaration of Human Rights as major moral milestones for the human race. Subsequent Popes—Paul VI, John Paul II, and Benedict XVI—have voiced, in addresses before the United Nations General Assembly and elsewhere, their fundamental affirmation both of the United Nations and the international framework of human rights centering on the Universal Declaration. . . . In keeping with its philosophical and theological commitments, the Vatican promotes a vision of human rights, including within their scope respect for the human being in all stages of development, from conception to a natural death.”).

243. 1 SECOND VATICAN COUNCIL, *Dignitatis Humanae*, in VATICAN COUNCIL II: THE CONCILIAL AND POST-CONCILIAL DOCUMENTS 799, 800 (Austin Flannery, O.P., ed., new rev. ed. 2004), available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

A search of the interventions by the Holy See yields no explicit references to abortion. Rather, language pertaining to abortion would have to be implied from other general statements, with the exception of a few explicit statements. Nevertheless, the language used by the Holy See in most of these interventions leaves little room for ambiguity on its stance pertaining to issues of human life.

The Holy See has stated that “[a]mong the fundamental rights, or rather foremost among them, as the Universal Declaration explicitly states, is the right to life of every individual.”<sup>244</sup> In another prime example of its understanding and position on human rights, the Holy See has further stated:

The recognition of the existence of fundamental human rights necessarily presupposes a universal and transcendent truth about man that is not only prior to all human activity, but also determines it . . . . Respect for the right to life at every stage, from conception to natural death, firmly establishes the principle that life is not at anyone’s disposal.<sup>245</sup>

The Holy See has also communicated its stance concerning health and women: “The Holy See continues to advocate a holistic approach to the health of women which does not exclusively focus on a single aspect of a woman but on her overall and comprehensive health care needs.”<sup>246</sup>

However, the Holy See’s language has not always been pleasant. It has, at times, been hostile, especially in its criticisms toward the UN pointing out the contradiction between the rights that are to be protected and the way the UN attempts to interpret and protect those rights:

[T]he Holy See understands access to reproductive health as being a holistic concept that does not consider abortion or access to abortion as a dimension of those terms. . . . It is surely tragic that . . . the same Convention created to protect persons with disabilities from all discrimination in the exercise of their rights, may be used to deny the very basic right to life of disabled unborn persons.<sup>247</sup>

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244. H.E. Archbishop Giovanni Lajolo, Secretary for the Holy See’s Relations with States, Address at the General Debate of the 59th Session of the UN General Assembly (Sept. 29, 2004), *available at* <http://www.un.org/webcast/ga/59/statements/holeng040929.pdf>.

245. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement at the 62nd Session of the United Nations General Assembly (Oct. 30, 2007), *available at* <http://www.holyseemission.org/30Oct2007%20Culture%20of%20Peace.html>.

246. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement before the Third Committee of the 60th Session of the United Nations General Assembly on Agenda Item 65: Implementation of the Outcome of the Fourth World Conference on Women and the Special Session of the General Assembly Entitled “Women 2000: Gender Equality, Development and Peace in the Twenty-First Century” (Oct. 13, 2005), *available at* <http://www.holyseemission.org/13Oct2005%20Women.html>.

247. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement before the 61st Session of the UN General Assembly, 76th Plenary Meeting, on Item 67(b): Human Rights Questions, Including Alternative Approaches for

In addition, the Holy See has recognized the great responsibility of the UN in capturing the true meaning of the human rights it seeks to protect: “The United Nations will be appreciated in its own right whenever the rule of law is translated from discussion of norms and values into tangible results for those who seek justice.”<sup>248</sup> This responsibility also extends to every person: “Protecting rights means, therefore, to respect ethical imperatives that are the necessary precondition for freedom. . . . Human rights, in fact, are not a rhetorical remembrance, but the result of the responsible deeds of everyone.”<sup>249</sup>

Also, the Holy See has intervened by stating its teleological vision on man and the way in which the goal of human rights might be fulfilled:

The rights to life and freedom of thought, conscience and religion remain the core of the human rights system. . . . Only by respecting the right to life, from the moment of conception until natural death, and the consciences of all believers, will we promote a world cognizant and respectful of a deeper sense of meaning and purpose.<sup>250</sup>

### C. What Can the Holy See Offer Human Rights Discourse in the Future?

The one thing the Church cannot do is remain silent: justice demands that the Church let its voice be heard. In fact, the international dialogue of human rights calls for a plurality of voices. This plurality is not a sacrifice of the truth or the common good, but rather is a catalyst to attaining that common good which subsists and relies on the truth. Considering the current state of international human rights law on the issue of abortion, this Comment concludes with four approaches that the Holy See would benefit from in its continual attempts at establishing a human rights system that recognizes the

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Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Note by the Secretary-General Transmitting the Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (A/61/611): Draft Resolution (para. 7) (Dec. 13, 2006), *available at* <http://www.un.org/disabilities/default.asp?id=155#holyseec>.

248. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement at the 63rd Session of the United Nations General Assembly, Before the Sixth Committee on Item 79: The Rule of Law at the National and International Levels (Oct. 14, 2008), *available at* <http://www.holyseemission.org/13Oct2008.html>.
249. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement before the 63rd Session of the United Nations General Assembly, Commemoration of the Sixtieth Anniversary of the Declaration of Human Right (Dec. 10, 2008), *available at* <http://www.holyseemission.org/10Dec2008.html>.
250. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement before the 63rd Session of the United Nations General Assembly, Agenda Item 100: Report of the Secretary-General on the Work of the Organization (Oct. 6, 2008), *available at* <http://www.holyseemission.org/06Oct2008.html>.

right to life from conception. First, the Holy See should promote a call for legal scholarship on the topic of the right to life from conception. Second, the Holy See should continue to promote true religious freedom over merely religious tolerance. Additionally, the Holy See must maintain its tenacious stance on abortion, even if this view happens to be in the minority. Finally, the Holy See should continue to reiterate exactly where the true battlefield is on this issue. The battle is not strictly legal, but also cultural and spiritual.

Wilkins calls for the “need for an academic pro-life response.”<sup>251</sup> He states that the “pro-life academic efforts—particularly in comparison with those made by scholars and academic organizations that support abortion rights—have been timid and restrained.”<sup>252</sup> Wilkins points to the major influence of academia because it is “highly prized in the formulation of international law.”<sup>253</sup> Indeed, the American Law Institute’s *Restatement (Third) of Foreign Relations Law of the United States* points to Article 38(1)(d) of the Statute of the International Court of Justice, which states, “judicial decisions and the *teachings of the most highly qualified publicists of the various nations*” may be used in ascertaining the state of the law as a source of international law.<sup>254</sup> Accordingly, Wilkins believes that “[t]he redefinition and reconstruction of international norms related to the value of human life have been planned and executed, in large measures, by members of the academy” and that “[t]he pro-life academic community can hardly expect to make significant progress itself until it undertakes similarly active and focused efforts.”<sup>255</sup> Thus, it would greatly benefit the Holy See to advocate not only to its own community of believers, but those of other faiths and non-faiths who hold similar views as well. The Holy See should make known that a groundswell is needed at the academic level to make the voice of those who cannot be heard more prominent in the human rights context, so that a holistic approach to fundamental human rights might be adopted.

Furthermore, this academic groundswell can assist the legal field in eradicating ignorance of the Holy See’s position on abortion and point out the logical flaws in the arguments of opponents. For example, one commentator, Rishona Fleishman, points to the acceptance of abortion within the Catholic Church by stating the stance of an eighteenth century theologian and some exceptional circumstances afforded by Pope Gregory XIII.<sup>256</sup> However, the fact that a couple

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251. Wilkins & Reynolds, *supra* note 46, at 164.

252. *Id.* at 135.

253. *Id.*

254. RESTATEMENT, *supra* note 17, § 102 (emphasis added).

255. Wilkins & Reynolds, *supra* note 46, at 164–65.

256. Rishona Fleishman, Comment, *The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in both International and Domestic Arenas*, 14 EMORY INT’L L. REV. 277, 308 (2000).

individuals stated abortion was permissible, under whatever circumstances they argued for, does not persuasively overturn the explicit and official stance the Church has had on abortion over the last 2000-plus years.<sup>257</sup> Furthermore, Fleishman attempts to link strong anti-abortion advocacy and the proclamation of the Immaculate Conception of Mary, claiming that the proclamation was an elevation of the “status of women—particularly the ‘sacredness’ of their child-bearing role in church dogma.”<sup>258</sup> Although the Church certainly places a high esteem on Mary and women in general, but especially in their sacred role as child-bearers, the use of this Church teaching borders on the absurd in its attempt to find a connection to the Church’s anti-abortion advocacy. The doctrine of the Immaculate Conception of Mary actually teaches that Mary was conceived without sin.<sup>259</sup> To Fleishman’s credit, the Immaculate Conception of Mary is often misunderstood to be a proclamation pertaining to Mary’s conception of the Christ.<sup>260</sup> Nonetheless, it remains interesting how Fleishman could make such a connection. It is precisely this type of misunderstanding of Church doctrine that should not be passed over without scrutiny, especially when it is part of the logical progression of an argument.<sup>261</sup> This type of ignorance can only breed further ignorance when it is not verified by other scholars who are knowledgeable about the faith or at least by those who take the effort to verify their theology. Such errors should not go unchecked in a discipline that should be promoting the common good.

The second step for the Holy See is the promotion of religious freedom. In a statement by Archbishop Celestino Migliore, Apostolic Nuncio and Permanent Observer of the Holy See to the United Nations, His Excellency stated that “the time has come to move beyond . . . religious tolerance, and to apply instead the principles of

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257. See *supra* section III.A.

258. Fleishman, *supra* note 257, at 308.

259. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 200, ¶¶ 490–93.

260. *Immaculate Conception and Assumption*, CATHOLIC.COM, [http://www.catholic.com/library/Immaculate\\_Conception\\_and\\_Assum.asp](http://www.catholic.com/library/Immaculate_Conception_and_Assum.asp) (last visited Feb. 14, 2011) (“It’s important to understand what the doctrine of the Immaculate Conception is and what it is not. Some people think the term refers to Christ’s conception in Mary’s womb without the intervention of a human father; but that is the Virgin Birth. Others think the Immaculate Conception means Mary was conceived ‘by the power of the Holy Spirit,’ in the way Jesus was, but that, too, is incorrect. The Immaculate Conception means that Mary, whose conception was brought about the normal way, was conceived without original sin or its stain—that’s what ‘immaculate’ means: without stain. The essence of original sin consists in the deprivation of sanctifying grace, and its stain is a corrupt nature. Mary was preserved from these defects by God’s grace; from the first instant of her existence she was in the state of sanctifying grace and was free from the corrupt nature original sin brings.”)

261. Fleishman, *supra* note 257, at 308–10.

authentic religious freedom.”<sup>262</sup> Archbishop Migliore argued that there exists a “recurring state of intolerance when group interests or power struggles seek to prevent religious communities from enlightening consciences and thus enabling them to act freely and responsibly, according to the true demands of justice.”<sup>263</sup> The height of intolerance is to exclude these religions from “public debate and cooperation because they do not agree with options nor conform to practices that are contrary to human dignity.”<sup>264</sup> Human rights dialogue demands that “[n]ational and global decision making, legal and political systems, and all people of good will must cooperate to ensure that diverse religious expressions are not restricted or silenced.”<sup>265</sup> This approach outlined by Archbishop Migliore would sustain the diversity of voices that is essential to international human rights law discussion. When certain governments or individuals call for the total exclusion of groups from the outset of the discussion, no longer is there dialogue, but a form of totalitarianism is substituted where only those with the “correct” voice are welcomed to enter the human rights forum.

Along these lines, the Holy See should additionally continue to proclaim its stance on the issue of life, recognizing the dignity of the human person beginning at conception. As a reality, the Catholic Church has maintained this stance since its inception.<sup>266</sup> Therefore, it cannot be reasonably assumed that the Catholic Church will begin arguing a different position any time soon. However, this does not mean that the Catholic Church is unaware that its beliefs are not the norm or in sync with the majority. In fact, as Wagner states, the Church acknowledges its role as “one intermediate social organization among others, devoted to charity and voluntary giving.”<sup>267</sup> This acknowledgement that it is one among many, however, in no way should inhibit the Holy See from continuing to defend its position. The Holy See must maintain its position that life is a fundamental human right that begins at conception, and such a right is neither relative to the preference of an individual, nation, or international regime nor is the right to life to be subordinated to other, inferior rights based on some utilitarian calculus. It must be made clear that the right to life is the

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262. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement at the 61st Session of the UN General Assembly, Before the Third Committee, on Item 67(b): Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms (Oct. 27, 2006) [hereinafter Statement on the Promotion and Protection of Human Rights], *available at* <http://www.holyseemission.org/27Oct2006.html>.

263. *Id.*

264. *Id.*

265. *Id.*

266. *See supra* section III.A.

267. Wagner, *supra* note 210, at 270.

precondition upon which every other right derives; the right to life is a *sine qua non* of international human rights law.

Finally, the Holy See must continue to identify where the battlefield in this war truly lies. The battle is not exclusively a legal one. It is a cultural battle and, for the Catholic Church, a spiritual battle. Archbishop Migliore states that

[t]he rights of persons are not simply a set of legal norms but represent, above all, fundamental values. Such values must be fostered by society, otherwise they risk disappearing even from legislative text. The dignity of persons must be safeguarded in culture, in the public mentality and in the conduct of society, as a precondition and in order to be protected by the law.<sup>268</sup>

In other words, rule of law is a mechanism by which the state can come to recognize the dignity of persons. The law is not an end in itself—in fact, the law is often incorrect and imperfect. Thus, the advice of Jacques Maritain that the human community should not expect too much from the Declaration<sup>269</sup> was not so much words of prophecy as much as it was a basic truth about the ability of the law to ensure total justice.

The fact that the law will fall short indicates all the more that it is the culture that must be transformed more so than the law. Archbishop Migliore used the words of the current Holy Father, Pope Benedict XVI, when issuing a statement concerning social transformation, stating that what the fight really needs is “men and women who live in a profoundly fraternal way and are able to accompany individuals, families and communities on journeys of authentic human development.”<sup>270</sup>

This cultural battle also involves reshaping the understanding of what it means to have rights. The *Compendium of the Social Doctrine of the Church (Compendium)* states that “[i]nextricably connected to the topic of rights is the issue of duties falling to men and women.”<sup>271</sup> Quoting Pope John XXIII from his encyclical, *Pacem in Terris* (Peace on Earth), the *Compendium* states, “Those, therefore, who claim their own rights, yet altogether forget or neglect to carry out their respective duties, are people who build with one hand and destroy with the other.”<sup>272</sup> Thus, to talk about a so-called unfettered right to abortion, or any right to abortion for that matter, ignores the duty that is owed

268. Statement on the Promotion and Protection of Human Rights, *supra* note 262.

269. See *supra* note 233 and accompanying text.

270. H.E. Archbishop Celestino Migliore, Permanent Observer of the Holy See, Statement before the Economic and Social Council, 47th Session of the Commission for Social Development, On Item 6(a), Priority Theme: Social Integration (Feb. 5, 2009), available at <http://www.holyseemission.org/5Feb2009.html>.

271. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 68 (2004).

272. *Id.* at 67 (quoting Encyclical Letter, Pope John XXIII, *Pacem in Terris* (Apr. 11, 1963), available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html)).

to the innocent child that was conceived, a child who should have been afforded a right to life.

#### IV. CONCLUSION

In conclusion, it should be stated emphatically that the current state of the law should not be read as elevating abortion to the level of an international human right. However, the reality that it could attain such status is not inconceivable with the large movement of those who urge that it should be recognized as a right. At most, the current state of law only speaks of a woman's ability to have an abortion under certain exceptional circumstances. These exceptional circumstances are when her life or health is in danger or the pregnancy is the result of rape or incest. While the rights of the unborn child are scant under international human rights law, it is perhaps necessary (and demanded by justice) that some explicit provision be accepted articulating the right to life of an unborn child—at the very least, where none of the exceptions just mentioned apply.

To date, the Holy See, as a Permanent Observer to the United Nations, has done a great amount of work in protecting the life of the unborn child. Because there remains ambiguity within all of this legal discussion, it is important that the Holy See remain a prominent figure in this heated and passionate dialogue. The Holy See must remain steadfast and continue fighting the battle it fights at the various levels of social interaction. Its voice, although one among many, is important to an authentic human rights dialogue and is an invaluable resource to the many unborn children who go without a voice.