

# International Law and the Right to Life

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ABSTRACT: The language of international norms dealing with human reproduction is often shaped at negotiations sponsored by the United Nations. This paper explores the connection between international law and national laws protecting unborn human life. It includes a first-hand account of an organized academic effort to supplant long-standing national abortion laws during the 1998 negotiation of the Rome Statute for the Creation of an International Criminal Court. The paper then surveys the current status of international reproductive rights law and explores the way in which various legal scholars, lawyers and UN agencies continue to press for an international abortion right. This unrelenting advocacy shows the need for active, coordinated and coherent pro-life academic involvement in the international policymaking arena. The Doha Declaration demonstrates that such efforts can successfully reinforce international norms protecting the inherent dignity of human beings throughout all

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stages of life.

The United Nations System has assumed a major new role: that of world policymaker.<sup>1</sup> Language formulated at UN-sponsored negotiations now shapes and solidifies international *and* national law. Perhaps no aspect of this development has been more hotly contested than international norms dealing with human reproduction. These newly emerging norms are generally phrased in emotionally appealing human rights rhetoric,<sup>2</sup> the clear meaning of which is obscured by elastic phrases, such as “access to reproductive health care services,”<sup>3</sup> and illusive legal constructs, such as “forced pregnancy.”<sup>4</sup> By means of prose at turns lofty

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<sup>1</sup> Nafis Sadik, “Reflections on the International Conference on Population and Development and the Efficacy of UN Conferences,” 6 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW & POLICY 249, 252-53 (1995), noting that the “UN Conference Cycle” has “fostered the mobilization and participation of civil society and the private sector in the affairs of the international community.... This process has nurtured the growth of democracy at the national level and democratized processes at the international level, increasing their transparency and accountability.”

<sup>2</sup> See, e.g., Rhonda Copelon, “Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom,” 18 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE 15, 49 (1991). See also Rhonda Copelon, “Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law,” 5 HASTINGS WOMEN’S LAW JOURNAL 243, 252-53 (1994).

<sup>3</sup> Sarah A. Ramage, “Resisting the West: The Clinton Administration’s Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response,” 27 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1 (1996), documenting U. S. advocacy of abortion as an “international human right” during the 1994 Cairo Conference. U.S. advocacy was couched in terms of “access” to health care services: “We’re not talking about a new right; we’re talking about, in our language, access. And it is access to the full range of reproductive health care services, that’s what we’re talking about,” quoting Timothy Wirth.

<sup>4</sup> Maria Sophia Aguirre and Ann Wolfgram, “United Nations Policy and the Family: Redefining the Ties that Bind: A study of History, Forces and Trends,”

and unintelligible, and often after somewhat incongruously disclaiming lawmaking intent,<sup>5</sup> international policymakers are redefining the legal, social, moral and ethical value of human life.

For the past nine years, and often accompanied (as here) by a talented research associate,<sup>6</sup> I have been an active academic participant in this international discourse, attending numerous international negotiations where normative language related to the value of unborn

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16 JOURNAL OF PUBLIC LAW 113, 170 (2002), discussing use of “forced pregnancy” to promote abortion rights.

<sup>5</sup> International conventions are often designed, not only to clarify the content of international law, but to alter national norms in identified substantive areas. Such conventions, like the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), not only establish international standards but seek national compliance to avoid abuses that might otherwise be condoned or perpetuated by national laws. See, e.g., CEDAW, UN Doc. A/34/46 (September 3, 1981), art. 2(a), obligating signatory nations to “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.” But even while setting forth norms designed to govern national law, international documents may simultaneously—and somewhat inconsistently—disclaim any intent to override national policies (perhaps to encourage joinder by non-compliant nations). CEDAW’s Preamble, for example, formally recites that “respect for national sovereignty” will “contribute to the attainment of full equality between men and women,” even while the body of the convention rather dramatically cabins national gender policies. UN Doc. A/34/46 (September 3, 1981), at Preamble, Par. 10. See also “Program of Action of the International Conference on Population and Development,” A/Conf.171/13 (October 18, 1994), at Chapter II, Principles, Par. 1, reciting that the “implementation of the recommendations contained” in the Program of Action is “the sovereign right of each country, consistent with national laws.” Similar language formally disclaiming international lawmaking intent and retaining national sovereign power was included in the outcome documents adopted at the Beijing Fourth World Conference on Women, “Beijing Declaration and Platform for Action,” A/CONF.177/20 (October 17, 1995), at Par. 131, noting that, at least in the context of armed conflict, the platform should be applied “in accordance with...respect for sovereignty.”

<sup>6</sup> See note \*, above.

human life has been formulated. The stakes are high. At issue is the ultimate scope of the “right to life” set out in Article 3 of the “Universal Declaration of Human Rights,”<sup>7</sup> a right that, according to the Preamble, is “inalienable” and extends to “all members of the human family.”<sup>8</sup>

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<sup>7</sup> Article 3, “Universal Declaration of Human Rights.”

<sup>8</sup> The first paragraph of the Preamble to the “Universal Declaration of Human Rights” states that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

This paper explores the connection between international law and national laws protecting unborn human life. The first section examines the growing importance of international norms. The second portion provides a brief, first-hand account of an organized academic effort to supplant long-standing national abortion laws during the 1998 negotiation of the Rome Statute for the Creation of an International Criminal Court. The paper then surveys the current status of international reproductive rights law. The fourth section explores how, despite the refusal of nations to create an express international abortion right, legal scholars, lawyers and UN agencies continue to press for such a right. This unrelenting advocacy provides the background for the fifth and final section: the need for active, coordinated and coherent pro-life academic involvement in the international policymaking arena. The Doha Declaration, noted by a consensus resolution of the UN General Assembly at the conclusion of its Special Session commemorating the tenth Anniversary of the International Year of the Family,<sup>9</sup> demonstrates that such efforts can successfully reinforce international norms protecting the “inherent dignity of human beings...throughout all stages of life.”<sup>10</sup>

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<sup>9</sup> U.N. Doc. A/RES/59/111 (December 6, 2004).

<sup>10</sup> “The Doha Declaration,” U.N. Doc. A/59/592 (December 3, 2004), *ibid.* at 4 par. 5. The “Call for Action” section exhorts nations to “[e]valuate and reassess government policies to ensure that the inherent dignity of human beings is recognized and protected throughout all stages of life.”

## I. INTERNATIONAL LAW AND NATIONAL POLICY

Lawmakers in present-day America (as in countries around the world) face an unexpected reality: international norms—not national laws— may determine the ultimate legality of their official actions. A complete analysis of how international law shapes the contours of domestic policies (including the meaning of the U.S. Constitution) would require numerous chapters in a fairly hefty book.<sup>11</sup> For present purposes, three

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<sup>11</sup> A book-length version of this study could profitably include an analysis of international law as it was understood at the time the U.S. Constitution was written, an analysis of the advantages and shortcomings of judicial review in the development of constitutional norms, a review of the various possible understandings of “international law” and how those understandings have changed during the Cold War and post-Cold War periods, a discussion of the means and processes by which actors in the UN System have gradually assumed policymaking authority, and a critique of the sociological and legal developments that have resulted in increasing international disdain for the sovereign authority historically exercised by independent nations.

An entire chapter (or even another book) could be devoted to tracing how early treaties establishing a European common market in the post-World War II era have resulted, step by step and treaty by treaty, in the founding of an integrated European mega-state—the European Union. No single treaty produced the EU. Rather, the EU is the result of the inexorable “mission creep” of international treaties and agreements.

The Charter of Fundamental Rights of the European Union, approved by the Parliament, Council and Commission of the European Union in 2000, is merely one example of this process. See “The Charter of Fundamental Rights of the European Union,” <http://www.europarl.eu.int/charter/default.eng.html>. The Preamble to the Charter asserts that its norms are derived: “from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights” (ibid). As one commentator has aptly noted, “If [this] does not qualify as a

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common law of Europe, what then would?" J. Wouters, "The EU Charter of Fundamental Rights: Some Reflections on its External Dimension," INSTITUTE FOR INTERNATIONAL LAW, Working Paper No. 3, May 2001 at 3. Europe's experience in the sixty years following World War II demonstrates that successive international agreements (like the documents cited in the Preamble of the EU "Charter of Human Rights") produce increased supra-national integration of functions previously controlled by national governments (such as the definition of human rights). The same international processes that produced the EU are now

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at work within the larger international community.

The 1948 "Universal Declaration of Human Rights," for example, provided the foundation for the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, which expanded on the language of the Universal Declaration. Paul Szasz, "General Law-Making Processes," in *United Nations Legal Order*, ed. Oscar Schacter and Christopher C. Joyner (Cambridge UK: Cambridge Univ. Press, 1995), p. 47 n18. These Covenants have been very influential. Other non-binding international instruments, such as model codes and guidelines, also have been precursors to later international treaties and laws enacted by nations (ibid.). As similar (and continually expanding) norm-setting processes continue, international inertia favoring some form of global federation may become inexorable. See, e.g., Harold Honjuh Koh, "Why Do Nations Obey International Law?" 106 *YALE LAW JOURNAL* 2599, 2646 (1997). But see "French Say 'No' to EU Treaty," May 30, 2005, <http://news.bbc.co.uk/2/hi/europe/4592243.htm> (last visited June 13, 2005); "Dutch Say 'No' to EU Constitution," June 2, 2005,

developments demonstrate the growing prominence of international law.

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<http://www.news.bbc.co.uk/1/hi/world/europe/4601439.htm> (last visited June 13, 2005), noting the recent rejection of the proposed “Constitution for the European Union” by France and the Netherlands because of concerns by voters in those nations regarding further concentration of power in a supra-national entity.

First, international treaties now deal—not only with the obligations of nations—but with the rights of individuals. Second, in addition to treaties, the UN system is generating a vast body of pliable norms—called “soft law”—that are quickly ripening into “hard law.”<sup>12</sup> Third, a growing number of national actors (including judges in the United

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<sup>12</sup> The definitions of “soft law” and “hard law” are almost self evident: “soft law” consists of norms that “might be enforceable,” but—then again—perhaps not; while “hard law” consists of norms that command a rather high level of compliance by national and international actors. See Jiri Toman, “Quasi-Legal Standards and Guidelines for Protecting Human Rights” in *Guide to International Human Rights Practice*, ed. Hurst Hannum (Philadelphia PA: Univ. of Pennsylvania Press, 1992), 2nd ed., p. 192, noting that “soft law” consists of norms not directly enforceable by formal or informal means.

But, while definitions may be more or less straightforward, the processes that produce “soft” and “hard” international law are rather difficult to describe. As one scholar put it: “International law is manifested in a large variety of different types of instruments, such as treaties, non-binding agreements, and declarations and decisions of international organs. All of these have the characteristics of “black letter” law in that the provisions can easily be read, although their binding force is widely differentiated and certainly cannot be defined by constructing hierarchies. There are also manifestations of the collective, coordinated, or merely parallel will of states that can be determined by studying their actions in the light of expressed or implied motives. Thus, in addition to the distinctions between black and increasingly gray letter law, there is the distinction between binding or “hard” law and various “softer” forms. The international legislative or norm-making process is similarly structured, and also confusing in that there is no simple legislature and no single source of administrative law. Instead, there are a multitude of norm-makers at every geographic level (i.e., global, regional, subregional, and so on), as well as inchoate processes that create and identify international customary and perhaps even general principles of law. Furthermore, the rather clear-cut relationship that exists at the domestic level between processes and products (e.g., a legislative body produces statutes) is by no means as simple internationally, where all sorts of processes can produce, as direct outputs or as indirect by-products, various types of hard and soft and written and unwritten law.” Paul Szasz, “General Law-Making Processes” in *United Nations Legal Order*, pp. 35-36.

States) are increasingly willing to consider (and sometimes enforce) international norms in ways that would have been hard to anticipate a mere twenty years ago.

Treaty law—beginning with the Treaty of Westphalia—began as the primary fount of international law.<sup>13</sup> For centuries, treaties dealt primarily with issues of war, peace, boundary disputes, navigation and

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<sup>13</sup> Treaty of Westphalia, Oct. 24, 1648, Holy Roman Emperor-King of France, The Avalon Project at Yale Law School, available at <http://www.yale.edu/lawweb/avalon/westphal.htm>.

commerce; questions that were fundamental to the relationship of one nation with another.<sup>14</sup> Indeed, the phrase “international law” reflects this reality: international law governed conduct between (“inter”) nations.<sup>15</sup>

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<sup>14</sup> Jeffrey L. Dunoff et al., *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (New York NY: Aspen, 2002), p. 4. The Aouzou Strip problem is provided as an example of an international legal disagreement in “its most traditional sense”; see *ibid.* at 4-9 for a general overview of the development of international law through the nineteenth century.

<sup>15</sup> BLACK'S LAW DICTIONARY 822 (7th ed. 2004). Wilhelm Grewe reminds his readers that Jeremy Bentham originally coined the phrase “international law.” 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 867-68, citing Wilhelm Grewe, *The Epochs of International Law*, trans. Michael Byers (GmbH & Co. 3d ed., 2000 [1984]).

The importance of treaties in establishing the form and content of international law continues unabated. However, modern treaties do more than settle wars, boundary questions, and resource disputes. They now govern such important issues as gender equality,<sup>16</sup> children's rights,<sup>17</sup>

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<sup>16</sup> "Convention on the Elimination of All Forms of Discrimination Against Women," G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/34/180, entered into force Sept. 3, 1981 (hereinafter CEDAW) at art. 11 cl. 2, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, mandating that states initiate a program for maternity leave with pay, or comparable benefits, so that women do not lose jobs, and give them special protections from harm when pregnant, *ibid.* at art. 12; in clause 1: mandating that states provide access to family planning services; in clause 2: states must provide free nutrition and appropriate services for pregnant women where necessary.

<sup>17</sup> "Convention on the Rights of the Child," G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., Annex, U.N. Doc. A/RES/44/25 (hereinafter CRC). See *ibid.* at art. 6, specifically stating that all children have the "inherent right to life" and that state must insure the survival and development of the child; see

and racial discrimination.<sup>18</sup> These issues, until quite recently, were the sole concern and prerogative of national governments.

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also *ibid.* at art. 7, mandating that the state register the child immediately after birth, and that the child shall be given the right to inherit, to acquire nationality, and to know and be cared for by its parents.

<sup>18</sup> "International Convention on the Elimination of All Forms of Racial Discrimination," opened for signature, Dec. 21, 1965, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (hereinafter ICERD).

In addition to promoting a burgeoning number of international treaties and conventions, the modern UN system churns out soft law norms at an ever increasing rate. Hundreds of UN negotiations each year examine questions related to virtually every conceivable social issue.<sup>19</sup> As a result of these negotiations—the most prominent of which are the periodic five-, ten-, and fifteen-year reviews of major UN conferences on the environment, population, women’s rights, and human settlements<sup>20</sup>—various reports, platforms, agendas and declarations are issued, updated, and expanded. Not long ago, these soft law documents were considered little more than helpful (or, perhaps, even irrelevant)

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<sup>19</sup> A search on the UN website <http://www.un.org/search/> reveals hundreds of meetings conducted by the various bodies of the UN System in 2004. For example, there were 39 interagency meetings <http://ceb.unsystem.org/calendar%20previous%20meetings.htm#January%202004>), 70 meetings by Human Rights committees (<http://www.ohchr.org/english/events/2004.htm>), and 59 meetings by the Division of Public Administration and Development Management (DPADM) (<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan011663.pdf>), just to name a few. These meetings dealt with such diverse topics as an Inter-Agency Network on Women and Gender Equality (IANWGE), migrant workers, communications, energy, and a meeting of experts on priorities in the Mediterranean Region.

<sup>20</sup> See, e.g., “United Nations Conference on Environment and Development, Agenda 21, Rio Declaration on Environment and Development,” U.N. GAOR, U.N. Docs. A/CONF.151/26, A/CONF/151/26, available at [http://www.sidsnet.org/docshare/other/Agenda21\\_UNCED.pdf](http://www.sidsnet.org/docshare/other/Agenda21_UNCED.pdf) (link from U.N. webpage <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>); International Conference on Population and Development (ICPD) Report of the ICPD, U.N. Doc. A/CONF.171/13, (18 Oct. 1994) available at <http://www.un.org/popin/icpd/conference/offeng>; “Women 2000: Gender Equality, Development and Peace for the Twenty-first Century” (BEIJING +5), U.N. GAOR, 23d Spec. Sess., U.N. Doc. A/S-23/10/Rev.1 [Agenda item 10] (2000) available at <http://www.un.org/womenwatch/daw/followup/ress233e.pdf>; Report of the United Nations Conference on Human Settlements (Habitat II), U.N. Doc. A/CONF.165/14 (1996).

suggestions.<sup>21</sup> Nowadays they are more than mere words.

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<sup>21</sup> Just a decade ago, scholars suggested that the norms adopted at international negotiations might have little meaning because they are often adopted merely to reach “consensus” or to “appease popular or ‘politically correct’ sentiment.” Neil H. Afran, “International Human Rights Law in the Twenty First Century: Effective Municipal Implementation or Paen to Platitudes,” 18 *FORDHAM INTERNATIONAL LAW JOURNAL* 1756, 1758 (1995). Even the hard law language of treaties was often disregarded in the recent past. One writer noted that, in a conversation with a Latin American lawyer-diplomat over a decade ago, he was told that treaties signed by the lawyer’s country were negotiated by the

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Ministry of Foreign Affairs and, when approved, were locked in a cabinet and almost never seen again. John H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis," 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 310, 322 n. 70 (1992).

In the new millennium, soft law norms generated at UN meetings can rather rapidly attain a status approximating hard law. As a result of constant negotiation, re-examination, and reformulation, various actors in the international legal system—including national governments, non-governmental organizations, and legal scholars—develop expectations that these norms will be respected.<sup>22</sup> If expectations related to enforcement are low, a norm is soft. But expectations grow and norms harden. Eventually, what began as soft law is transmuted into hard law. This occurs if and when soft law norms (crafted and elaborated in UN conference negotiations) come to be seen as evidence of customary international law.<sup>23</sup>

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<sup>22</sup> Harold Hongju Koh describes this process clearly: “[S]uch a process can be viewed as having three phases. One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party’s internal normative system. The aim is to ‘bind’ that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.” Harold Honjuh Koh, “Why Do Nations Obey International Law?” 106 *YALE LAW JOURNAL* 2599, 2646 (1997); see also Harold Honjuh Koh, 1998 Frankel Lecture, “Bringing International Law Home,” 35 *HOUSTON LAW REVIEW* 623: even resisting nations cannot insulate themselves from the influences of the transnational interactions on particular issues; Janet Koven Levit, “The Constitutionalization of Human Rights in Argentina: Problem or Promise?” 37 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* 281, 286-87 (1999); Joseph F. C. Dimento, “Process, Norms, Compliance and International Environmental Law,” 18 *JOURNAL OF ENVIRONMENTAL LAW & LITIGATION* 251 (2003), discussing how the international norm-setting process impacts national policies in various social and legal spheres.

<sup>23</sup> International soft law norms are the product of significant international debate and deliberation. Hurst Hannum, “Human Rights” in *United Nations Legal Order*, pp. 319, 336 n77; see also James C.N. Paul, “The

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United Nations and the Creation of an International Law of Development,” 36 HARVARD INTERNATIONAL LAW JOURNAL 307, 315 (1995): “Because world conferences provide potential opportunities for global popular participation, expert consultations, and, sometimes, vigorous debate, they can in theory, become unique vehicles to elaborate norms [cast in the form of legal instruments] governing development.” As such, conference declarations are imbued with a strong expectation that members of the international community will abide by them. See the authority cited in preceding note. As this expectation is justified by state practice, including activities within the UN organization, the principles of a UN document may—by custom—become binding upon a state. Hurst Hannum, cited above.

The on-going international discussion and re-deliberation of soft law norms may be expanding, rather rapidly, the official canon of binding customary law. See, e.g., Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford UK: Clarendon Press, 1989), p. 99: “Given the rapid continued development of international human rights, the list [of customary international law norms] as now constituted is essentially open-ended.... Many other rights will be added in the course of time.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 cmt. a (1987), noting that its “list [of customary international law norms] is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future”); Richard B. Lillich, “The Growing Importance of Customary International Human Rights Law,” 25 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1, at 7 n43 (1995/96), reporting that in a 1996 speech, Professor Louis Henkin, Chief Report of *Restatement (Third)*, indicated that “if he were drafting Section 702 today he would include as customary international law rights the right to property and freedom from gender discrimination, plus the right to personal autonomy and the right to live in a democratic society”); Beth Stephens, “Litigating Customary International Human Rights Norms,” 25 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 191, 198-99 (1995/96), describing customary international law as a “developing concept” and predicting as likely developments “environmental protections and the right to political access (i.e., to vote) and other attributes of democracy.” Commentators have argued, for example, that customary international law includes, or will soon include, rights such as freedom of thought, free choice of employment, the right to primary education, the right to form and join trade unions, and rights relating to sexual orientation. See Curtis A. Bradley & Jack L. Goldsmith, “Customary International Law as Federal

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Common Law: A Critique of the Modern Position," 110 HARVARD LAW REVIEW 815 (1997).

It once required centuries to form customary law because such law was developed through the uniform, consistent practice of nations over time.<sup>24</sup> 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. As a leading international scholar has asserted, negotiated language “repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain[s] the status of law.”<sup>25</sup>

The third factor driving the expansion of international law is the willingness of an increasing number of national actors to consult, consider, and sometimes follow that law. For several decades, various influential non-governmental organizations (including prominent environmental and human rights groups) argued that international norms should influence, if not govern, domestic legal policies.<sup>26</sup> Scholars made similar arguments,<sup>27</sup> as did litigants.<sup>28</sup> These submissions, once consid-

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<sup>24</sup> Richard B. Bilder, “An Overview of International Human Rights Law” in Hannum, cited above: customary international law is defined as a consistent practice in which states engage out of a sense of legal obligation.

<sup>25</sup> Higgins, “The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System,” quoted in Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting*, 2nd ed. (St. Paul MN: West Publ., 1993), p. 341. See also the authority cited in n25 above.

<sup>26</sup> “Beijing Betrayed,” ed. June Zeitlin, Women’s Environment and Development Organization 2005), 7, available at [http://www.wedo.org/files/gmr\\_pdfs/gmr2005.pdf](http://www.wedo.org/files/gmr_pdfs/gmr2005.pdf), “[These reports] show that women advocates everywhere have stepped up their activities since Beijing using the Platform for Action and other key global policy instruments to push governments into taking action.”

<sup>27</sup> Jiri Toman, “Quasi-Legal Standards and Guidelines for Protecting Human Rights” in Hannum, p. 192.

<sup>28</sup> See, e.g., *The Center for Reproductive Law and Policy v. Bush*, No. 01-4986, 2001 U.S. Dist. WL 868007 (S.D.N.Y. July 31, 2001), dismissed for failure to show standing, *aff’d*, 304 F.3d 183 (2d Cir. 2002): the policy did not violate the Center’s First Amendment rights to speech

ered controversial,<sup>29</sup> are now bearing fruit in surprising ways.

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and association, party lacked standing for Fourteenth Amendment claims, and that even though party had standing with equal protection theory, the policy did not violate equal protection rights.

<sup>29</sup> See, e.g., Marc-Olivier Herman, "Fighting Homelessness: Can International Human Rights Law Make a Difference?": 2 *GEORGETOWN JOURNAL FOR FIGHTING POVERTY* 59, 71 n157 (1994), discussing reluctance of U.S. courts to either invoke or rely upon international norms in deciding domestic disputes.

Take the U.S. Supreme Court, for example. Until recently, it was rather unlikely that any state or federal court would enforce the terms of a treaty that had not been ratified by the U.S. Senate. This is no longer true. On March 1, 2005, in *Roper v. Simmons*, Justice Kennedy cited the UN Convention on the Rights of the Child—a treaty *never* ratified by the Senate—to support the conclusion of five Justices that the execution of minors is unconstitutional.<sup>30</sup>

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<sup>30</sup> 125 S. Ct. 1183, 1198-1200 (2005).

As a personal matter, I oppose the execution of minors. As a constitutional scholar, however, I would have been hard pressed (prior to *Roper*) to assert that the execution of minors was *unconstitutional*.<sup>31</sup> Whatever the ultimate wisdom of executing minors, as of March 2005, there was no clear consensus that such punishment violated constitutional values that were deeply held and widely shared by the American people: indeed, slightly more than half of the states that permit capital punishment included minors within its reach.<sup>32</sup> The Supreme Court's decision, therefore, that there was a "constitutional consensus" invalidating the juvenile death penalty was unusual. The Supreme Court's citation of an unratified, non-binding treaty to *support* this conclusion

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<sup>31</sup> In *Marbury v. Madison*, Chief Justice John Marshall declared that "a written Constitution" was "the greatest improvement on political institutions" flowing from the American Revolution. *Marbury*, 1 Cranch (5 U.S. 137, 1803). But despite Justice Marshall's extensive reliance upon the concept of a "written Constitution," the proper judicial technique for determining the meaning of the Founders' words remains controversial. According to some, the judicial inquiry essentially involves "lay[ing] the article of the Constitution which is invoked beside the [government action] which is challenged...to decide whether the latter squares with the former." *United States v. Butler*, 297 U.S. 1, 62 (1936). This task, of course, is rarely as straightforward as the language of *Butler* suggests. Accordingly, constitutional interpretation has often led judges to look beyond plain constitutional text to the history and traditions of the American people. See, e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937): a provision of the Bill of Rights that embodies "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" is applicable to state governments, notwithstanding express constitutional language limiting such a provision to actions of the federal government, quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934). Whether the meaning of the Eighth Amendment is determined by reference to its words or the "traditions and conscience" of the American people, it is hardly clear that the execution of minors was unconstitutional prior to March 2005.

<sup>32</sup> *Roper*, 125 S. Ct. at 1206 (O'Connor, J., dissenting), stating that the evidence fails to show conclusively that a national consensus has emerged to condemn execution of minors; see also *ibid.* at 1218 (Scalia, J., dissenting), noting that "18 States—or 47% of States that permit capital punishment" prohibit the execution of minors, but asserting that "[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."

was *astonishing*. *Roper* demonstrates beyond doubt that the meaning of the U.S. Constitution can be altered by international norms *rejected* by political processes at the state level (the majority of death penalty states applied it to minors) and at the federal level (the U.S. Senate had not ratified the international treaty the Supreme Court cited to prohibit the execution of minors).

“Soft” international law has also been found determinative in discerning the content of the 14th Amendment. In *Lawrence v. Texas*,<sup>33</sup> a majority of the Supreme Court reversed its determination—announced a mere sixteen years earlier—that the U.S. Constitution did not afford special protection for consensual acts of homosexual sodomy.<sup>34</sup> The Court could not convincingly argue that either the words of the Constitution or the history and traditions of the American people had changed dramatically in those sixteen years.<sup>35</sup> Instead, the Justices simply suggested that—sixteen years ago—the Court got it wrong.<sup>36</sup> As evidence that the current Majority now “had it right,” the Justices cited

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<sup>33</sup> 539 U.S. 558 (2003).

<sup>34</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>35</sup> See discussion at n31 above.

<sup>36</sup> *Lawrence*, 539 U.S. at 567, stating that the *Bowers* court “misapprehended the claim of liberty there presented to it” for not recognizing the privacy interests at stake; *ibid.* at 568, rejecting the claim of the *Bowers* court that such conduct had been illegal for a “very long time.”

decisions from international tribunals and a brief filed by the former UN High Commissioner of Human Rights.<sup>37</sup> Prior to their citation by the nation's highest court, these materials would have been considered by most constitutional scholars as among the "softest" of all possible soft law relevant to the meaning of the Due Process Clause. But no more. Soft international law has rather suddenly attained respectable constitutional stature.

Because of the foregoing factors—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—individuals and groups interested in protecting the intrinsic value of human life must pay attention, not only to national laws, but to international treaties, UN conference declarations, and the opinions of jurists from legal systems that have no experience with (or even an understanding of) their own legal systems. Indeed, developing and poorer nations must pay *particular* care to international legal rules: if the United States—purportedly the most powerful nation on earth—can be influenced by international norms, the impact of these rules on less-developed nations could be profound indeed.

## II. INTERNATIONAL ACADEMIC EFFORTS TO REDEFINE THE VALUE OF UNBORN HUMAN LIFE

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<sup>37</sup> *Ibid.* at 573, citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981); see also *ibid.* at 576-77, citing brief of Mary Robinson, U.N. High Commissioner of Human Rights 1997-2002.

Given the unequivocal assertion of the “Universal Declaration of Human Rights” that “[e]veryone” is entitled to “life, liberty and security of the person,”<sup>38</sup> international hostility to the intrinsic and absolute value of human life is somewhat surprising. That is, of course, until one examines the views of the legal academy. Law professors from America and around the world, from 1973 onward, have heaped disproportionate and continuing praise upon the Supreme Court’s decision in *Roe v. Wade*.<sup>39</sup> The very fact that the great majority of legal scholars have embraced a utilitarian analysis of the case that values privacy (or individual autonomy) more highly than unborn life because of a presumptive inability to establish either “when life begins” or the value of unborn human life, explains in large measure the surprising ambivalence of international law on questions related to human life.<sup>40</sup>

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<sup>38</sup> “Universal Declaration of Human Rights,” Art. 3.

<sup>39</sup> 410 U.S. 113 (1973); see also, “Question-and-Answer Session: Twenty-five Years of *Roe v. Wade* Symposium,” 62 ALBANY LAW REVIEW 1203, 1203-04 (1999), question directed to Professor Lynn Wardle, the single pro-life member on a five-member panel, concerning the lack of free exchange of ideas on abortion; Professor Wardle stated that “[y]ou’ve got a list of probably 30 or 40 [pro-life professors] on one hand and you could probably come up with 3,000 or 4,000 on the other side”; see also Richard Wilkins, Richard Sherlock, & Steven Clark, “Mediating the Polar Extremes: A Guide to Post-*Webster* Abortion Policy,” 1991 BYU LAW REVIEW 403 (1991).

<sup>40</sup> *Roe*, 410 U.S. at 153-54, asserting, among other things, that it is impossible to “arrive at any consensus” regarding “the difficult question of when life begins;” accordingly, the Court concluded that a woman’s interest in terminating a pregnancy outweighs the state’s interest in protection of unborn life because “[m]aternity, or additional offspring, may force upon the woman a distressful life and future.” Despite the Court’s facile assertion, the question when “life begins” is not terribly complex: the life of any discrete human *must* begin at conception because there is no other point at which such a life *can* “begin.” See, e.g., Richard G. Wilkins et al., “Mediating the Polar Extremes: A Guide to Post-*Webster* Abortion Policy,” 1991 BYU LAW REVIEW 403, 454, noting that human life “is a continuum that begins at conception,” citations omitted; see also Lynn Wardle, “The Quandary of Pro-Life Speech: A Lesson from the Abolitionists,” 62 ALBANY LAW REVIEW 853, 865 (1999), citing Codell Carter, “Semmelweis and His Predecessors,” 25 MEDICAL HISTORY

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JOURNAL 57 (1981) to show that people had considered life to begin at conception for many years prior to the *Roe* decision. The *real* issue in *Roe* was not when “life begins,” but rather the constitutional *value* that the Court would assign to human life beginning at conception and at all stages thereafter. This may well involve difficult, values-based judgments, but such judgments are unavoidable in the abortion context, even though *Roe* disingenuously asserted the Court was “not in a position to speculate” regarding such questions. *Roe*, 410 U.S. at 159. Contrary to the reasoning of *Roe*, values-based judgments do not require any particular level of “proof” or “validation” in order to survive constitutional scrutiny. Values-based judgments, especially those favored by the Court, often rest upon little more than a less-than-perfect social presumption. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1195-98 (2005), invalidating the execution of minors, in part, because of the presumptive inability of minors to calculate or understand the consequences of planned criminal activities; the Court rejects a fact-sensitive inquiry into the cognitive skills of minors on a case-by-case-by-case basis. Compare *Roper*, 125 S.Ct. at 1212-14 (O’Connor, J., dissenting), discussing the conscious, knowing culpability of the minor involved in the case before the Court.

Academic opinion is highly prized in the formulation of international law. Section 102(1) of the 1987 revision of the American Law Institute's Restatement of Foreign Relations Law explains that there are three major sources of international law: (1) "customary law," (2) law established by treaties or "international agreement," and (3) law derived "from general principles common to the major legal systems of the world."<sup>41</sup> The views of scholars and academicians are exceptionally influential in determining the form and content of law in category (3). As stated in Article 38 of the Statute of the International Court of Justice, "judicial decisions" and "the teachings of the most highly qualified publicists [e.g., scholars] of the various nations" provide credible evidence regarding which "general principles" qualify as international law.<sup>42</sup> Accordingly, the same academicians that praise *Roe* also hold a privileged status in international law: that of "quasi-lawmakers." Over the past three decades, many international scholars have taken advantage of this special status to engage in organized (and effective) advocacy promoting world-wide revision of domestic abortion laws.

This ongoing process is complex and has been documented elsewhere.<sup>43</sup> The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, Italy, during the summer of 1998, provides but one example of such efforts. An understanding of the events at this discrete event may be helpful to many academicians (pro-life or otherwise) who seek to understand the pragmatic contours of the intense and often emotional struggle within the legal academy as to whether unborn children are entitled to continuing status as members of the international "human family."<sup>44</sup>

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<sup>41</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) (1987).

<sup>42</sup> STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, 59 Stat. 1055, T.S. No. 993, art. 38 available at <http://www.icj-cij.org/icjwww/basicdocuments/Basetext/istatute.htm>.

<sup>43</sup> See, e.g., Maria Sophia Aguirre & Ann Wolfram, "United Nations Policy and the Family: Redefining the Ties that Bind: A Study of History, Forces and Trends," 16 BYU JOURNAL OF PUBLIC LAW 113, 170 (2002).

<sup>44</sup> Preamble, "Universal Declaration of Human Rights," par. 1. Interestingly enough, the Convention on the Rights of the Child *does not* exclude unborn

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children from the human family. Paragraph 9 of the Preamble to the CRC notes that 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.” Convention on the Rights of the Child, General Assembly Resolution 44/25 (November 20, 1989), Preamble at par. 9, quoting a November 20, 1959, Declaration of the Rights of the Child adopted by the General Assembly. Interestingly, the editors of at least one modern international case book apparently find this provision of the CRC rather too discomfiting. A collection of international documents, distributed as a supplement to the casebook, omits this paragraph from the Preamble of the CRC with an unexplained ellipsis. Barry E. Carter, Phillip R. Trimble & Curtis A. Bradley, *International Law: Selected Documents* (New York NY: Aspen, 2003), p. 485.

The Rome Conference culminated a decades-long effort by the United Nations and the international community to establish a permanent judicial body to prosecute grave international crimes.<sup>45</sup> I first became aware of the potential scope of the proposed International Criminal Court (“ICC”) after reviewing a provisional draft copy of the ICC statute during the summer of 1997. Review of that document suggested that the ICC, as initially conceived, had the potential (among other things)<sup>46</sup> to establish a world-wide right to abortion on demand. It did so by creating a previously unknown crime: “forced” or “enforced pregnancy.” Concerns regarding this newly minted international “crime”

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<sup>45</sup> In 1951, following the conclusion of the Nuremberg and Tokyo War Crime Tribunals, a proposal was circulated among members of the newly formed United Nations to create a permanent standing court. Benjamin B. Ferencz, “International Criminal Courts: The Legacy of Nuremberg,” 10 *PACE INTERNATIONAL LAW REVIEW* 203 (1998). The proposed court would be responsible for prosecuting grave crimes of international concern committed in armed conflict. Nations initially balked at the idea of a permanent court because of the potential ramifications for individual state sovereignty (*ibid.* at 218). The idea, however, continued to resurface whenever the world was confronted with serious war-time crimes. Public pressure increased in the early 1990’s as the world reacted to reported atrocities in Rwanda and the former Yugoslavia. Informal meetings on the issue, commenced early in 1990, ultimately resulted in a draft statute for the ICC. As that draft statute emerged, however, the mandate for the proposed ICC slowly but steadily expanded. Instead of dealing solely with serious and well-established war crimes, the draft text became a veritable handbook on emerging “human rights” law, weighted with countless provisions never before envisioned.

<sup>46</sup> In addition to abortion, there were other areas of concern. The “war crimes” and “crimes against humanity” proscribed by the draft statute were exceptionally vague. The ICC’s proposed administrative structure (which required judges to possess “gender expertise” and conferred almost limitless power on the prosecutor) could result in unfair and ideologically driven prosecutions. In addition, the draft ICC statute listed “deprivation of liberty” (a legal concept capable of almost limitless expansion) as a “crime against humanity.” These provisions (and others) could have ceded vast policymaking powers to the ICC. See generally Richard G. Wilkins, “The Right Thing the Wrong Way,” *WORLD AND I*, Oct. 1, 2002, at 265.

prompted me to work throughout the 1997-1998 academic year to prepare for the negotiation. I also cleared my calendar for June and July 1998 to permit full participation at the conference.

Together with two second-year law students,<sup>47</sup> I arrived in Rome as an accredited NGO-representative of the David M. Kennedy Center for International Studies at Brigham Young University. Because of my prior preparation, I had anticipated encountering numerous law professors, as well as other academicians from study centers around the world. I had not expected, however, to find that I represented the lone academic center that actively questioned the propriety of establishing “forced” or “enforced pregnancy” as a crime against humanity.

I do not wish to over-emphasize or misrepresent the import of the foregoing. There were numerous able lawyers and members of civil society who worked zealously in Rome to protect the intrinsic and absolute value of human life.<sup>48</sup> These pro-life delegates were able and committed. But, in comparison with the scores of law professors and other academicians (including sociologists and specialists in gender studies) who urged the devaluation of unborn human life, the institution-

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<sup>47</sup> William O. Perry, Jr., and Marcus Mumford. Mr. Mumford subsequently published an article analyzing the Rome Statute. Marcus R. Mumford, “The International Criminal Court: Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference,” 8 MSU-DCL JOURNAL OF INTERNATIONAL LAW 151 (1999).

<sup>48</sup> Among these was Jane Adolphe, an exceptionally bright Canadian lawyer who now serves on the faculty of Ave Maria Law School. Other lawyers (and ordinary citizens) from throughout the world joined Professor Adolphe in Rome.

ally supported pro-life academic effort in Rome seemed insignificant indeed.

On the first day of the conference, I learned that the Caucus for Gender Justice—headquartered at the law school at the City University of New York—had been instrumental in framing the debate of “enforced” or “forced” pregnancy. Various versions of the draft ICC statute listed the concept as a “war crime” or as a “crime against humanity.”<sup>49</sup>

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<sup>49</sup> “Enforced pregnancy” initially appeared as a “war crime.” “Report of the Preparatory Committee on the Establishment of an International Criminal Court,” U.N. ICC, Rome, 1998, Art. 5, War Crimes, ¶ (p bis), at 20, U.N. Doc. A/Conf.183/2/Add.1. During the negotiation process, however, abortion proponents succeeded in including “enforced pregnancy” as a “crime against humanity” as well. U.N. ICC, Rome, 1998, Art. 7 [5 ter], Crimes Against Humanity, ¶ 1(g), U.N. Doc. A/Conf.183/C.1/L.76/Add.2. The terms “enforced” and “forced” pregnancy were used interchangeably during the ICC negotiation process. The original draft ICC statute proscribed “enforced pregnancy.” “Report of the Preparatory Committee on the Establishment of an International Criminal Court,” U.N. ICC, Rome, 1998, Art. 5, War Crimes, ¶ (p bis), at 20, U.N. Doc. A/Conf.183/2/Add.1. As adopted, however, the statute reaches “forced pregnancy.” “Rome Statute of the International Criminal Court,” U.N. ICC, Rome, 1998, Art. 7 ¶ 1(g), at 5, U.N. Doc. A/Conf.183/9. There

Professor Rhonda Copelon, Director of the Legal Secretariat for the International Women's Caucus and a Professor of Law at CUNY law school, was in charge of marshaling the impressive academic support for the "enforced pregnancy" debate in Rome. She was assisted by ranks of law students and law faculty drawn from throughout North America, Scandinavia, and Europe.

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appears to be little real linguistic (or legal) difference in the two terms. Compare dictionary definition of "enforce" as "to put into execution, to cause to take effect; to make effective," *Black's Law Dictionary* 528 (6th ed. 1990), with the dictionary definition of "force" as "power, violence, compulsion, or constraint exerted upon or against a person or thing," *ibid.* at 644.

The purpose of the proposed “crimes” of “forced” or “enforced” pregnancy was clear: Dawn Johnsen<sup>50</sup> and Marcy Wilder had written in 1989 that “forced pregnancy and childbirth...constitute an intolerable bodily intrusion when imposed by the state on unwilling pregnant women.”<sup>51</sup> As discussed by Johnsen and Wilder, however, the phrase “unwilling pregnant women” was *not* limited to women who were forced by the state to *become* pregnant; rather the phrase included women who were prevented from terminating unplanned and/or unwanted pregnancies.<sup>52</sup> Other legal scholars, prior to the 1998 conference, also equated “unwanted children” with “forced” or “enforced” pregnancy.<sup>53</sup>

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<sup>50</sup> Legal Director of the National Abortion Rights Action League in Washington, D.C.

<sup>51</sup> Dawn Johnsen & Marcy J. Wilder, “*Webster* and Women’s Equality,” 15 AMERICAN JOURNAL OF LAW AND MEDICINE 178, 180 (1989).

<sup>52</sup> *Ibid.*: “Few events, however, can more dramatically constrain a woman’s opportunities in life than an unplanned child.” See also *ibid.* at 181, advocating the “fundamental right to choose abortion” can never be overridden by any state interest to preserve life at any time during pregnancy. There are, of course, significant differences between “unplanned” and/or “unwanted” pregnancies and pregnancies conceived through the use of force (i.e., rape or comparable sexual violence) and continued for the purpose of “ethnic cleansing” or changing the ethnic composition of a society. See, e.g., n55 below, discussing how the final definition of “forced pregnancy” adopted in Rome limits the crime to these egregious circumstances.

<sup>53</sup> Seth F. Kreimer, “Does Pro-Choice Mean Pro-Kevorkian? An Essay on *Roe*, *Casey*, and the Right to Die,” 44 AMERICAN UNIVERSITY LAW REVIEW 803, 849 (1995). Kreimer states: “Requiring women to bear unwanted children threatens to lock them into a traditional and subordinate role, embodies assumptions about their inability to make autonomous moral choices, and burdens women as a group with obligations that have no counterpart in the burdens that the State demands from men” (*ibid.*), textual discussion of “unwanted children” correlates with a footnote referring to “forced pregnancy.” Students obviously picked up on this intended meaning of “forced pregnancy” as well. See Andrea M. Sharrin, “Note: Potential Fathers and Abortion: A Woman’s Womb Is Not a Man’s Castle,” 55 BROOKLYN LAW REVIEW 1359, n199, characterizing another professor’s language concerning the burdens imposed by laws restricting access to abortion as “forced pregnancy,” citing Donald H. Regan, “Rewriting *Roe v. Wade*,” 77 MICHIGAN LAW REVIEW 1569, 69-70 (1979). Furthermore,

“Forced” or “enforced pregnancy,” in short, was designed to create a world-wide right to abortion on demand. Western nations, backed by ranks of law professors and other academicians, as well as hundreds of NGOs, pushed for the inclusion of this new “crime” in the ICC Statute. They adamantly resisted any effort either to define or limit this previously unknown offense.

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commentaries on the same Regan article show that litigators had also picked up a pro-abortion definition of “forced pregnancy” and claimed specifically that forced pregnancy was a violation of the thirteenth amendment’s prohibition of involuntary servitude. Lynne N. Henderson, “Legality and Empathy,” 85 MICHIGAN LAW REVIEW 1574, n349 (1987), using “unwanted pregnancies” as basis for a footnote discussing “forced pregnancy” and involuntary servitude.

My students and I, together with other pro-life advocates in Rome, prepared materials collecting academic writings related to “forced” or “enforced” pregnancy. These materials explained the nature of the “crime” as follows: if a pregnancy (*any* pregnancy) could *not* be legally terminated, the pregnancy was “forced” or “enforced” and, therefore, criminal.<sup>54</sup> Our materials explained that, while rape and other sexual

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<sup>54</sup> See, e.g., Rhonda Copelon, “Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law,” 5 HASTINGS WOMEN’S LAW JOURNAL 243, 252-253 (1994). More than calling it criminal, Rhonda Copelon also gives the example of denying an abortion on “the basis of the independence and sanctity of fetal life” to help explain the complexity of “strategic issues involved in

misconduct *was* properly subject to criminal penalty, pregnancy itself—absent extraordinary circumstances—should not be criminalized.<sup>55</sup> Far from constituting a “crime against humanity,” pregnancy is a necessary precondition to the *continuation* of humanity. These materials persuaded many delegations.

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reconceptualizing *intimate violence as torture* in different cultural and political contexts.” See Rhonda Copelon, “Recognizing the Egregious in the Everyday: Domestic Violence as Torture,” 25 COLUMBIA HUMAN RIGHTS LAW REVIEW 291, 299-300, n26 (1994), *emphasis added*.

<sup>55</sup> See n49 above, discussing the debate surrounding the precise words to be used; see also nn59-61 below, discussing that pregnancies conceived by force and continued for the purpose of ethnic cleansing properly constitute criminal conduct.

The debate on enforced pregnancy continued off and on for nearly the entire duration of the Rome Conference. When the proponents of “enforced pregnancy” realized the considerable opposition to the inclusion of an undefined crime of enforced pregnancy in the Rome Statute, they resorted to questionable tactics in order to further the abortion agenda. For example, when debate in the Committee of the Whole on July 3, 1998 indicated that a great many nations supported deletion of “enforced pregnancy,” the Canadian Chairman of the Committee of the Whole (a staunch proponent of the new crime) suspended discussion. Thereafter, with the support of the European Union, the Canadian Chair convened a secret meeting on Sunday, July 5, at which a hand-picked group of supportive nations met to hammer out a so-called “consensus” on “enforced pregnancy.” This Canadian/European “consensus” prohibited “forced” (rather than “enforced”) pregnancy, denominating the offense not only as a “war crime,” but (for the first time) as a “crime against humanity.”<sup>56</sup> The meeting, subsequently described by the NGO press as “special” rather than “secret,”<sup>57</sup> had its intended effect: “enforced pregnancy,” which had appeared dead at the conclusion of debate on Friday, July 3, reappeared as a live issue on Monday, July 6. The Chairman’s “revival” of “forced pregnancy,” however, nearly backfired. When it became apparent to non-invited national delegations on Tuesday, July 7, that a purported “consensus” agreement had been reached at a secret meeting, many delegations responded angrily. The anger, directed against abortion proponents and those who organized the Sunday meeting, threatened to derail the entire conference. By Friday, July 10, some NGOs were so fearful that the “enforced pregnancy/abortion” debate would scuttle the conference that

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<sup>56</sup> U.N. ICC, Rome, 1998, Art. 7 [5 ter], Crimes Against Humanity, ¶ 1(g), U.N. Doc. A/Conf.183/C.1/L.76/Add.2.

<sup>57</sup> *Terra Viva*, a newspaper published by NGOs highly supportive of the ICC process, reported on July 7 that Canada had taken “the lead in organising [a] special closed-door meeting on Sunday,” an effort that included the distribution of a “discussion paper” designed to “develop an intricate network of compromises.” “Canadians Float Compromise,” *Terra Viva*, July 7, 1998, at 1 (emphasis added).

Rhonda Copelon took the unusual step of denying—in print—that “forced pregnancy” had *anything* to do with abortion.<sup>58</sup> Professor Copelon did

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<sup>58</sup> *Terra Viva* accurately reported on July 10 that it was “forced pregnancy that is being left for further discussion,” and added that “some delegations... would have preferred the issue left out entirely” (“On Women and Gender,” *Terra Viva*, July 10, 1998, at 7). Professor Copelon, however, asserted that “the resistance to include forced pregnancy as a crime in the Statute” was the result of “linking” enforced pregnancy, “artificially in her view, to the possibility of obtaining abortions” (*ibid.*).

not cite or mention her own previously published articles where she made the link between “forced pregnancy” and abortion absolutely clear.<sup>59</sup>

But, despite heavy opposition to the Canadian/European July 5 secret “consensus,” the tactic ultimately ensured that some version of “enforced pregnancy” would be included in the ICC statute. By Monday morning, July 13, with the conference scheduled to end on Friday afternoon, most delegations were under extreme pressure to conclude the negotiations. With Canada and Western Europe strongly supportive of abortion rights, delegations opposing abortion determined that the best they could do was to define “forced” pregnancy in a manner that did not result in abortion on demand.

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<sup>59</sup> Professor Copelon had written in 1991 that “forced pregnancy is involuntary servitude and...abortion is essential to women for personhood.” Rhonda Copelon, “Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom,” 18 NYU REVIEW OF LAW & SOCIAL CHANGE 15, 49 (1991). See also Rhonda Copelon, “Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law,” 5 HASTINGS WOMEN’S LAW JOURNAL 243, 252-253 (1994).

Accordingly, beginning on Monday, July 13, a series of extraordinary negotiating sessions were conducted between various interest blocs. The Islamic bloc, led by Saudi Arabia, Qatar and the United Arab Emirates, together with the pro-family coalition, hammered out a restrictive definition of “forced pregnancy.” That definition provided that “forced pregnancy” consisted of “the unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”<sup>60</sup> The definition also provided, in an excess of caution, that “this definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”<sup>61</sup>

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<sup>60</sup> “Rome Statute of the International Criminal Court,” U.N. ICC, Rome, 1998, Art. 7 ¶ 2(f), at 6.

<sup>61</sup> *Ibid.*

Thus, as negotiations concluded, the ICC condemned a carefully defined set of egregious circumstances as “forced pregnancy.” But this new crime, which required forcible impregnation of a woman, her physical detention throughout the period of the pregnancy, and evil intent to alter the ethnic composition of a targeted population during armed conflict, did not come anywhere near establishing a world-wide right to abortion on demand.<sup>62</sup> Abortion proponents were surprised by the loss. A spokesperson for the women’s caucus in Rome, shortly after the conclusion of the conference, called the final definition of “forced pregnancy” a “retrogression” in the development of women’s rights.<sup>63</sup>

The “forced pregnancy” debate may be instructive on several points. First, and most obviously, academic support for abortion rights is strong, organized, and active. Law professors who support abortion rights—backed and supported by significant numbers of energetic and engaged students—came to Rome to ensure that their academic voices were heard. These members of the legal academy did not simply assume that the reasoning and persuasive power of their published scholarship regarding “enforced” and “forced pregnancy” would result in the creation of a new international crime. They came to Rome to advocate actively for the results their published work promoted.

Second, a modest—but engaged—pro-life academic effort had a

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<sup>62</sup> See, e.g., Darryl Robinson, “Developments in International Criminal Law: Defining ‘Crimes against Humanity’ at the Rome Conference,” 93 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 43, n63 (Jan. 1999). Mr. Robinson, Legal Officer of the United Nations, wrote at length to clarify the “considerable misunderstanding” (promoted chiefly by the primary architects of the crime, such as Professor Copelon) that “forced pregnancy” creates “a universal right to abortion.” Mr. Robinson refutes these claims, noting that “forced pregnancy” has “three elements”: (1) unlawful confinement, (2) of a woman forcibly made pregnant, and (3) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. He notes that Subparagraph 2(f) further specifies that this provision “shall not in any way be interpreted as affecting national laws relating to pregnancy” (*ibid.*).

<sup>63</sup> “Women Withhold Final Verdict,” *Terra Viva*, <http://www.ips.org/icc/tv180705.htm> (last visited June 13, 2005), reporting on final outcome of the Rome conference, quoting Alda Facio, director of the Women’s Caucus.

substantial impact. There were exceptionally few pro-life law professors and law students engaged full-time at the conference in Rome; perhaps only three (myself and my two students). Fortunately, the dearth of experienced pro-life legal faculty and law students was compensated for by the presence of able international lawyers, many of whom knew more than others who held the title (so musical and impressive in Italian) of “Professore.” Furthermore, national delegations in Rome (aware of the important role of academic opinion in the creation of international norms) sought out and listened to pro-life academic views. As a result, while “forced pregnancy” was ultimately included in the ICC statute, the proscribed conduct was carefully limited.<sup>64</sup>

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<sup>64</sup> The crime did not (as its supporters had hoped) establish either an international right to abortion or support the broad assertion that “abortion is essential to women for personhood.” Rhonda Copelon, “Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom,” 18 *NYU REVIEW OF LAW & SOCIAL CHANGE* 15, 49 (1991).

Third, and finally, the “forced pregnancy” debate is paradigmatic of the still on-going international legal struggle regarding human reproduction. Abortion proponents came to Rome with high hopes, supported by extensive published scholarship that proclaimed that “enforced” or “forced pregnancy” was a crime that deserved international disapproval.<sup>65</sup> During the actual course of negotiations, however, those hopes (if not dashed) were significantly deflated. The tactics of the abortion proponents, furthermore, were highly questionable, involving (at various times) parliamentary evasion and procedural irregularities,<sup>66</sup> as well as outright disavowal of previously stated and published positions.<sup>67</sup>

Nevertheless, despite disappointments, questionable tactics and the need to resort to double-speak, abortion-rights proponents continue to move ahead. Relentlessly. Their academic personnel, resources and enthusiasm never seem to diminish. All are deployed in the consistent advocacy of an international right to abortion.

### III. THE MAKING OF AN INTERNATIONAL RIGHT

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<sup>65</sup> See, e.g., nn 3, 53, above.

<sup>66</sup> See, e.g., text accompanying nn 55-58, above.

<sup>67</sup> See, e.g., text accompanying n 58, above.

Events similar to those in Rome have been repeated in conference after conference. Rather than “forced pregnancy,” the reproductive debate has been couched in terms of “environmental preservation,” “empowerment of women,” “access to health care,” “elimination of violence against women,” and “promotion of human dignity.” Whether the ostensible topic for international negotiation has been environmental protection,<sup>68</sup> human settlements,<sup>69</sup> or the education of children,<sup>70</sup> government

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<sup>68</sup> “Rio Declaration on Environment and Development,” U.N. GAOR, Annex I, U.N. Doc. A/CONF.151/26 (Vol. I) (1992), according to principle 8, states should “reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies”; see also *ibid.*, principle 20 points out women’s “vital role in environmental management and development.”

<sup>69</sup> See Richard Wilkins, “The Fight for Families at the United Nations,” available at <http://www.family.org.au/journal/1999/j19991020.html>, given at World Congress of Families II, Australian Regional Conference, Aug. 7, 1999.

<sup>70</sup> At the World Summit for Children, a publication was passed out that promoted “sexual activity and abortion among teens in their countries.” George Archibald, “Child Sex Book Given Out at U.N. Summit; Cites Animals, Gays as Partners,” *THE WASHINGTON TIMES*, May 10, 2002, at A1. Excerpts from the book, which had been given to delegates from Latin America, were passed out by pro-life groups, along with an accompanying workshop book, to “persuade delegates from the large Latin American bloc of countries...to support the U.S. proposal to remove ambiguous language from the child-summit action document, which [had] been used in the past by U.N. agencies to promote abortion” (*ibid.*). The book was a product of the Mexican government and was created in part with UNICEF funding (*ibid.*). The book defined “reproductive health” to include “counseling on sexuality, pregnancy, methods of contraception, abortion, infertility, infections and diseases” (*ibid.*). But see Carol Bellamy, “UNICEF Removed Child Sex Book from Use,” *THE WASHINGTON TIMES*, May 18, 2002, at A12: letter from executive director of UNICEF to the Washington Times disassociates UNICEF from the book’s teachings, but openly admits that it was “published in part with UNICEF-provided funds.” The World Youth Alliance also noted the advocacy for such rights by groups present at the Summit. See World Youth Alliance, “Final Report on the World Summit for Children” at <http://www.worldyouthalliance.org/news/0205.shtml> (last visited Jun. 9, 2005), describing the disappointment of NGOs promoting the sexual and reproductive rights of children.

representatives have been pressured into manufacturing rhetoric that constructs and promotes a concept cherished by a significant majority of the legal academy: reproductive liberty.<sup>71</sup> In the legal dictionaries and indices now being compiled by international scholars on both sides of the abortion debate, such diverse concepts as environmental protection, gender equality, health care, and human dignity have begun to share one common element: unrestricted access to abortion services.<sup>72</sup>

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<sup>71</sup> Although children were not the assigned topic of the meeting, the movement for children's reproductive and sexual rights was spotlighted at the Cairo +5 meetings, sponsored by the United Nations Population Fund (UNFPA). The World Youth Alliance reported on that conference as follows: "In March through June of 1999 the United Nations Fund for Population Activities (UNFPA) hosted the five-year follow-up meetings to the 1994 Cairo conference on Population and Development. During these meetings, held at UN headquarters in New York City, the UNFPA introduced a youth caucus, a small, well-funded group of thirty-two young people who were drawn from many different organizations throughout the world, and used by the UNFPA and the Western Countries as an excuse to push an extremely radical agenda of personal autonomy and sexual freedom at the Cairo+5 conference. This small group claimed to speak on behalf of all three billion of the world's youth. Their demands included sexual and reproductive health rights and services for all young people, currently defined as those ten years old and up, which included access to contraceptives, abortion, and emergency contraception without parental knowledge or consent. They demanded mandatory comprehensive sexual education courses at all levels in the schools, which would cover, as appropriate, sexual pleasure, confidence, and freedom of sexual expression and orientation. Moreover, they declared that youth must receive information that would allow them to make their sexual decisions in a guilt-free way. In order to reach this goal, mandatory education of religious leaders was necessary to enlighten, educate, and sensitise them to the rights of young people." World Youth Alliance, "Cairo+5 Conference on Population and Development," at <http://www.worldyouthalliance.org/unconferences/cairo5.shtml> (last visited Jun. 9, 2005).

<sup>72</sup> See, e.g., Sarah A. Ramage, "Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response," 27 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1 (1996): "One of the Clinton Administration's earliest foreign policy aims was to entrench the practice of abortion in both U.S. domestic law and, more broadly, in international law as an 'international human right' and a 'fundamental right of all women.' In support of this agenda, the Clinton

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Administration sought to link abortion to the 'empowerment' of women, ostensibly through health services and education, as a necessary part of an overlying policy of third world development" (footnotes omitted); see also *ibid.* at 75: "Wirth acknowledged that the Clinton Administration's promotion of abortion was... 'top priority for everybody' in the U.S. government. He described the purpose of his mission somewhat obscurely as 'to conserve what many would call God's creation,' and identified high birth rates as causing problems for 'our national security, population, environment, counter-narcotics, terrorism.' Although Wirth did not elaborate on what each problem had to do with the other, he linked them inextricably to population control, including counter-narcotics and terrorism" (footnotes omitted); see also Jeremy Sarkin, "The Drafting of South Africa's Final Constitution From a Human Rights Perspective," 47 *AMERICAN JOURNAL OF COMPARATIVE LAW* 67 (1999), citing Sarkin's previous articles that evidence his persistent abortion rights advocacy and asserting that a "democratic society based on human dignity" should include an abortion rights clause in its constitution); but see Michel Rosenfeld, Book Review Panel: "Comprehensive Pluralism is Neither an Overlapping Consensus Nor an Overlapping Consensus Nor a Modus Vivendi: A Reply to Professors Arato, Avineri, and Michelman," 21 *CARDOZO LAW REVIEW* 1971, 1986 (2000), discussing the significantly distinct meaning that pro-choice and pro-life advocates attribute to "human dignity" even though both groups of advocates assert the importance of "human dignity." See also Kathryn Kolbert, 15 *AMERICAN JOURNAL OF LAW AND MEDICINE* 153, 157 (1989), alluding to the litigation of "environmentalists and population groups who clarified the international ramifications of losing *Roe*"; Robert R. M. Verchick, "In a Greener Voice: Feminist Theory and Environmental Justice," 19 *HARVARD WOMEN'S LAW JOURNAL* 23 (1996), making a connection between pollution and discrimination based on sex, and specifically emphasizing the abortion rights debate.

Because of the single-mindedness of the international abortion rights lobby, UN conference negotiations follow a predictable routine: academicians and abortion-rights NGOs descend on the negotiations en masse to distribute papers, sponsor lectures, and convene cocktail parties and other events where diplomats and government representatives are instructed on how and why “access to the full range of reproductive health care services”<sup>73</sup> is the necessary lynchpin for environmental protection, empowerment of women, elimination of gender-based violence, and the promotion of human dignity. Depending upon the time and resources available prior to the negotiation, the non-governmental participants (including law professors and their supporting universities) will host academic conferences analyzing the topics set for negotiation.<sup>74</sup>

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<sup>73</sup> Sarah A. Ramage, “Resisting the West: The Clinton Administration’s Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response,” 27 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1, 78 (1996), quoting U.S. spokesperson Timothy Wirth.

<sup>74</sup> See nn 135, 137, and 140 below, describing efforts of the Center for Global Women’s Leadership at Rutgers University.

Throughout this process, the term “abortion” is rarely used. Proponents generally assert they are *not* promoting abortion (although the credibility of such claims often evaporates once the publications of the legal scholars involved are examined).<sup>75</sup> Operating within this verbal fog of double-speak and hidden meanings, a relatively small group of opposing academicians and NGOs attempt to explain to national delegations the legal (and moral) consequences of the language placed on the negotiating table each day.

The diplomatic personnel engaged in this ritual operate under incredible pressure. Tasked with crafting language to govern whatever topic has brought them together, they struggle diligently to craft language that (in the words of the Preamble to the “Universal Declaration of Human Rights”) will promote the “equal and inalienable rights of

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<sup>75</sup> Sarah A. Ramage, “Resisting the West: The Clinton Administration’s Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response,” 27 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL at 78, noting that, after the Cairo Conference, the U.S. asserted that it had *not* promoted abortion; rather it had merely promoted “access to the full range of reproductive health care services.” See also nn 57, 58 above, discussing the public testimony of Professor Copelon at the Rome ICC Conference that any “link” between “forced pregnancy” and abortion was “artificial,” an assertion flatly contradicted by her prior law review articles which asserted that unwanted pregnancies were “forced” and constituted unlawful “involuntary servitude.”

all members of the human family.”<sup>76</sup> The negotiating process can be as brief as two days or can consume the better part of two months. But however long the event, the “real action” usually takes place during the final hours.

When the deadline for a negotiation’s completion draws near, and often in the middle of the night, delegates (sometimes motivated primarily by exhaustion and the pragmatic need to finish) adopt language that skirts the outer perimeters of the abortion debate. They do so by including references to some aspect of “reproductive health” in various paragraphs of the negotiated document. As a result, the final document is often weighted down with amazingly complex paragraphs that defy the rules of logic as well as the comprehension skills of most ordinary readers.

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<sup>76</sup> “Universal Declaration of Human Rights,” Preamble, Par. 1.

The entire effort rests upon the careful use of coded and purposefully vague language. The final language—to note just a few of the possibilities—can variously “urge,” “call upon nations to provide,” or “note with concern the lack” of “access to a full range of reproductive health services,” “reproductive health care,” or simply “reproductive health.”<sup>77</sup> These and similar phrases are often designed to operate like magic mirrors: providing onlookers with the visions they desire most.

Indeed, as negotiations near their end, it often seems that diplomats, fatigued by long hours of discussion and weary of the abortion struggle, choose words that (while not establishing an international abortion right) are somewhat less than clear in precluding a contrary interpretation. There seems to be a nearly inexhaustible supply of language that

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<sup>77</sup> Similar language is found in numerous UN documents. See, e.g., Conference on Environment and Development (Agenda 21), A/CONF.151/26 (Vol. I) (12 August 1992) par. 3.8 (j): “Governments, with the assistance of and in cooperation with appropriate international, non-governmental and local community organizations, should establish measures that will directly or indirectly...[i]mplement, as a matter of urgency, ...safe and effective reproductive health care and affordable, accessible services”; Fourth World Conference on Women, “Beijing Declaration and Platform for Action,” A/CONF.177/20 (17 October 1995) par. 206 (i): nations should improve “access to comprehensive sexual and reproductive health services”; “Report of the United Nations Conference on Human Settlements (Habitat II), Habitat Agenda,” A/CONF.165/14 (7 August 1996) par. 136(f): “To improve the health and well-being of all people throughout their life-span... Governments...should...[d]evelop and implement programmes to ensure universal access for women throughout their life-span to a full range of affordable health-care services, including those related to reproductive health care, which includes family planning and sexual health”; “Programme for the Further Implementation of Agenda 21 (Earth Summit + 5),” A/RES/S-19/2 (19 September 1997) par. 30: “The current decline in population growth rates must be further promoted through...the further expansion of...health care, including reproductive health care, including both family planning and sexual health”; Key actions for the further implementation of the Programme of Action of the International CAIRO +5, A/S-21/5/Add.1 (1 July 1999) par. 52(e): “Governments, in collaboration with civil society, including non governmental organizations, donors and the United Nations system, should...[i]ncrease investments designed to improve the quality and availability of sexual and reproductive health services.”

encompasses the *possibility* of abortion without any *express reference* to the practice.<sup>78</sup> This includes the ubiquitous words “reproductive health,”

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<sup>78</sup> There seems to be a nearly inexhaustible supply of language that encompasses the possibility of abortion, but without any express reference to the practice. For example, “population control” and “empowerment” language crafted at the 1992 Environmental Conference in Rio de Janeiro was expanded and used to promote “reproductive freedom” two years later at the Cairo Conference on Population: “By the time of the 1994 Cairo ICPD, the population control advocates had successfully embedded much of their message into several conference documents, most particularly at the 1992 Earth Summit in Rio (‘Agenda 21’), where Malthusian language of limits came to dominate rhetoric about population and development. Couched in more friendly terms of ‘sustainable development,’ the substance of the argument that population growth equals poverty had changed little, except in style and presentation.”

This population argument strongly influenced the Cairo conference, which was the largest intergovernmental conference on population and development held. More than 11,000 people participated from all levels of society, with 179 nations taking part in the negotiations. The kinder and gentler approach to population control was very much present at the conference. As a UNFPA backgrounder noted, the Cairo Programme of Action (“POA”) ostensibly endorsed: “[A] new strategy that emphasizes the integral linkages between population and development and focuses on meeting needs of individual men and women, rather than on achieving demographic targets. The key to this new approach is empowering women and providing them with more choices through expanded access to education and health services, skill development and employment, and through their full involvement in policy- and decision-making processes at all levels.”

The backgrounder assured that the empowerment of women is the “key to improving the quality of life for everyone.” Another backgrounder noted that “advancing gender equality, eliminating violence against women and ensuring women’s ability to control their own fertility were acknowledged as cornerstones of population and development policies.” Indeed, the table of contents of the Cairo POA had the appearance of a document of the World Conference on Women: Chapter IV dealt with Gender Equality, Equity and Empowerment of Women; Chapter V was entitled “The Family, Its Roles, Composition and Structure”; Chapter VII, “Reproductive Rights, [Sexual and Reproductive Health] and Family Planning”; and almost every chapter that did not have women’s issues as their main subject treated them in detail in a subsection. Thus, the conference made an explicit connection between women’s rights, particularly their “reproductive rights,” and population and development.

Maria Sophia Aguirre & Ann Wolfgram, “United Nations Policy and the

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Family: Redefining the Ties that Bind: A Study of History, Forces and Trends," 16 JOURNAL OF PUBLIC LAW 113 (2002), providing a thorough analysis of the movement for women's sexual and reproductive rights (ibid. at 140-42, footnotes omitted). Malthusian reasoning, of course, assumes that "population growth is the main cause of poverty and an obstacle to development because the more people there are in a given area the fewer resources there are to support or develop them" (ibid. at 122).

which may sometimes appear to encompass abortion, even though (as defined) they do not.<sup>79</sup> As a result of these kinds of technical drafting

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<sup>79</sup> The 1994 International Conference on Population and Development (“ICPD”) defined “reproductive health” as: “[A] state of complete physical, mental and social well-being...in all matters relating to the reproductive system.... Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective,

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affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law.... In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems." "Report of the International Conference on Population and Development," U.N. Doc. A/CONF.171/13 (1994) par. 7.2. Without careful analysis, the foregoing definition, which includes the "freedom" to "decide if, when and how often" to reproduce, could be construed as including access to abortion services. This "freedom," however, is limited to family planning methods that "are not against the law." Thus, while the Platform for Action obligates countries to provide access to reproductive health care "no later than the year 2015," access to abortion is mandated *only* "as specified in paragraph 8.25." Ibid. at par. 7.2. Paragraph 8.25, in turn, provides 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" (ibid. at par. 8.25).

difficulties, the final draft of a negotiated document can be opaque, creating opportunities for interpretation thereafter by scholars and intergovernmental entities in ways that are arguably inconsistent with the document's language and/or negotiating history.<sup>80</sup>

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<sup>80</sup> See discussion accompanying nn 126-33 below, discussing how the CEDAW Committee interprets the convention as mandating abortion rights, notwithstanding the views of scholars that the treaty is "neutral" on abortion, and noting that scholars, prior to the ten-year review of the Beijing Platform for Action, developed strategies to expand the platform in ways that might include an abortion right.

Nevertheless, and despite the use of ambiguous and potentially expansive terms (such as reproductive “choice”<sup>81</sup>), this process, at least to date, has not produced a single negotiated document that expressly and unequivocally recognizes an international right to abortion. Indeed, because of consistent pro-life efforts, the final documents generally include language preserving national sovereignty on questions of human fertility and limiting the potentially expansive sweep of any reproductive rights language.<sup>82</sup> In addition, negotiations usually conclude with several nations issuing statements explaining that the final document—whatever its title or topic—does not alter national or international law related to the regulation of abortion.<sup>83</sup>

Examples of the foregoing abound. The Cairo and Beijing Platforms for Action and the Convention on the Elimination of Discrimination against Women (CEDAW), however, provide an adequate (although hardly exhaustive) overview of how the contemporary international lawmaking process handles the intense moral, emotional, and legal debates surrounding human rights and the protection of human life.

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<sup>81</sup> See, e.g., paragraph 94 of the “Beijing Platform for Action.”

<sup>82</sup> See, e.g., the discussion above of the exclusion of abortion from the ICPD’s otherwise expansive definition of “reproductive health.”

<sup>83</sup> See discussion of the “Beijing Platform,” above at n 60.

*A. Cairo Conference on Population and Development*

A powerful bloc of nations, including the United States and the European Union, made a concerted effort to establish abortion as a “fundamental human right” at the Cairo Conference on Population and Development. During preparations for the conference, the U.S. publicly announced that one of the major objectives of the conference would be the establishment of abortion as an international human right.<sup>84</sup> The

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<sup>84</sup> Dee Dee Meyers, Press Secretary of the Clinton Administration, told reporters that the President considered abortion to be “part of the overall approach to population control.” A State Department action cable thereafter stated that assuring access to safe abortions was a priority issue for the U.S. The cable asserted that “access to safe, legal and voluntary abortion is a fundamental right of all women.” Gregory M. Saylin, “Note: The United Nations International Conference on Population and Development: Religion, Tradition, and Law in Latin America,” 28 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 1245, 1252-54 (1995), footnotes omitted.

United States thereafter exercised its considerable political clout to promote that result.<sup>85</sup>

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<sup>85</sup> The U.S. State Department “action cable” sent to every U.S. diplomatic post in the world specifically instructed the embassies to inform their host countries that the United States supported recognition of a “new fundamental right to abortion.” John Leo, “Playing Hardball at Cairo,” *U.S. NEWS & WORLD REPORT*, Sept. 19, 1994, at 26. As summarized by Leo: “This was not an offer to fund abortion for poor nations that want it. It was an attempt to override laws and customs by establishing some sort of internationally recognized right that might be financially enforced in the future by the U.N. or international aid organizations.” Tim Wirth,

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Undersecretary of State and point man in the U.S. abortion lobbying effort, said that “a government which is violating basic human rights should not hide behind the defense of sovereignty.” He meant that once international organizations accept abortion as a fundamental right, it can be cited to trump the laws, constitutions and sovereignty of any nation.

The abortion rights proposal became one of the most—if not *the* most—contentious topic at the conference.<sup>86</sup> The U.S. effort was vigorously opposed by Catholic and Muslim nations, who received strong support from the delegation of the Roman Catholic Church (the Holy See holds a seat as a Permanent Observer in the UN General Assembly).<sup>87</sup> As a result of this opposition, and despite the pressure exerted by the U.S., nothing in the Cairo Platform for Action establishes abortion as a human right. On the contrary, the plain language of the document provides that abortion lies clearly within the sovereign prerogative of national governments.<sup>88</sup> Furthermore, many of the nations involved in the Conference clarified their understanding that the platform did not alter domestic abortion laws.<sup>89</sup>

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<sup>86</sup> See generally Sarah A. Ramage, “Resisting the West: The Clinton Administration’s Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response,” 27 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1 (1996).

<sup>87</sup> See generally Maria Sophia Aguirre & Ann Wolfgram, “United Nations Policy and the Family: Redefining the Ties that Bind: A Study of History, Forces and Trends,” 16 JOURNAL OF PUBLIC LAW 113, 170 (2002); Sarah A. Ramage, “Resisting the West: The Clinton Administration’s Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response,” 27 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1 (1996); Gregory M. Saylin, “Note: The United Nations International Conference on Population and Development: Religion, Tradition, and Law in Latin America,” 28 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1245, 1252-54 (1995).

<sup>88</sup> The Cairo Platform for Action provides 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.” “Report of the International Conference on Population and Development, Final Document,” U.N. Doc. A/CONF.171/13 (1994) 8.25. See also *ibid.* at par. 7.24, emphasis added: “Governments should take appropriate steps to help women avoid abortion, *which in no case should be promoted as a method of family planning*, and in all cases provide for the humane treatment and counseling of women who have had recourse to abortion.”

<sup>89</sup> Many nations made oral or written reservations regarding the language of the ICPD. Argentina, “Report of the International Conference on Population and Development (ICPD), Final Document,” at 49, U.N. Doc. A/CONF.171/13

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(1994) at 142: "The Argentine Republic cannot accept the inclusion of abortion in the concept of 'reproductive health' either as a service or as a method of regulating fertility"; the Dominican Republic, *ibid.* at 143: "[A]ccepts the content of the terms 'reproductive health,' 'sexual health,' 'safe motherhood,' 'reproductive rights,' 'sexual rights,' and 'regulation of fertility' but enters an express reservation on the content of these terms and of other terms when their meaning includes the concept of abortion or interruption of pregnancy"; the United Arab Emirates, *ibid.* at 141: "We do not consider abortion as a means of family planning"; Nicaragua, *ibid.* at 139: "[W]e accept the concepts of 'family planning,' 'sexual health,' 'reproductive health,' 'reproductive rights,' and 'sexual rights' expressing an explicit reservation on these terms and any others when they include 'abortion' or 'termination of pregnancy' as a component"; Ecuador, *ibid.* at 144: "Ecuador enters a reservation with respect to all terms such as 'regulation of fertility,' 'interruption of pregnancy,' 'reproductive health,' 'reproductive rights,' and 'unwanted children,' which in one way or another, ...could involve abortion"; Honduras, *ibid.* at 138: "[T]he concepts of 'family planning,' 'sexual health,' 'reproductive health,' 'maternity without risk,' 'regulation of fertility,' 'reproductive rights,' and 'sexual rights' ...do not include 'abortion' or 'termination of pregnancy'"; El Salvador, *ibid.* at 137: "As far as reproductive rights, reproductive health and family planning are concerned, ...we should never include abortion within these concepts, either as a service or as a method of regulating fertility"; Paraguay, *ibid.* at 140: "Paraguay accepts all forms of family planning with full respect for life"; the Libyan Arab Jamahiriya, *ibid.* at 139: "unwanted pregnancies" will not be prevented by abortion "unless the mother's health is in danger." Many countries that have Islam as an official religion made a blanket statement reservation similar to Kuwait's (*ibid.* at 138): "[W]e would like to put on record that our commitment to any objectives on population policies is subject to their not being in contradiction with Islamic Sharia"; see generally *ibid.* at 136-51.

*B. Beijing Conference on Women*

In September 1995, world governments gathered in Beijing to hold the Fourth World Conference on Women.<sup>90</sup> The stated purpose of the event was to address constraints and obstacles that impede progress and perpetuate inequalities between men and women.<sup>91</sup> Pregnancy soon surfaced as one of the principal “inequalities” between men and women. As a result, the conference followed a pattern similar to that of Cairo: organized advocacy for abortion rights by certain governments and academicians, followed by the adoption of a document that did not (in actual fact) embrace this goal.

The outcome of the fierce debate over human reproduction in Beijing is reflected in the careful wording of paragraph 94 of the “Platform for Action,” which discusses “reproductive health.” The paragraph provides, in pertinent part:

Reproductive health...implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.<sup>92</sup>

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<sup>90</sup> Fourth World Conference on Women, “Beijing Declaration,” paras. 1, 2, U.N. Doc. A/CONF.177/20 (1995).

<sup>91</sup> *Ibid.* at paras. 5, 7.

<sup>92</sup> *Ibid.* at par. 94.

Nuanced phraseology is the distinguishing hallmark of paragraph 94. There is discussion of “choice” regarding “regulation of fertility,” but that discussion is coupled with the strong proviso that “choice” does *not* extend to fertility options that are “against the law.” The paragraph also asserts that “reproductive health” includes “the constellation of methods, techniques and services” that “prevent” or “solve” “reproductive health problems.” But starkly missing is *any* reference to the modern solution for many “reproductive health problems,” abortion. Accordingly, while this or that word or phrase from paragraph 94 of the “Platform for Action” (as well as other possible portions of the document) might be used to *argue* for abortion rights, nothing in the “Platform for Action” *establishes* or *recognizes* those rights.

On the contrary, as with Cairo, the “Beijing Platform” expressly provides that abortion is a matter for domestic—not international—policy. Paragraph 106(k) of the “Platform,” echoing the identical language from the Cairo document, provides 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>93</sup> The “Beijing Platform for Action” leaves abortion firmly within the control of national governments.

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<sup>93</sup> Ibid. at par. 106(k).

Finally, should doubt remain in any mind, the negotiating history of Beijing clarifies that the drafters of the Platform for Action did not intend to create an international abortion right. The Dominican Republic, for example, entered “an express reservation to the content of [reproductive health] terms, or any others, if they include abortion or interruption of pregnancy as a component.”<sup>94</sup> The Government of Guatemala reserved the right to interpret the “Platform for Action” in express accordance with its “unconditional respect for the right to life from the moment of conception.”<sup>95</sup> Other countries forcefully asserted that no provision of the “Platform,” including reproductive health provisions, would override national legislation. Tunisia stated that it would “reject any provision that is contrary to its fundamental laws and texts.”<sup>96</sup> In a direct reference to reproductive health, Paraguay explained that paragraph 94 would be “interpreted in conformity with its national legislation,”<sup>97</sup> which protects unborn life.<sup>98</sup> The Holy See, for its part,

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<sup>94</sup> Adoption section 7, Dominican Republic. Reservations and interpretative statements on the “Beijing Declaration and Platform for Action” were made during this conference session.

<sup>95</sup> *Id.* at section 10 Guatemala.

<sup>96</sup> *Ibid.* at section 29 Tunisia.

<sup>97</sup> *Ibid.* at section 25 Paraguay.

<sup>98</sup> Para. Const., art. IV. Paraguay’s 2001 submission to the Committee on the

explained that “it does not consider abortion or abortion services to be a dimension of reproductive health or reproductive health services.”<sup>99</sup>

*C. CEDAW*

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Rights of the Child also explains the country’s stance on abortion. See para. 173, 287-88, U.N. Doc. CRC/C/65/Add.12 (2001).

<sup>99</sup> Ibid. section 11 Holy See.

The Cairo and Beijing “Platforms for Action” are “soft law” documents. That is, they are not formal treaties and they bind nations only to the extent that UN agencies (and/or other donor nations and non-governmental organizations) make compliance a condition of financial and other assistance,<sup>100</sup> or to the extent that national officials voluntarily adopt and enforce the documents.<sup>101</sup> By contrast, the “Convention on the Elimination of All Forms of Discrimination Against Women” (CEDAW) is a “hard law” treaty. Once ratified by Congress, treaties become the supreme law of the land under Article IV of the U.S. Constitution.<sup>102</sup> CEDAW has never been ratified by the U.S. Senate.<sup>103</sup> The convention, nevertheless, could have a profound impact on American reproductive rights law.<sup>104</sup>

The U.N. website describes the convention as follows:

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<sup>100</sup> See, e.g., Richard G. Wilkins, “The Impact of UN Conference Declarations on International and Domestic Law” at 6-9 (Monograph Series, The World Family Policy Center, Brigham Young University 2000).

<sup>101</sup> See nn 29, 35-36, discussing U.S. Supreme Court enforcement of international “soft law” norms.

<sup>102</sup> U.S. Const., Art. VI, cl. 2: the “Constitution...and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”

<sup>103</sup> In the late 1980s and early 1990s, the Senate held several hearings on CEDAW, ratification of which was strongly supported by the Clinton Administration. Opposition to the treaty centered, in large measure, upon fears that CEDAW included an international right to abortion. The Senate committee studying the matter concluded, as did the Clinton Administration, that CEDAW was “abortion neutral, that is, that it does not create or reflect an international right to abortion or sanction abortion as a means of family planning.” Marian Nash (Leich), “U.S. Practice: Contemporary Practice of the United States Relating to International Law,” 89 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 96, 106-07 (1995); the author of this article was an employee within the Office of the Legal Adviser, Department of State, at the time of the Senate hearings.

<sup>104</sup> The U.S. Supreme Court has now cited unratified UN conventions on at least two occasions to determine the meaning of Due Process and Equal Protection Clauses. See nn 29, 35-36 above.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.<sup>105</sup>

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<sup>105</sup> <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited May 18, 2005).

Proponents take somewhat schizophrenic positions as to whether the treaty does (or does not) establish an international abortion right. The official UN website explains that CEDAW “is the only human rights treaty *which affirms the reproductive rights of women.*”<sup>106</sup> Consistent with this potentially broad language, the international body charged with monitoring the convention has asserted that CEDAW affirms access to abortion in some circumstances.<sup>107</sup> By contrast, academicians who support U.S. ratification of the treaty deny that it establishes any such right. Harold Hongju Koh, Dean of Yale Law School, for example, asserts flatly that “CEDAW does not create any international right to abortion.”<sup>108</sup>

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<sup>106</sup> <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited May 18, 2005), emphasis added.

<sup>107</sup> See nn 129 & 131 below, discussing decisions of the CEDAW Committee promoting the legalization of abortion to promote the “health of the mother.”

<sup>108</sup> Harold Hongju Koh, “Why America Should Ratify the Women’s Rights Treaty (CEDAW),” 34 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 263, 272 (2002). Dean Koh refutes the claim that “CEDAW supports abortion rights” as “flatly untrue” (ibid.). He asserts: “There is absolutely no provision in CEDAW that mandates abortion or contraceptives on demand, sex education without parental involvement, or other controversial reproductive

With the UN's own web site promoting a broad reproductive rights role for the treaty, while scholars assert the contrary, the reach of CEDAW on abortion is difficult to determine. The language of the treaty is expansive; almost breathtakingly so. Article 1 defines "discrimination" as "any distinction...on the basis of sex," in "any...field." Article 2 requires states parties to eliminate "all discrimination against women," not just by government actors, but "by any person, organization, or enterprise." Article 5, in turn, requires states parties to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of...all...practices which are based on...stereotyped roles for men and women."

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rights issues. CEDAW does not create any international right to abortion. To the contrary, on its face, the CEDAW treaty itself is neutral on abortion, allowing policies in this area to be set by signatory states and seeking to ensure equal access for men and women to health care services and family planning information."

One can argue that these commands, sensibly applied, might promote needed social justice reforms.<sup>109</sup> But the commands themselves are exceptionally broad and reach a remarkable range of relationships, legal structures, and informal institutions. Experience, furthermore, suggests that CEDAW's dictates are not always given entirely "sensible" readings. For example, as interpreted by the UN committee charged with its enforcement, CEDAW mandates that countries engage in remedial efforts to ameliorate the apparently "harmful stereotype" of "motherhood."<sup>110</sup> Treaty provisions that are expansive enough to bring motherhood into question could well be manipulated by academicians, philosophers, lawyers, judges, and government officials to support a right to pregnancy termination.<sup>111</sup> Thus, while academic opinion (at least

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<sup>109</sup> See generally Harold Hongju Koh, "Why America Should Ratify the Women's Rights Treaty (CEDAW)," 34 *CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW* 263, 272 (2002).

<sup>110</sup> When countries have attempted to follow the admonition in the "Universal Declaration of Human Rights" that motherhood (and the correlative right of childbearing) deserve special protection and care ("Universal Declaration of Human Rights," art. 25(2)), the CEDAW Committee has stated that these efforts are "paternalistic" and has asserted that encouraging motherhood discourages women from seeking (ostensibly more valuable) paid work. The Committee reports have gone so far as to tell Western European countries with below replacement birth rates and imploding populations that their governments must do more to get women into the full-time work force and to "eradicate stereotypical attitudes." U.N. Docs. A/55/38 Part One, paras. 311-12 (Germany); A/54/38/Rev.1, Part Two, para. 259 (Spain); A/52/38/Rev.1, Part Two, paras. 215-17 (Luxembourg).

<sup>111</sup> CEDAW condemns "any distinction...on the basis of sex" (CEDAW, Article 1). As astonishing as it sounds to those without years of legal training, many of the "equality" and "discrimination" arguments made by abortion proponents rest upon the simple biological reality that only women can become pregnant. One author in particular captured the argument with remarkable clarity: "Just as no man will ever become pregnant, no man will ever need an abortion, hence be in a position to be denied one by law. On this level, only women can be disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion." Catherine A. MacKinnon, "Reflections on Sex Equality Under the Law," 100 *YALE LAW JOURNAL* 1281, 1320 (1991); the article as a whole gives a very thorough review of the argument (footnotes omitted); see also Erin Daly,

at present) appears to be that CEDAW does not mandate abortion on demand,<sup>112</sup> the impact that the broad wording of the treaty might have on unborn life is unknown.

#### IV. CONTINUED ADVOCACY FOR THE RIGHT THAT ISN'T

The foregoing review suggests that, at present, there is no express "international human right to abortion." However, the indeterminacy of international norms (resulting, in large measure, from their vague and expansive wording), a recent and somewhat inconclusive international debate regarding the original understanding of the Beijing Platform, and the consistent advocacy of abortion rights by legal scholars and UN agencies, renders this conclusion somewhat tentative. The international right that "isn't" nevertheless "might be."

As set out above, the Cairo and Beijing documents—as understood

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"Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of *Planned Parenthood v. Casey*," 45 AMERICAN UNIVERSITY LAW REVIEW 77 (1995), discussing the court's recognition of the unequal burdens of procreation on men and women; Dawn Johnsen & Marcy J. Wilder, "Webster and Women's Equality," 15 AMERICAN JOURNAL OF LAW & MEDICINE 178 (1989), arguing for the equality of women by securing the decision in *Roe*, using similar language to CEDAW; Christina L. Misner, "What if Mary Sue Wanted an Abortion Instead? The Effect of *Davis v. Davis* on Abortion Rights," 3 AMERICAN UNIVERSITY JOURNAL OF GENDER & LAW 265, 296 (1995): "[E]qual protection is triggered in the abortion context in that laws regulating abortion treat women differently than men"; Alec Walen, "Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion," 63 BROOKLYN LAW REVIEW 1051, 1128 (1997), discussing the inequality between males and females associated in consensual sex without assuming the burden of a fetus. See also Eileen L. McDonagh, "My Body, My Consent: Securing the Constitutional Right to Abortion Funding," ALBANY LAW REVIEW 1057 (1999), seeking to classify equal protection argument in the context of the harm created by the fetus and "consent-to-pregnancy." To the extent that pregnancy is seen primarily as a "distinction" on "the basis of sex," CEDAW's broad equality mandate might well encompass a right to abortion.

<sup>112</sup> Harold Hongju Koh, "Why America Should Ratify the Women's Rights Treaty (CEDAW)," 34 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 263, 272 (2002).

at the time of their adoption—did not create any new international right, including access to abortion services. But various phrases repeated throughout these documents provide fertile ground for lawyers who support a pro-abortion agenda. A complaint filed in 2001 by the Center for Reproductive Law and Policy,<sup>113</sup> for example, suggested that the Cairo and Beijing documents could provide a foundation for abortion rights “in the event” that *Roe v. Wade* was “overruled by the United States Supreme Court.”<sup>114</sup>

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<sup>113</sup> Complaint, *The Center for Reproductive Law and Policy v. Bush*, No. 01-4986, 2001 U.S. Dist. WL 868007 (S.D.N.Y. July 31, 2001).

<sup>114</sup> *Ibid.* at 21 ¶ 76.

Although the federal district court ultimately dismissed the complaint (a decision later affirmed by the court of appeals),<sup>115</sup> the Center for Reproductive Law and Policy unquestionably has high hopes that the Cairo and Beijing platforms will ultimately establish an international abortion right. As explained in paragraph 46 of the Center's complaint:

During the period from 1993 to 2000, several major international conferences... resulted in major agreements promoting women's equality including reproductive rights for women. In 1994, the International Conference on Population and Development (ICPD) was held in Cairo, Egypt. In 1995, the Fourth World Conference on Women was held in Beijing, China. Among other issues, a variety of reproductive health and rights issues were addressed at these conferences, including abortion.<sup>116</sup>

The Center wisely stopped short of asserting that international discussions have *already* produced an international abortion right. But the thrust of the Center's argument is that—over time—international abortion rights are expanding. The Center might have a point. The recent review of the "Beijing Platform for Action," concluded in March 2005, suggests

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<sup>115</sup> See, e.g., *The Center for Reproductive Law and Policy v. Bush*, No. 01-4986, 2001 U.S. Dist. WL 868007 (S.D.N.Y. July 31, 2001), dismissed for failure to show standing, *aff'd*, 304 F.3d 183 (2d Cir. 2002): the policy did not violate the Center's First Amendment rights to speech and association, party lacked standing for Fourteenth Amendment claims, and even though party had standing with regard to claims founded on equal protection theory, the policy did not violate equal protection rights.

<sup>116</sup> *Ibid.*, Complaint at Par. 46.

that global understandings regarding reproductive rights may be somewhat more expansive now than ten years ago.

At the outset of the ten-year review process, the U.S. delegation submitted that the outcome document adopted by the General Assembly should include language explaining that (as all nations understood in 1995) the “Beijing Platform for Action” does *not* establish or create an international right to abortion.<sup>117</sup> This suggested reaffirmation of the 1995 intent would halt the proliferation of spurious claims regarding the “meaning” of the “Beijing Platform”; claims like those set out in the complaint filed by the Center for Reproductive Law and Policy. But however understandable the U.S. request, the action prompted a veritable firestorm.

Abortion proponents—including representatives of the ostensibly objective news media—attacked the U.S. proposal with astonishing venom.<sup>118</sup> Lost in the ensuing media controversy was any objective reporting of the background events supporting the wisdom of the U.S. diplomatic stance. Press reports, for example, failed to note that academic centers, law professors and non-governmental organizations

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<sup>117</sup> “U.S. Ignites Abortion Firestorm, CHICAGO TRIBUNE, Mar. 1, 2005, Around the World at p. 5, reporting that United States “insisted” that “delegates declare that women have no right to abortion.” See also “Anti-Abortion Demand Let Go,” CHICAGO TRIBUNE, Mar. 4, 2005, Around the World at p. 6, reporting that the U.S. would drop a proposed statement clarifying “that the platform adopted at the 1995 UN women’s conference in Beijing did not include a ‘right to abortion’.”

<sup>118</sup> In a widely published “news” article that should have been published (if at all) as political commentary, a Scripps-Howard reporter attacked the U.S. for making “a totally unnecessary and hideously denigrating motion to roll back women’s rights.” Bonnie Erbe, “U.S. Delegate Acted Idiotic at U.N. Women’s Event,” DESERET MORNING NEWS, March 13, 2005. In an extraordinary display of journalistic vitriol, prompted by the U.S. request that the international community merely affirm its original understanding of the Beijing Platform for Action, the reporter accused the U.S. Ambassador to the Commission on the Status of Women of behaving “a bit too much like every man’s nightmarish version of a woman commandeered by a PMS hissy-fit” (ibid.). Those fully informed of the facts, however, might question *who* was having a “hissy-fit” at the time Ms. Erbe filed her “news report.”

had publicly announced—on the Internet—strategic plans to use the Beijing review process to expand international abortion rights.<sup>119</sup> In light of such public pronouncements regarding the meanings that *could be* ascribed to the “Beijing Platform,” *any* nation’s request for reaffirmation of the original understandings would hardly have been unusual. But angry news reports ignored such details and, instead, asserted that the U.S. position was nothing more than “conservative politics at its nadir.”<sup>120</sup>

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<sup>119</sup> Academic study centers were particularly active in their promotion of reproductive rights prior to the 10-year review of the Beijing Conference. See discussion below.

<sup>120</sup> Bonnie Erbe, n 113 above; see also Editorial, “Still Unequal,” BOSTON

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GLOBE, Mar. 8, 2005, at A12, characterizing the U.S. action as “obstructionist insistence”; Editorial, “The Bush Team’s Abortion Missstep,” NEW YORK TIMES, Mar. 5, 2005, at A12, characterizing the U.S. delegation’s work “a burst of anti-abortion zealotry,” “shabby and mischievous,” and also calling for an apology for the “disruption”; Colum Lynch, “U.S. Drops Abortion Issue at U.N. Conference,” WASHINGTON POST, Mar. 5, 2005, at A13, claiming that many of the delegates and women’s rights groups accused the Bush Administration of trying to “hijack the conference.”

There was much more involved, of course, than “conservative politics.” At issue was the legitimacy of international legal scholarship based primarily upon the “liberal politics” of expanding the meaning of the words used in the “Beijing Platform for Action” well beyond the original intent of the nations who negotiated and adopted the document.<sup>121</sup> Reaffirmation that the 1995 document did *not* create an

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<sup>121</sup> “Women’s Rights Document OK’d after U.S. Drops Abortion Issue,” CHICAGO TRIBUNE, Mar. 6, 2005, sec. Around the World at p. 9: U.S. Representative to the commission Ellen Sauerbrey that the U. S. delegation

abortion right could seriously undermine post-1995 scholarship, which promotes national and international access to abortion by invoking the platform's language of "choice," "freedom," and "access" to "reproductive health care."<sup>122</sup>

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"sought to amend the declaration because of concerns that advocacy groups were attempting to hijack the term 'reproductive health services' in the Beijing document and define it in a way that guarantees the right to abortion."

<sup>122</sup> See, e.g., Fourth World Conference on Women, "Beijing Declaration," par. 94, U.N. Doc. A/CONF.177/20 (1995); the paragraph defines "reproductive health" as including the right "to have a satisfying and safe sex life" and "the capability to reproduce and the freedom to decide if, when and how often to do so"; "reproductive health care," in turn, is "defined as the constellation of

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methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.” These concepts, including “a safe and satisfying sex life” and “freedom” to decide “if, and when,” to reproduce, provide the foundation for many of the academic arguments supporting abortion, including the oft-used notions of privacy and choice. “Privacy” analysis encompasses sexual privacy (e.g., “a safe and satisfying sex life”), while the “freedom to decide if, and when” to reproduce appears to be the essence of “choice.” See, e.g., Thomas V. Van Flein, “The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution,” 21 ALASKA LAW REVIEW 227, 249 (2004), discussing a right to abortion established under the state constitution’s “right to privacy”; Eileen L. McDonagh, “My Body, My Consent: Securing the Constitutional Right to Abortion Funding,” ALBANY LAW REVIEW 1057 (1999); the first sentence of the article states that the “right to choose to have an abortion” was a “breakthrough for women’s reproductive rights”; Elizabeth A. Cavendish, “Unburdening the Right to Abortion: *Casey*’s Undue Burden Standard Casey Reflections,” 10 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & LAW 305 (2002), extended discussion of how a restriction on abortion is a restriction on “reproductive rights.”

For example, international discussion of “a satisfying and safe sex life,” including “the capability to reproduce and the freedom to decide if, when and how often to do so,”<sup>123</sup> may *not* have connoted a right to abortion in 1995. But because of the continuing redefinition of these terms by legal scholars since 1995, the same may not be true in 2005. As one writer noted in 1997, just two years after the Beijing conference:

Within the right to procreate also lies the right to terminate the pregnancy. Arguably, the same [documents] that recognize the woman’s right to make decisions regarding procreation should encompass the woman’s right to have an abortion. The right of individuals to decide the number and spacing of their children makes sense only if it includes the right to abort an unwanted pregnancy.<sup>124</sup>

This reasoning, to say the least, is somewhat extraordinary: it *establishes* an international abortion right on the very language that was carefully crafted to *preclude* that right.<sup>125</sup> Accordingly, one might have expected

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<sup>123</sup> Fourth World Conference on Women, “Beijing Declaration and platform for Action,” at 38 ¶ 94, U.N. Doc. A/CONF.177/20 (1995).

<sup>124</sup> Iris Leibowitz-Dori, “Note, Womb for Rent: The Future of International Trade in Surrogacy,” 6 MINNESOTA JOURNAL OF GLOBAL TRADE 329, 349 (1997), footnotes omitted. To her credit, the author also noted that “the issue of whether a woman has an international right to have an abortion is controversial” and the “language of international agreements indicates an unwillingness to recognize this right” (ibid).

<sup>125</sup> See discussion above of the limited reach of “reproductive health” in both the

that at least *some* member nations of the UN would have supported the U.S. request to reaffirm the original understanding of the Platform for Action—if for no other reason than simply to put these sorts of “heads I win, tails you lose” arguments to rest. Reaffirmation would have clarified the following important point: “We *did not* create an international abortion right in 1995 and the very language that *did not* establish an abortion right then *does not* create one now.”

Numerous member nations, furthermore, might well have supported the U.S. initiative on the basis of their own national laws. According to reports filed with the committee that monitors compliance with the Convention on the Rights of the Child, a clear majority of the world's nations provide at least some level of formal legal protection for the unborn child's right to life.<sup>126</sup> Not one member of the UN General

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<sup>126</sup>The preamble of the CRC states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate

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legal protection, before as well as after birth." *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plenary meeting., Annex, Preamble, U.N. Doc. A/RES/44/25, available at <http://www.un.org/documents/ga/res/44/a44r025.htm>, quoting "Declaration of the Rights of the Child," G.A. Res. 1386(XIV), U.N. GAOR, 14th Sess., 841st plenary meeting at 19, Preamble, available at <http://www.un.org/documents/ga/res/14/ares14.htm>. The Committee charged with overseeing compliance with the Convention on the Rights of the Child (CRC) collects periodic reports from signatory and party states. These reports give an accounting of national efforts to implement the CRC. These reports are recorded in an Internet database, <http://www.unhcr.ch/tbs/doc.nsf>. As of April 27, 2005 the UN reported having

Assembly, however, was apparently willing to clarify on the record the original understanding regarding the reach of reproductive rights

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140 signatories to the CRC, and 192 parties. See <http://www.ohchr.org/english/countries/ratification/11.htm>. Review of the reports filed with the committee suggests that the great majority of the world's nations provide some form of legal protection for the unborn child's right to life. These reports demonstrate that national laws protecting unborn life range from absolute prohibitions on abortion to regulations requiring medical review before the termination of pregnancy. Reports from only a handful of countries, less than 10, report that they provide no protection to the unborn child, but, even here, it is not clear that these laws allow abortion on demand. For example, while the Former Yugoslav Republic of Macedonia grants a constitutional right to abortion, there may be limitations upon that right after 12 weeks. U.N. Doc. CRC/C/8/Add.36 (1997) at 35 par. 142; the report suggests that abortion is permissible after the 12th week only "if there are clear medical indications the termination of pregnancy can be performed even later in the pregnancy." Papua New Guinea's report states explicitly that "the unborn has no protection under law," even though the report confusingly asserts that the country has "very strict anti-abortion laws" and abortion is in fact illegal. Submission of Papua New Guinea to the Committee on the Rights of the Child at 25 ¶ 85 & 57 ¶ 226, U.N. Doc. CRC/C/28/Add.20 (2003).

language contained in the 1995 “Platform for Action.”

The actual import of this international reticence is unknown and perhaps unknowable. Reaffirmation, as the U.S. itself noted at the end of the negotiation, may have been “unnecessary” because all nations clearly understood in 1995—and continued to assert during the negotiations in 2005—that the platform does not establish an international abortion right or alter national laws relating to human reproduction.<sup>127</sup> It is also possible that the U.S. negotiation strategy faltered because of the Bush Administration’s current unpopularity within the UN diplomatic corps.<sup>128</sup> Accordingly, the international community’s failure to speak regarding “original understandings” could mean little, if anything. Plausible explanations include (a) continued international adherence to the 1995 understandings and/or (b) general diplomatic grumpiness with the current American chief executive. But the very public and contentious abortion discussion before the UN General Assembly in 2005 may also suggest that the neutrality of the “Beijing Platform for Action” on abortion is now itself somewhat questionable.<sup>129</sup>

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<sup>127</sup> See “Explanation of Position by the United States Representative to the Commission on the Status of Women Ambassador,” Ambassador Ellen Sauerbrey, at the 49th session of the United Nations Commission on the Status of Women, March 4, 2005, USUN Press Release #039 (05), March 4, 2005, asserting that statements by various nations in response to the original U.S. proposal evidenced “an international consensus” that the “Beijing or Beijing+5 outcome documents” do not “constitute support, endorsement, or promotion of abortion.” This explanation, although invoked by the U.S., is somewhat strained. Various UN agencies (including the CEDAW Committee) are now engaged in expanding international abortion norms. See discussion at nn 126-33 below. In the face of UN promotion of abortion, the U.S. request for clarification that international law does *not* favor abortion was hardly insubstantial.

<sup>128</sup> See, e.g., Bonnie Erbe, “U.S. Delegate Acted Idiotic at U.N. Women’s Event,” *DESERET MORNING NEWS*, March 13, 2005; Inter Press Service, “Women and Gender; World’s Women Stand Together for Equality,” *Africa News*, Mar. 11, 2005: general disapproval of the U.S. foreign policy was evidenced when the executive director of WEDO said “What we proved here is that the United States can’t bully the world when it comes to women’s human rights.”

<sup>129</sup> The explanation that “reaffirmation” was “unnecessary” because the “original

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understanding of the “Beijing Platform” regarding abortion is clear” is somewhat strained. Various UN agencies (including the CEDAW Committee) are now engaged in expanding international abortion norms. See discussion at nn 126-133, below. In the face of UN promotion of abortion, the failure of the UN General Assembly to clarify that the “Beijing Platform” is indeed “neutral” on abortion rights may indeed call into question this very “neutrality.”

There can be very little doubt, however, regarding the “neutrality” of CEDAW on the question of international access to abortion. Despite claims of American legal commentators that the treaty says nothing regarding abortion,<sup>130</sup> the UN committee that oversees compliance with the convention has not allowed nations to create and implement their own abortion policy. Instead, the committee has repeatedly demanded expansion of international abortion rights.

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<sup>130</sup> See, e.g., Harold Hongju Koh, “Why America Should Ratify the Women’s Rights Treaty (CEDAW),” 34 *CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW* 263, 272 (2002), asserting that CEDAW is “neutral on abortion” and allows abortion policy “to be set by signatory states.”

Article 21 of CEDAW authorizes the committee to make general recommendations to signatory nations.<sup>131</sup> General Recommendation 24, adopted in 1999,<sup>132</sup> addresses the obligation of signatory states to “provide health care services, including those related to family planning.”<sup>133</sup> The committee’s “Recommendations for Government Action,” prepared under General Recommendation 24, suggest that nations decriminalize access to abortion.<sup>134</sup> In nations where religious sentiment against abortion has been particularly prominent, the committee has been even more forceful. In 1999, for example, the committee criticized Ireland for the Catholic Church’s influence on the issue of abortion.<sup>135</sup> That same year the committee criticized Colombia’s abortion laws as “a violation of the rights of women to health and life” under the treaty.<sup>136</sup>

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<sup>131</sup> <http://www.un.org/womenwatch/daw/cedaw/recommendations/> (last visited May 18, 2005), explaining that Article 21 powers of the CEDAW committee. As of January 2004, CEDAW had adopted 25 general recommendations. Those adopted during the Committee’s first ten years were short and modest, addressing such issues as the content of reports, reservations to the Convention and resources (ibid.).

<sup>132</sup> U.N. Doc. A/54/38 (Part I), available at <http://www.un.org/womenwatch/daw/cedaw/reports/20report.pdf>.

<sup>133</sup> Ibid. at 5-6.

<sup>134</sup> The committee suggests that state parties should “prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. *When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion*” (ibid. at 9, emphasis added).

<sup>135</sup> The committee noted “that, although Ireland is a secular State, the influence of the Church is strongly felt not only in attitudes and stereotypes, but also in official State policy. In particular, women’s right to health, including reproductive health, is compromised by this influence.” U.N. Doc. CEDAW/C/1999/L.2/Add.4, at para. 20, available at <http://www.hri.ca/fortherecord1999/documentation/tbodies/cedaw-c-1999-12-add4.htm.20>, available at <http://www.hri.ca/fortherecord1999/documentation/tbodies/cedaw-c-1999-12-add4.htm>.

<sup>136</sup> U.N. Document, n24 above, UN Document A/54/38 (Part I), available at <http://www.un.org/womenwatch/daw/cedaw/reports/20report.pdf>, at

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para. 393. The committee issued detailed suggestions for the reform and relaxation of Colombian abortion laws (*ibid.*): “The Committee notes with great concern that abortion, which is the second cause of maternal deaths in Colombia, is punishable as an illegal act. No exceptions are made to that prohibition, including where the mother’s life is in danger or to safeguard her physical or mental health or in cases where the mother has been raped. The Committee is also concerned that women who seek treatment for induced abortions, women who seek an illegal abortion and the doctors who perform them are subject to prosecution. The Committee believes that legal provisions on abortion constitute a violation of the rights of women to health and life and of article 12 of the Convention.” The committee’s recommendations are now the basis for a Colombian lawsuit that seeks dramatic alterations in that nation’s abortion laws. Women’s Link Worldwide, “Landmark Constitutional Challenge In Colombia Seeks to Loosen One of the World’s Most Restrictive Abortion Laws,” Apr. 14, 2005, available at [http://www.womenslinkworldwide.org/co\\_lat\\_colombia.html](http://www.womenslinkworldwide.org/co_lat_colombia.html). Women’s

The CEDAW Committee has even gone so far as to characterize a doctor's conscientious objection to conduct an abortion on demand an "infringement of women's reproductive rights."<sup>137</sup> As a result, the supposedly abortion-neutral CEDAW committee "strongly recommend[ed] that the Government take steps to secure the enjoyment by women of their reproductive rights by, *inter alia*, guaranteeing them access to abortion services in public hospitals."<sup>138</sup>

These developments, which include U.S. litigation based on international abortion norms, the recent reticence of the international community to speak clearly and unequivocally to the question of international abortion rights, and a UN agency's use of a supposedly "abortion neutral" treaty to force the liberalization of abortion laws, suggest that international law poses (at the very least) serious and growing challenges for efforts to protect unborn life around the world.

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Link Worldwide also provides a complete .pdf version of the complaint available at the same website.

<sup>137</sup> Report of the Committee on the Elimination of Discrimination Against Women (18th & 19th Sessions), U.N. GAOR, 53d Sess., Supp. No. 38, at 12 ¶ 109, U.N. Doc. A/53/38/Rev.1 (1998).

<sup>138</sup> *Ibid.* at 13 ¶ 117.

International law now threatens one of civilization's most cherished values: the right to life.

#### V. THE NEED FOR AN ACADEMIC PRO-LIFE RESPONSE

How has the international legal system reached the point where its norms undermine rather than support the inalienable right to life acknowledged by the "Universal Declaration of Human Rights"?<sup>139</sup> At least three possible factors are involved. First, scholars who are convinced that personal choice trumps all competing values have engaged in coordinated, pro-active, and strategic efforts to promote new international norms consistent with their views. Second, pro-life academicians may not have adequately understood the hopes and dreams of the men and women who created the UN System. The UN was founded to prevent the systematic disregard of fundamental values; the world should be reminded of the dangers that inhere in disregarding the intrinsic value of all human life. Third, pro-life academic efforts, particularly in comparison with those made by scholars and academic organizations that support abortion rights, have been timid and restrained. Pro-life academicians should consider each of these factors when considering the course of future possible efforts.

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<sup>139</sup> "Universal Declaration of Human Rights," Art. 3.

The redefinition and reconstruction of international norms related to the value of human life has been planned and executed, in large measure, by members of the academy. Professors at law schools around the world have taken the lead in this disturbing process.<sup>140</sup> Post-modern legal scholars—joined by specialists in sociology, gender studies, and sexual behavior—have not been content to conduct research, send it off for publication, and thereafter discuss “this” or “that” insight with an occasional colleague. Policy-savvy professors, well aware that their opinions might be ignored in the journals but become the focus of discussion at international law-making events,<sup>141</sup> have monitored the

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<sup>140</sup> See, e.g., Rutgers Center for Global Women’s Leadership, “Beijing + 10 Review: A Feminist Strategy for 2004-05, A Working Paper for NGOS on How to Move Forward,” March 2004 (copy on file with the author). This monograph “emerged out of several activities held as part of a consultation process on the future of women’s human rights sponsored by the Center for Women’s Global Leadership in 2003” (ibid. at page 1).

<sup>141</sup> See discussion above, explaining the prominent role of legal scholars in the development of international legal norms.

course of negotiations related to abortion rights, sponsored interdisciplinary conferences on reproductive rights, mustered political support for their policy preferences, and taken active steps to promote dramatic changes in international law. Indeed, reports issued on the Internet by academic study centers openly note the need to “re-politicize our agenda” and promote discussion of “sexual rights” issues, including abortion.<sup>142</sup> The pro-life academic community can hardly expect to make

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<sup>142</sup> Ibid. at pp. 2, 3. NGO documents reporting on the discussions sponsored by Rutgers reveal further details of academic and non-governmental efforts to promote abortion rights during the Beijing + 10 process. One such document suggests “strategies” for the negotiation, including “infiltration” of “conservative groups” and the distribution of materials “that support sexual and reproductive rights.” Alejandra Sardá, “Report: Global Reunion about Strategies for Beijing+10,” New Jersey, December 5-8, 2004 (copy on file with the author). The same document notes that “We will have Informative Sheets [to distribute at the Beijing review process], at least in English and in Spanish, about the most

significant progress itself until it undertakes similarly active and focused efforts.

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controversial topics: abortion, sexual orientation, maternal mortality, gender expression, sexuality of young women, sexual education."

When undertaking these efforts, the lofty goals of those who founded the UN should be kept in mind. The UN System was fashioned at the conclusion of World War II. Following two global conflicts, the international community was well aware that great evil is possible (and perhaps inevitable) when fundamental moral values are corrupted. The UN was organized to combat programmatic evil and to promote social responsibility, decency, and liberty. The achievement of these vital goals, however, requires recognition of and respect for the intrinsic and absolute value of human life. As eloquently explained in the Preamble to the “Universal Declaration of Human Rights,” “freedom, justice and peace in the world” are founded upon “the inherent dignity” of mankind and the “equal and inalienable rights of *all* members of the human family.”<sup>143</sup> We have an obligation to remind the international community that, when respect for the basic rights of *all* members of the human family wanes, “barbarous acts” that “outrage the conscience of mankind”<sup>144</sup> are the inevitable result. This warning is as timely today as it was when the “Universal Declaration of Human Rights” was first crafted.

To ensure that the international community hears this warning, pro-life academicians must be willing to act—even when acting is not easy. Pro-life members of any university faculty understand that defense of the unborn is unpopular. Pro-life efforts are rarely viewed favorably, either by colleagues or academic administrators. Within the legal

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<sup>143</sup> “Universal Declaration of Human Rights,” Preamble, par. 1 (emphasis added).

<sup>144</sup> *Ibid.*, par. 2.

academy, moreover, *any* pro-life stance permanently diminishes career opportunities—particularly if future plans might include “upward mobility” within the ranks of the nation’s law schools or appointment to a state or federal judicial post.

Faced with these undeniable realities, the prudent course for pro-life academicians (and particularly energetic and ambitious legal scholars) often regrettably involves laying low and staying quiet, or acting with such “moderation” that the ethical or moral contours of any position on abortion is barely discernible. All of this prudence, of course, is exercised while academic proponents of abortion rights rally support on the Internet for further “politicization” of their efforts<sup>145</sup> and convene world-wide summits at which legal scholars, government leaders and NGOs plan abortion rights advocacy strategy.<sup>146</sup> It is well past time for coordinated efforts by pro-life members of the academy to alter these unfortunately dynamics. A prudent, reasoned defense of human life is possible and can be successful—as demonstrated by the outcome of the Doha International Conference for the Family in 2004.

The Doha International Conference for the Family consisted of year-long series of interlocking academic, non-governmental and intergovernmental events organized by various non-governmental and governmental partners.<sup>147</sup> The Doha Conference was welcomed by a

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<sup>145</sup> See, e.g., Rutgers Center for Global Women’s Leadership, “Beijing + 10 Review: A Feminist Strategy for 2004-05, A Working Paper for NGOs on How to Move Forward,” March 2004, pp. 2-3 (copy on file with the author).

<sup>146</sup> *Ibid.*

<sup>147</sup> Various academic panels, non-governmental conferences and inter-governmental meetings were organized and conducted in Geneva, Switzerland; Stockholm, Sweden; and Kuala Lumpur, Malaysia. The Center assisted with major events in Mexico City, Mexico; Cotonou, Benin; Baku, Azerbaijan; and Riga, Latvia. Declarations, papers, essays, personal statements, findings and proposals for action developed at these events were collected and two significant reports were prepared. The first, entitled “The World Unites to Protect the Family,” reports the results of over 200 community meetings in 34 nations. The second, entitled “The Family in the Third Millennium,” provides an initial look at the more than 2,000 pages of global scholarship and academic findings developed during preparatory proceedings. “Report on the Doha

December 2003 Resolution of the General Assembly and culminated in an intergovernmental meeting in Doha, Qatar, on November 29-30, 2004.<sup>148</sup> In Doha, governmental representatives negotiated and adopted the Doha Declaration, which reaffirms long-standing legal norms related to family life.<sup>149</sup> On December 6, 2004, the UN General Assembly adopted a consensus resolution, co-sponsored by 149 nations, taking note of the Doha Declaration.<sup>150</sup>

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International Conference for the Family," UNGA Doc. A/59/599 (Dec. 8, 2004).

<sup>148</sup> A/RES/58/15 (December 15, 2003).

<sup>149</sup> The Doha Declaration, UNGA Doc. A/59/592 (Dec. 3, 2004).

<sup>150</sup> A/RES/59/29 (Dec. 6, 2004).

The Declaration reaffirms important commitments of the international community that have been allowed—by legal scholars and governments alike—to fall into the shadows. Among other things,<sup>151</sup> the Declaration reaffirms “the inherent dignity of the human person,” and notes “that the child, by reason of his physical and mental immaturity, needs special safeguards and care before as well as after birth.”<sup>152</sup> It proclaims that “[m]otherhood and childhood are entitled to special care and assistance”<sup>153</sup> and “everyone has the right to life, liberty and security of person.”<sup>154</sup> The Declaration concludes by calling upon the international community, among other things, to “[e]valuate and reassess government policies to ensure that the inherent dignity of human beings is recognized and protected throughout all stages of life.

These developments could be significant. The Doha process was built upon cooperative efforts by governments, non-governmental organizations, research institutions, academicians, faith communities and members of civil society, who joined together to protect the “inherent dignity” of human beings “before as well as after birth.”<sup>155</sup> As a result, the international community was provided with the opportunity to recommit itself to foundational ideas contained in documents dating

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<sup>151</sup> The Doha Declaration reaffirms that “the family is the natural and fundamental group unit of society” and “emphasize[s] that marriage shall be entered into only with the free and full consent of the intending spouses” and that “husband and wife should be equal partners.” The Doha Declaration, UNGA Doc. A/59/592 (Dec. 3, 2004), “Reaffirmation of Commitments,” Pars. 3 and 4. It also “emphasize[s] that the family has the primary responsibility for the nurturing and protection of children from infancy to adolescence,” and that parents have “a prior right to choose the kind of education that shall be given to their children and the liberty to ensure the religious and moral education of their children in conformity with their own convictions” (ibid. at par. 5).

<sup>152</sup> Ibid., “Reaffirmation of Commitments,” par. 2, reaffirming “Universal Declaration of Human Rights,” Preamble, Par. 1; “The Convention on the Rights of the Child,” Preamble, Par. 9.

<sup>153</sup> Ibid., reaffirming “Universal Declaration of Human Rights,” Art. 25(2).

<sup>154</sup> Ibid., reaffirming “Universal Declaration of Human Rights,” Art. 3.

<sup>155</sup> Ibid. at “Reaffirmation of Commitments,” Par. 2.

back to the founding of the UN System. The Doha Declaration provides an important counter to the academic and legal rhetoric that has been invoked to undermine the value of unborn human life for the past three decades. But it will be the academic work that follows—or that ignores—the developments in Doha that will make the real difference.

#### CONCLUSION

The value of human life in the international legal system has been revised and redefined because academicians, activists and advocates have vigorously engaged in the international lawmaking process. This still-ongoing revisionist process can be slowed, and perhaps reversed, by similar action on the part of those who believe in—and understand—that “[e]veryone” is entitled to “life, liberty and security of the person.”<sup>156</sup> The task will be daunting, but not impossible.

The situation reminds me of a story told by my Great Uncle Joseph Gundersen. His father, my Great-Grandfather Thomas Gundersen, was a blacksmith. He knew how to make useful things out of iron: nails, hinges, wheel rims and horse shoes—the simple things that improved the quality of ordinary life. Great-Grandpa taught Uncle Joe, who he called “Dodi Boy,” how to be a blacksmith. It wasn’t easy.

Uncle Joe didn’t like the heat and he was afraid of the fire. He had to stand by the hot oven, take the iron out of the fire and put it on the anvil. Then he had to strike the iron with a heavy hammer. Sparks would fly and burn his face and arms. The smoke would sting his eyes and the heat covered him in drenching sweat. When he would shrink from the pain, Great-Grandpa would shout, “Stand up to the fire, Dodi Boy! Stand up to the fire!”

Uncle Joe learned to stand up to the fire. When he did, when the sparks didn’t frighten him and the sweat was a sign of accomplishment and not oppression, he forged useful things out of iron: nails, hinges, wheel rims and horse shoes—the simple things that improved the quality of ordinary life.

We must stand up to an intensely hot, global furnace. The fire of

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<sup>156</sup> “Universal Declaration of Human Rights,” Art. 3.

academic debate is forging the international laws that will increasingly govern many aspects of ordinary human life. This forge, left unattended, will almost certainly produce tools that will threaten not just the quality, but the very value, of human life. Like Uncle Joe, we may not like the heat. We might be afraid of the sparks. We could prudently wish to shrink from the effort and the sweat associated with any approach to this furnace.

But failure to stand up to this fire will almost certainly result in the forging of dangerous tools indeed. Those who cherish the right to life must forge an international legal system that respects and protects the inalienable rights of all members of the human family. If we succeed, we will have forged results stronger than iron: generations of mothers and fathers, sons and daughters, grandparents and grandchildren, who will reap the blessings of the simple things of life—marriage, motherhood, fatherhood, childhood and faith—the simple things that make ordinary life pleasant and possible.

No task on this grand and great earth is more important.