

Penn State Journal of Law & International Affairs

Volume 6 | Issue 1

June 2018

Pushing a Right to Abortion through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment

Andrea Stevens

ISSN: 2168-7951

Recommended Citation

Andrea Stevens, *Pushing a Right to Abortion through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment*, 6 PENN. ST. J.L. & INT'L AFF. 71 (2018).
Available at: <https://elibrary.law.psu.edu/jlia/vol6/iss1/6>

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State
Journal of Law & International Affairs

2018

VOLUME 6 NO. 1

**PUSHING A RIGHT TO ABORTION
THROUGH THE BACK DOOR: THE NEED
FOR INTEGRITY IN THE U.N. TREATY
MONITORING SYSTEM, AND PERHAPS A
TREATY AMENDMENT**

*Andrea Stevens**

TABLE OF CONTENTS

I.	INTRODUCTION	72
II.	INTERNATIONAL LAW DOES NOT RECOGNIZE A RIGHT TO ABORTION	75
A.	Inferring a Right to Abortion Under U.N. Treaties	78
1.	Inferring a Right to Abortion from the Right to Life	79
a.	The Right to Life Under the ICCPR	81
b.	Ireland's Inconsistent Interpretation of the ICCPR	84
c.	The Right to Life Under the CRC.....	86
2.	Inferring a Right to Abortion from the Right to Health	88
3.	Inferring a Right to Abortion from Other Rights.....	97
a.	The Right to Freedom from Torture and CIDTP.....	98
b.	The Right to Privacy.....	100

* Andrea Stevens is an LL.M. candidate at Georgetown University Law Center. The author would like to thank Professor Jane Stromseth for her invaluable guidance and feedback during the research and writing of this paper. The author would also like to thank the editors and staff of the Penn State Journal of Law & International Affairs for their editing contributions.

2018	<i>Pushing a Right to Abortion through the Backdoor</i>	6:1
	c. The Right to Equality Before the Law (Non-Discrimination)	100
	B. Customary International Law Does Not Establish a Right to Abortion	102
III.	TREATY INTERPRETATION AND THE SURREPTITIOUS EFFORT TO CRAFT A RIGHT TO ABORTION	104
	A. Treaty Interpretation.....	104
	B. The Limits of Treaty Monitoring Body Authority	106
	C. The Concerted Effort to Create a Right to Abortion....	109
	D. State Pushback	116
IV.	RIGHTS OF THE UNBORN IN INTERNATIONAL LAW	117
	A. Rights of the Unborn in U.N. Treaties	119
	1. The Right to Life.....	119
	a. Under the UDHR.....	119
	b. Under the ICCPR	121
	c. Under the CRC	123
	2. Other Rights in U.N. Human Rights Treaties.....	125
	3. The Prohibition Against Discrimination.....	127
	B. Customary International Law and Protection for the Unborn.....	129
V.	ADDITIONAL PROBLEMS ARISING FROM THE BACKDOOR PUSH FOR A RIGHT TO ABORTION.....	130
	A. Devaluation of Existing Human Rights	130
	B. Loss of Human Rights Progress in Other Areas	131
	C. Danger of Withdrawal or Schism.....	134
VI.	THE NEED FOR CLARIFICATION: USING AN AMENDMENT OR OPTIONAL PROTOCOLS TO RESOLVE THE CONFLICT BETWEEN ABORTION AND PROTECTION OF THE UNBORN IN U.N. HUMAN RIGHTS INSTRUMENTS	135
	A. Amendment to Existing Human Rights Treaties	136
	B. Adoption of Optional Protocols.....	139
VII.	CONCLUSION.....	141

I. INTRODUCTION

On June 9, 2016, the United Nations Human Rights Committee (HRC) announced that Ireland's constitutional prohibition on abortion violated its obligations under the International Covenant on Civil and Political Rights (ICCPR).¹ While the HRC had found in 2005 that Peru violated the ICCPR for not ensuring a young woman's access to a legal abortion, the 2016 case marked the first time the Committee based its view of an ICCPR violation on a state party's domestic laws.² Pro-choice advocates heralded the decision as a landmark victory that would require Ireland to legalize abortion in contradiction of its own constitution,³ which "acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."⁴ On March 17, 2017, in a case that closely resembled the 2016 decision, the HRC again declared that Ireland's restrictions on abortion violate the country's obligations under the ICCPR.⁵ It was a bold move for the Committee—a body of eighteen

¹ U.N. Human Rights Comm., *Mellet v. Ireland*, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CCPR-C-116-D-2324-2013-English-chn-auv.pdf> [hereinafter *Mellet v. Ireland*].

² CENTER FOR REPRODUCTIVE RIGHTS, *IRELAND MUST LEGALIZE ABORTION TO END VIOLATIONS OF WOMEN'S HUMAN RIGHTS* (2006), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_Europe_MelletvIreland_FS_09%2006_Web.pdf.

³ *Id.*; see also Amelia Gentlemen, *UN Calls on Ireland to Reform Abortion Laws After Landmark Ruling*, THE GUARDIAN (June 9, 2016, 1:04 PM), <https://www.theguardian.com/world/2016/jun/09/ireland-abortion-laws-violated-human-rights-says-un> (quoting Colm O'Gorman, Executive Director of Amnesty International Ireland as saying, "The Irish government must act promptly. Ireland's constitution is no excuse. It must be changed to allow the reforms required by this ruling.>").

⁴ Constitution of Ireland 1937 art. 40.3.3, as amended by the Eighth Am. (1983).

⁵ U.N. Human Rights Comm., *Whelan v. Ireland*, Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/CCPR_C_119_D_2425_

experts⁶ whose recommendations are not binding—to instruct a sovereign nation to change its domestic law on the basis of an inferred, rather than explicitly stated, right to abortion.⁷

The HRC’s recent decisions raise concern for two principal reasons. First, the treaty monitoring body exceeded its mandate by asserting Ireland was obligated to fulfill a right that neither the ICCPR nor any other U.N. human rights treaty recognizes.⁸ In fact, the ICCPR and other U.N. human rights treaties are more easily interpreted to protect the rights of unborn human beings than a mother’s right to abortion,⁹ except in situations where the mother requires life-saving treatment that results in the loss of her child.¹⁰ Second, the HRC’s determination that international law requires a member state to change its domestic laws on abortion arguably violates the U.N. Charter’s prohibition against intervention in matters that are exclusively within a state party’s national jurisdiction.¹¹

2014_25970_E.pdf [hereinafter Whelan v. Ireland].

⁶ *Introduction*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (OHCHR), <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited Feb. 19, 2018); *Membership*, OHCHR, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx> (last visited Feb. 19, 2018).

⁷ Christina Zampas & Jaime M. Gher, *Abortion as a Human Right - International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 253 (2008) (stating, “Committees are not judicial bodies and their Concluding Observations are not legally binding.”); Michael Perlin, “*God Said to Abraham/Kill Me a Son*”: *Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence*, 54 AM. CRIM. L. REV. 477, 479 (Perlin, Professor Emeritus of Law at N.Y.U., states, “[P]olicy pronouncements of U.N. treaty bodies, in the form of GCs [general comments] or recommendations, are not considered binding international law.”); see also Michael O’Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 36 (2006) (“Arguments against granting binding status to concluding observations may also be derived from basic principles of due process of law.”).

⁸ See *infra* Parts II (discussing international law’s treatment of abortion) and III (discussing treaty interpretation and U.N. treaty monitoring body authority).

⁹ See *infra* Part IV (discussing the rights of the unborn in international law).

¹⁰ See text accompanying *infra* notes 63-65.

¹¹ See text accompanying *infra* notes 30-32 and Part III.

The HRC is not the only U.N. treaty monitoring body that has sought to compel states parties to change their domestic laws to comply with an inferred right to abortion. The committees for the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, and the Convention Against Torture have also leveled criticism at states parties for legislation that restricts abortion.¹² In addition to treaty committees, several U.N. agencies and offices have repeatedly asserted a right to abortion on the basis of explicitly stated human rights.¹³ The fact that pro-choice organizations have been directly involved with the U.N.'s push to pressure states into liberalizing domestic abortion laws highlights the illegitimacy of these efforts.¹⁴ While some states have conformed to the U.N.'s demands, numerous states have taken a firm stance against encroachments on their sovereign right to decide domestic law on this controversial matter.¹⁵ In the spring of 2018, Ireland will vote in a referendum that will decide whether the nation will maintain its constitutional abortion

¹² See *infra* Parts II-III.

¹³ This paper focuses primarily on efforts by U.N. treaty monitoring bodies to infer a human right to abortion from rights explicitly provided for in U.N. human rights treaties. However, U.N. agencies and offices have also argued in favor of inferring a right to abortion from established human rights. See, e.g., *infra* notes 215, 279-80 and accompanying text (regarding U.N. special rapporteurs); *infra* notes 51, 120-26, and accompanying text (discussing the World Health Organization); *infra* notes 89-91 and accompanying text (regarding the U.N. Office of the High Commissioner for Human Rights); *infra* note 284 and accompanying text (concerning the U.N. Population Fund); note 287 and accompanying text (regarding the U.N. Assistant Secretary-General for Policy Coordination, Department of Social and Economic Affairs). Unqualified references to “the U.N.” refer to U.N. treaty monitoring bodies and the U.N. agencies and offices listed in parentheses in this footnote.

¹⁴ See *infra* Section III.C.

¹⁵ See generally Kelsey Zorzi, *The Impact of the United Nations on National Abortion Laws*, 65 CATH. U.L. REV. 409 (2015) (discussing the liberalization of abortion laws in Nepal, Belgium, Ethiopia, Chad, Columbia, Argentina, Peru, and potentially Chile); *infra* Section III.D. (describing state pushback against U.N. pressure to liberalize domestic abortion laws).

restrictions or take a new direction in line with the U.N.'s push for abortion liberalization.¹⁶

A new approach to the issue of abortion in U.N. human rights treaties is in order. Given the range of state perspectives on abortion and rights of the unborn, as well as the U.N.'s problematic interpretations of human rights instruments, perhaps the best way to proceed is through the adoption of a treaty amendment or protocol that explicitly addresses these issues.¹⁷ Even though differences on these controversial matters would remain, such an instrument would clarify the various positions and prevent entities on either side of the abortion debate from unfairly pressuring states.

Part II of this paper examines the question of whether international law recognizes a right to abortion, looking primarily at U.N. human rights treaties and, briefly, customary international law. Part III looks at principles of treaty interpretation and how U.N. treaty monitoring bodies have, in conjunction with pro-choice NGOs, deviated from these principles in their effort to assert a right to abortion by inference from established human rights and customary international law. Part IV of this paper then turns to the issue of whether international law recognizes rights of the unborn. Part V describes problems that have arisen from the non-legislative effort to infer a human right to abortion. Part VI then proposes treaty modification through amendment or, more likely, optional protocols to clarify states parties' positions on abortion and rights of the unborn.

II. INTERNATIONAL LAW DOES NOT RECOGNIZE A RIGHT TO ABORTION

Article 38 of the Statute of the International Court of Justice, to which "all members of the United Nations are *ipso facto* parties,"¹⁸

¹⁶ Ed O'Loughlin, *Ireland to Hold Abortion Referendum Next Year*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/world/europe/ireland-abortion-ban-referendum.html?wpmm=1&wpisrc=nl_daily202.

¹⁷ See *infra* Part VI.

¹⁸ U.N. Charter art. 93, ¶ 1.

is considered the authoritative statement on sources of international law.¹⁹ According to Article 38, the primary sources of international law are international treaties and customary international law.²⁰ No U.N. human rights treaty speaks of a right to abortion, and, as discussed in *infra* Section II.B, neither does customary international law provide for such a right.²¹ Even pro-choice NGOs, such as Amnesty International and Center for Reproductive Rights, have affirmed that no legally binding global human rights instrument identifies a right to abortion.²² Accordingly, those who assert an

¹⁹ *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 156-57 (2d Cir. 2003) (citing *U.S. v. Yousef*, 327 F.3d 56, 100-103 (2d Cir. 2003) and *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 & n.8 (2d Cir. 1980)).

²⁰ Statute of the International Court of Justice art. 38(1)(a)-(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute].

²¹ In a 2011 meeting of the U.N. General Assembly, Mr. Anand Grover, U.N. Special Rapporteur for Health, expressed that “it was important to recognize that there was no international law on the matter [of abortion].” Press Release, Several Aspects of Sexual, Reproductive Health - Providing Information, Using Contraception, Abortion - Should Be “Decriminalized,” Third Committee Told, U.N. Press Release GA/SHC/4018 (Oct. 24, 2011), <https://www.un.org/press/en/2011/gashc4018.doc.htm>.

²² See Zampas & Gher, *supra* note 7, at 250 (“The African Women’s Protocol is the only legally binding human rights instrument that explicitly addresses abortion as a human right and affirms that women’s reproductive rights are human rights.”); see also PIERO A. TOZZI, INTERNATIONAL LAW AND THE RIGHT TO ABORTION 1 (2010), <https://c-fam.org/wp-content/uploads/International-Law-and-the-Right-to-Abortion-FINAL.pdf> (citing Amnesty International as saying, “There is no generally accepted right to abortion in international human rights law.” Amnesty International, ‘Women, Violence and Health,’ Feb. 18, 2005.”). Tozzi notes that in 2007, Amnesty “abandon[ed] neutrality on the abortion issue.” *Id.* at n.1. Similarly, in 2003, the Center for Reproductive Rights [hereinafter CRR] made the following comment, which was entered into the U.S. Congressional Record: “We have been leaders in bringing arguments for a woman’s right to choose abortion within the rubric of international human rights. However, there is no binding hard norm that recognizes women’s right to terminate a pregnancy.” CENTER FOR FAMILY & HUMAN RIGHTS, WRITTEN CONTRIBUTION OF THE CENTER FOR FAMILY AND HUMAN RIGHTS TO THE GENERAL DISCUSSION ON THE PREPARATION FOR A GENERAL COMMENT ON ARTICLE 6 (RIGHT TO LIFE) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 9 (June 12, 2015), <http://studylib.net/doc/17701878/written-contribution-of-the-center-for-family-and-human-r>. In 2009, the CRR changed its position, though, as with the period of time between Amnesty’s positions, “Nothing had changed in the intervening years,

international right to abortion support their position by inference from rights stipulated in binding international agreements. The long-term goal of this approach appears to be the creation of a customary international law right to abortion based on states' positive responses to pressure from treaty monitoring bodies to relax their domestic abortion laws.²³

A discussion of abortion and rights of the unborn within the regional human rights systems is beyond the scope of this paper, which focuses primarily on U.N. human rights treaties and, briefly, customary international law as global sources of legally binding human rights norms. However, it bears mentioning that there is one exception to the otherwise non-existence of a right to abortion in international law: the African Women's Protocol (Maputo Protocol), which was concluded within the African human rights system.²⁴ As of June 2017, thirty-six out of fifty-four states parties to the African Charter on Human and Peoples' Rights have ratified the Maputo Protocol, which obligates member states to protect a woman's right to abortion "in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."²⁵ In contrast, within the Inter-American human rights system, the American Convention recognizes that human life begins at conception.²⁶

either in customary law or in treaty law, to make the [original] statement no longer true." *Id.*

²³ See *infra* Section II.B.

²⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, O.A.U. Doc. CAB/LEG/66.6, <http://www.achpr.org/instruments/women-protocol/> [hereinafter Maputo Protocol]. The Protocol was adopted at a 2003 summit of the African Union in Maputo, Mozambique. Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 FORDHAM INT'L L.J. 1178, 1202 (2010). As of June 2017, thirty-six out of fifty-four African nations have ratified the Maputo Protocol. See *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, <http://www.achpr.org/instruments/women-protocol/ratification/> (last visited Feb. 11, 2018).

²⁵ Maputo Protocol, *supra* note 14, art. 14.2.c.

²⁶ American Convention on Human Rights art. 4(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

A. Inferring a Right to Abortion Under U.N. Treaties

In her seminal book, *Mobilizing for Human Rights*, Harvard Professor Beth Simmons asks why a sovereign nation would bind itself to an international legal agreement regarding its treatment of its own nationals.²⁷ She responds that, “[t]he primary reason is that the government anticipates its ability and willingness to comply.”²⁸ As Professor Simmons explains, “[g]overnments participate in negotiations, sign drafts, and expend political capital on ratification in most cases because they support the treaty goals and generally want to implement them.”²⁹

The domestic laws of many countries prohibit or strictly limit a woman’s ability to terminate a pregnancy, and some explicitly recognize that the right to life begins at conception.³⁰ These states did not anticipate an obligation to protect a right to abortion when they signed human rights treaties which make no mention of such a right. In fact, the legislative history of the relevant U.N. human rights treaties shows that states parties considered abortion to be a matter of national jurisdiction.³¹ Accordingly, U.N. efforts to assert a right to abortion and hold states accountable for violations of the inferred right arguably violate Article 2(7) of the U.N. Charter, which prohibits the U.N. from intervening in explicitly domestic matters of any state.³²

²⁷ HURST HANNUM ET AL., *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 70 (5th ed. 2011) (citing Beth Simmons, *Mobilizing for Human Rights* (2009)).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *infra* notes 151-54 and accompanying text.

³¹ See, e.g., David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 *GEO. J. FIGHTING POVERTY* 161, 178 (1998); Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 *HARV. HUM. RTS. J.* 161, 186 (2006) (stating that drafters of the Convention on the Rights of the Child sought to ensure the treaty’s neutrality on the matter of abortion).

³² U.N. Charter art. 2, ¶ 7.

Pro-choice advocates and the U.N., through numerous U.N. offices and agencies,³³ have stated that a woman's right to abortion is inferred from treaty-protected rights such as the right to life, the right to health, the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, the right to privacy, and the right to be free from discrimination.³⁴ However, as discussed in *infra* Part IV, the relevant U.N. human treaties arguably support application of these protections to the unborn, or at least, as indicated in the legislative history, leave the matter up to each state. Furthermore, while in some cases the U.N. treaty committee findings are influential, they are non-binding.³⁵ Yet if treaty monitoring bodies succeed in convincing states that they are legally bound to relax domestic laws on abortion, non-law could potentially push state practice into a new norm of customary international law.³⁶

1. Inferring a Right to Abortion from the Right to Life

In 1948 the U.N. General Assembly unanimously voted to adopt the Universal Declaration of Human Rights (UDHR).³⁷ Although the UDHR is not binding per se, it provides the foundation for numerous international human rights treaties.³⁸ In addition, some

³³ See *supra* note 13.

³⁴ See Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259, 283-84 (2011) (“[I]t is safe to say that there really is no single international treaty or convention that is accepted universally and protects women’s right to reproductive choice, let alone abortion specifically. However, proponents of the recognition of such a right cobble together the provisions of the UDHR, CEDAW, ICCPR, and ICESCR to arrive at a rough approximation of legal support for the right.”).

³⁵ See *supra* note 7.

³⁶ See generally Zorzi, *supra* note 15 (describing the link between U.N. treaty monitoring bodies’ pro-abortion rights interpretations and national liberalization of abortion laws).

³⁷ The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR]; see also MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* xv (2001).

³⁸ LORI F. DAMROSCH AND SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* 936 (6th ed. 2014) (“The Declaration is not a treaty; it was not adopted as a treaty and was never submitted by states to their respective ratification processes.”). After the General Assembly adopted the UDHR,

parts of the UDHR, such as its prohibitions against state-sanctioned slavery and torture,³⁹ are regarded as reflective of customary international law.⁴⁰ Together, the UDHR, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights⁴¹ form the “International Bill of Human Rights.”⁴²

Article 3 of the UDHR states, “Everyone has the right to life, liberty and security of person.”⁴³ The right to life is established as international law through the ICCPR⁴⁴ and the Convention on the Rights of the Child (CRC).⁴⁵ A mother’s right to life is the most compelling argument in support of an inferred right to abortion, as any other right of the mother (such as the right to health, the right to privacy, or the right to be free from discrimination) should be understood as inferior to the unborn child’s competing right to life.⁴⁶ However, as argued below, there are significant weaknesses in the link between a mother’s right to life and a right to abortion.

“consensus emerged among states to convert its norms into an international human rights covenant that would have the binding force of law.” *Id.* at 937.

³⁹ UDHR, *supra* note 37, arts. 4-5.

⁴⁰ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 702(b), (d) (Am. Law Inst. 1987).

⁴¹ International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁴² HANNUM, *supra* note 27, at 137.

⁴³ UDHR, *supra* note 37, art. 3.

⁴⁴ International Covenant on Civil and Political Rights Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

⁴⁶ *See* Human Rights Committee, General Comment 6, art.6, ¶ 1 (16th session, 1982), <http://www.refworld.org/docid/45388400a.html> (“The right to life enunciated in article 6 of the Covenant . . . is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation. . . .”).

a. The Right to Life Under the ICCPR

Under Article 6(1) of the ICCPR, “Every human being has the inherent right to life.”⁴⁷ Article 6(1) further provides that the right to life “shall be protected by law [and] [n]o one shall be arbitrarily deprived of his life.”⁴⁸ In an effort to draw a link between a right to abortion and the right to life, pro-choice advocates and U.N. treaty monitoring bodies, offices, and agencies,⁴⁹ often cite statistics regarding maternal death resulting from unsafe abortions.⁵⁰ For example, a 2012 World Health Organization publication that refers to abortion as a human right states that each year, “[a]pproximately 47[,]000 pregnancy-related deaths are due to complications of unsafe abortion.”⁵¹ While this arresting statistic does establish the potential danger abortion poses to a mother’s life and health, it does not in itself support a nexus between a mother’s right to life and a right to abortion. The fact that a practice is dangerous does not justify categorizing it as a right. Indeed, many acts are *proscribed* by law because they are dangerous. Furthermore, given that abortion raises issues of a prenatal human being’s right to life, those who advocate for a right to abortion based on a mother’s right to life would do well to offset the prenatal person’s competing rights by providing statistics that directly link the risk of carrying a child to term with the mother’s right to life.⁵²

⁴⁷ ICCPR, *supra* note 44, art. 6(1).

⁴⁸ *Id.*

⁴⁹ *See supra* note 13.

⁵⁰ For example, Christina Zampas and Jaime Gher, both attorneys with the pro-choice Center for Reproductive Rights when they co-wrote *Abortion as a Right*, begin their article by stating, “Every year, at least 70,000 women die from complications related to unsafe abortions.” Zampas & Gher, *supra* note 7, at 250.

⁵¹ WORLD HEALTH ORGANIZATION, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 17 (2d ed. 2012), http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf [hereinafter *Safe Abortion*].

⁵² A 2012 study that was based on data collected between 1998 and 2005 stated that the mortality rate associated with childbirth was higher than the mortality rate associated with legal abortion. However, as the authors acknowledged, the study was subject to potentially significant weaknesses, such as an incomplete assessment of the underlying risks of abortion and childbirth, as well as possible erroneous analytic rules used in conducting the research. *See* Elizabeth

The experience and testimony of Dr. Anthony Levatino, an American obstetrician-gynecologist with over twenty years of experience, highlights the need to more closely examine the asserted link between abortion and a mother's right to life.⁵³ Dr. Levatino performed over 1,200 abortions prior to developing a personal conviction against the procedure.⁵⁴ In 2012, he testified before Congress that the typical high-risk obstetrics case involved a mother with "severe pre-eclampsia or toxemia."⁵⁵ Pre-eclampsia involves a dangerous spike in blood pressure that can result in a major stroke and therefore threaten the mother's life.⁵⁶ The only cure for pre-eclampsia is delivery of the baby.⁵⁷ It is "one of the more common pregnancy complications, affecting about 5 to 8 percent of all pregnancies in the United States" and usually occurs in the third trimester of pregnancy.⁵⁸ In his Congressional testimony, Dr. Levatino stated that "[i]n most such cases, any attempt to perform an abortion 'to save the mother's life' would entail undue and dangerous

G. Raymond and David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 215-19 (2012). *But see* David Reardon, Comment to *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, PUBMED.GOV (Mar. 5, 2014, 4:17 PM), <https://www.ncbi.nlm.nih.gov/myncbi/david.reardon.1/comments/> (noting the unreliability of Raymond and Grimes' "simple comparison of reported mortality rates" and failure to provide record linkage. Reardon also points out that Raymond and Grimes neglected to discuss significant research that reached contrary conclusions regarding the relative safety of childbirth and legal abortion.).

⁵³ Dr. Anthony Levatino, M.D., U.S. NEWS & WORLD REPORT, <http://health.usnews.com/doctors/anthony-levatino-394395> (last visited July 5, 2017).

⁵⁴ Bradford Richardson, *Video of Former Abortionist Describing Late-Pregnancy Abortion Goes Viral*, WASH. TIMES (Mar. 8, 2016), <http://www.washingtontimes.com/news/2016/mar/8/video-former-abortionist-describing-late-pregnancy/>.

⁵⁵ Sarah Terzo, *Former Abortionist: Abortion Is Never Medically Necessary to Save the Life of the Mother*, LIVE ACTION (Oct. 21, 2016, 10:53 AM), <https://www.liveaction.org/news/former-abortionist-abortion-is-never-medically-necessary-to-save-the-life-of-the-mother/>.

⁵⁶ *Id.*

⁵⁷ Shivani Patel, M.D., *Preeclampsia Can Strike Suddenly During Pregnancy*, UT SOUTHWESTERN NEWS (Sept. 29, 2015), <http://www.utswmedicine.org/stories/articles/year-2015/preeclampsia.html>.

⁵⁸ *Id.*

delay in providing appropriate, truly life-saving care.”⁵⁹ Accordingly, in hundreds of pre-eclampsia cases Dr. Levatino saved the mother’s life by “terminating” her pregnancy by delivering her baby via Cesarean section.⁶⁰ Dr. Levatino testified, “In all those cases, the number of unborn children that I had to deliberately kill was zero.”⁶¹

Over one thousand medical doctors, midwives, nurses, medical professors, and medical students agree with Dr. Levatino, stating, “As experienced practitioners and researchers in obstetrics and gynaecology, we affirm that direct abortion – the purposeful destruction of the unborn child – is not medically necessary to save the life of a woman.”⁶² This panel of medical professionals attests to the “fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child.”⁶³ An example of this rare situation is when uterine cancer requires a hysterectomy to save the mother’s life.⁶⁴ In such a case, the death of the child is foreseen, but is not a deliberate act itself; it is an unfortunate consequence of the mother’s life-saving medical care.⁶⁵ A fair discussion of abortion in the context of a mother’s right to life should incorporate medical considerations such as these.

⁵⁹ Terzo, *supra* note 55.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Daniel Wechter et al., *A Second Opinion: Response to 100 Professors*, 29 ISSUES L. & MED. 147, 150 (2014).

⁶³ *Id.*

⁶⁴ Right to Life, Submission to The Human Rights Committee for the General Discussion in Preparation for General Comment on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights, ¶ 7, n.2, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>, accessible under “Documentation,” “Written contributions for the half day of discussion” [hereinafter Right to Life HRC Submission].

⁶⁵ *Id.*; see also Wechter et al., *supra* note 62, at 150 (“[S]eparating the mother and fetus before fetal viability in life-threatening circumstances is distinct from elective abortion, since the purpose of the parturition is to hopefully produce both a living mother and a living fetus, but at least a living mother. There is no intent to produce a dead fetus.”)

b. Ireland's Inconsistent Interpretation of the ICCPR

In September 2015, the U.N. Human Rights Committee, the treaty monitoring body that declared in 2016 and 2017 that Ireland's abortion laws violated the ICCPR, published Draft General Comment No. 36, in which it asserted a pro-abortion rights interpretation of Article 6 (right to life) of the ICCPR.⁶⁶ The draft comment states:

Unlike the American Convention on Human Rights, the Covenant does not explicitly refer to the rights of unborn children, including to their right to life. In the absence of subsequent agreements regarding the inclusion of the rights of the unborn within article 6 and in the absence of uniform State practice which establishes such subsequent agreements, the Committee cannot assume that article 6 imposes on State parties an obligation to recognize the right to life of unborn children.⁶⁷

The HRC stated that because the ICCPR does not explicitly refer to the rights of unborn children, such rights cannot be assumed. The Committee is selective in their use of this approach to treaty interpretation; for neither does the ICCPR speak of a "right to abortion," and yet the Committee reads such a right into Article 6, stating:

States parties whose laws generally prohibit voluntary terminations of pregnancy *must, nonetheless, maintain legal exceptions for therapeutic abortions* necessary for protecting the life of mothers, inter alia by not exposing them to serious health risks, and for

⁶⁶ U.N. Human Rights Committee, Draft General Comment No. 36: Article 6 (Right to Life), ¶ 7, U.N. Doc. CCPR/C/GC/R.36/Rev.2 (Sept. 2, 2015), available at <http://www.achrweb.org/reports/india/The-Right-to-life.pdf> [hereinafter Draft General Comment No. 36].

⁶⁷ *Id.*

situations in which carrying a pregnancy to term would cause the mother severe mental anguish. . . .⁶⁸

The severe mental anguish that a woman suffers in a pregnancy that comes about through rape or incest cannot be denied. However, “severe mental anguish” is a subjective term that could be used to justify abortions in situations in which the domestic laws of a state party forbid it, such as when the pregnancy does not threaten the mother’s life. In addition, an honest discussion of the severe mental harm associated with carrying an unwanted baby to term must also consider the severe mental harm that mothers often experience after an abortion.⁶⁹ For example, two studies from Finland, a nation with relatively liberal abortion laws, including abortion for socio-economic reasons,⁷⁰ found that women who aborted were nearly six times more likely to commit suicide than those who had given birth.⁷¹

While Draft Comment 36 claims that states parties to the ICCPR “must” provide for abortions, its comments are not binding.⁷² Furthermore, the only authority the HRC cites for its interpretation of the right to life is a list of its own non-binding concluding observations, all of which advocate for a loosening of

⁶⁸ *Id.* ¶ 7 (emphasis added).

⁶⁹ *See infra* notes 69-71 and accompanying text.

⁷⁰ WORLD ABORTION POLICIES 2013, U.N., DEPT. OF ECONOMIC AND SOCIAL AFFAIRS POPULATION DIVISION (2013), http://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013_WallChart.pdf.

⁷¹ Americans United for Life, Letter to the United Nations Human Rights Committee re: Draft General Comment No. 36 (June 11, 2015), <http://www.aul.org/wp-content/uploads/2015/10/06-11-2015-UN-letter-AUL.pdf> [hereinafter AUFL UNHRC Letter] citing Mika Gissler et al., Suicides After Pregnancy in Finland, 1987-94, 313 BRIT. MED. J. 1431, 1432 (1996); Mika Gissler, et al., Injury Deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987-2000, 15 EUROPEAN J. PUB. HEALTH 459, 460 (2005)). AUFL’s letter lists hundreds of studies regarding the harm that abortion causes the mother’s health, including harm to her mental health that culminates in suicide.

⁷² *See* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1840 (citing Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 351 (1997) (discussing the “expressly nonbinding nature of Committee’s decisions”)).

states parties' domestic restrictions on abortion, and a non-binding World Health Organization publication that likewise unilaterally classifies abortion as a right.⁷³

c. The Right to Life Under the CRC

The Convention on the Rights of the Child (CRC), like the ICCPR, explicitly acknowledges the right to life. Under Article 6 of the CRC, “States Parties recognize that every child has the inherent right to life . . . [and] shall ensure to the maximum extent possible the survival and development of the child.”⁷⁴ The Convention defines “child” as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁷⁵

Like the HRC, the Committee on the Rights of the Child, the treaty monitoring body for the CRC, has issued concluding observations that infer a mother’s right to abortion, in this case an adolescent mother, from her right to life.⁷⁶ For example, in March 2016 the Committee on the Rights of the Child published its Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland, in which the Committee called upon the country to “[d]ecriminalize abortion *in all circumstances* and review its legislation with a view to *ensuring access by children to safe abortion and post-abortion care services. . .*”⁷⁷ The CRC Committee is but one of

⁷³ See Draft General Comment No. 36, nn.11-18, 20.

⁷⁴ CRC, *supra* note 45, art. 6.

⁷⁵ *Id.*, art. 1.

⁷⁶ Pro-choice advocates have likewise asserted a right to abortion via Article 6 of the CRC. See, e.g., Zampas & Gher, *supra* note 7, at 259-60 (advocating for a “right to abortion” for adolescent mothers under the CRC and noting concluding observations of the Committee on the Rights of the Child).

⁷⁷ Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Period Reports of Ireland, CRC/C/IRL/CO/3-4, 1 Mar. 2016, ¶ 58(a), http://tbinternet.ohchr.org/_layouts/treatybody_external/Download.aspx?symbolno=CRC/C/IRL/CO/3-4&Lang=En [hereinafter CRC 2016 Concluding Observations on Ireland] (emphasis added).

five U.N. treaty monitoring bodies that has pressured Ireland to change its constitutional law regarding abortion.⁷⁸

The inference of a mother's right to abortion is in direct conflict with strong textual arguments against a right to abortion under the CRC and in favor of the CRC's protection of the unborn person's right to life. First, neither the text nor the travaux préparatoires ("travaux") of the CRC refer to a right to abortion.⁷⁹ According to human rights scholars, and contrary to the views of the Committee on the Rights of the Child, the drafters of the CRC intentionally did not take a position on abortion, recognizing that the states parties' domestic legislation on the matter would vary.⁸⁰ As Professor David Stewart stated, "[a] credible effort was made during the drafting process to ensure that the Convention is 'abortion neutral.'"⁸¹ Second, in spite of indications of abortion neutrality in the travaux, the preamble explicitly indicates that the Convention's protections extend to the unborn, stating, "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."⁸²

⁷⁸ Fiona De Londras, *Fatal Foetal Abnormality, Irish Constitutional Law, and Mellet v Ireland*, 24 MED L. REV. 591 (2016) (referencing concluding observations and comments by the HRC; Committee on Economic, Social and Cultural Rights; CEDAW Committee; Committee on the Rights of the Child, and the Committee Against Torture).

⁷⁹ Thomas Finegan, *Article: International Human Rights Law and the "Unborn": Texts and Travaux Préparatoires*, 25 TUL. J. INT'L & COMP. L. 89, 121 (2016) ("Furthermore, neither the text nor the travaux gives any indication that the UNCRC contains a right to abortion).

⁸⁰ See Rutkow & Lozman, *supra* note 31, at 186 ("The CRC does not take a position on family planning or abortion issues. Most observers assume that the CRC's authors deliberately left the CRC's provisions on family planning open to interpretation by each of the ratifying States Parties.>").

⁸¹ Stewart, *supra* note 31, at 178.

⁸² CRC, *supra* note 45, pmbl; see *infra* Section IV.A.1.c regarding the right to life for the unborn under the CRC; see also Abby F. Janoff, *Note: Rights of the Pregnant Child Vs. Rights of the Unborn Under the Convention on the Rights of the Child*, 22 B.U. INT'L L.J. 163, 165 (2004) (stating that "[t]he Convention's textual ambiguity calls into question the legality of abortion under the Convention. . ."). The author nonetheless argues that, based on the non-binding views of the Committee and decisions of regional human rights bodies, which are not binding on non-parties to

2. Inferring a Right to Abortion from the Right to Health

U.N. treaty committees and various U.N. agencies and offices have also sought to infer a right to abortion from the right to health, which states parties to five U.N. human rights treaties have agreed to ensure their citizens.⁸³ In support of the inference of a right to abortion from the mother's right to health, pro-choice advocates and the U.N. often refer to the Programme of Action that was adopted at the 1994 International Conference on Population and Development (ICPD) in Cairo.⁸⁴ The Programme of Action is not binding; even if it were, it does not provide convincing support for inferring a right to abortion from the right to health.⁸⁵ On the contrary, it contains strong language *against* abortion:

the regional human rights treaties, “under the Convention, the rights of a pregnant child trump the rights of a fetus.” *Id.* at 164, 176. The Vienna Convention on the Law of Treaties does consider “subsequent practice” to be a valid consideration for treaty interpretation. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. However, the “subsequent practice” to which the VCLT refers is not the subsequent practice of U.N. treaty committees or regional human rights judiciaries, but rather that of the states parties to the particular U.N. treaties at issue. The VCLT states that, in interpreting treaties, “[t]here shall be taken into account, together with the context . . . any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” *Id.*

⁸³ The right to health is recognized under the CRC, ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (Disabilities Convention), and the Convention on the Elimination of All Forms of Racial Discrimination. See Stephen P. Marks, *Normative Expansion of the Right to Health and the Proliferation of Human Rights*, 49 GEO. WASH. INT'L L. REV. 97, n.14 (2016).

⁸⁴ Zampas & Gher, *supra* note 7, at 268 (citing Report of the International Conference on Population and Development, Cairo, 5-13 Sept. 1994, A/CONF.171/13/Rev.1 (1995), Chapter VIII C. Women's Health and Safe Motherhood, ¶ 8.25).

⁸⁵ See Ligia M. De Jesus, *Treaty Interpretation of the Right to Life Before Birth by Latin American and Caribbean States: An Analysis of Common International Treaty Obligations and Relevant State Practice at International Fora*, 26 EMORY INT'L L. REV. 599, 619-20 (2012) (“Contrary to common misconceptions, CEDAW . . . and other international, non-binding instruments, such as the Cairo and Beijing international conferences, do not create abortion rights.”).

*In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family-planning services. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion. Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. Any 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. In circumstances where abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeat abortions.*⁸⁶

As Harvard professor Mary Ann Glendon said, "One would hardly say of an important right like free speech, for example, that governments should reduce it, eliminate the need for it, and help avoid its repetition."⁸⁷ Not only did the Cairo conference delegates

⁸⁶ Rep. of the Int'l Conference on Population and Development, Cairo, 5-13 Sept. 1994, A/CONF.171/13/Rev.1 (1995), 244 ¶ 63(i), http://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf (emphasis added) [hereinafter Cairo Conference]. It should be noted that the statement "Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion" refers to contraception, meaning the prevention of pregnancy through conception, as opposed to the termination of a conceived human being through abortion.

⁸⁷ Mary Ann Glendon, *What Happened at Beijing*, FIRST THINGS (Jan. 1996), <https://www.firstthings.com/article/1996/01/005-what-happened-at-beijing> [hereinafter Glendon, *What Happened at Beijing*]; see also De Jesus, *supra* note 85, at

not agree to a right to abortion, some countries explicitly stated their opposition to such a right in reservations they added to the conference outcome document.⁸⁸

In 2015, the U.N. Office of the High Commissioner for Human Rights (OHCHR) launched the Information Series on Sexual and Reproductive Health and Rights, in which the Office sought to infer a right to abortion from the right to health.⁸⁹ The section on abortion states, “Ensuring access to [abortion] in accordance with human rights standards is part of State obligations to . . . ensure women’s right to health as well as other fundamental human rights.”⁹⁰ In support of this proposition, the OHCHR references non-binding treaty committee communications and the Cairo ICPD Programme of Action, in spite of its clear language against abortion.⁹¹

Like the OHCHR, the Committee on the Rights of the Child has asserted a right to abortion through the right to health. Under

620 (“Even though the outcome documents for the international conferences of Cairo and Beijing, . . . (the nature of which is entirely non-binding), are often cited as authorities supporting the creation of international abortion rights, neither document comes close to doing so”).

⁸⁸ See William L. Saunders, *Neither by Treaty, Nor by Custom: Through the Doha Declaration, the World Rejects Claimed International Rights to Abortion and Same-Sex Marriage, Affirming Traditional Understandings of Human Rights*, 9 GEO. J.L. & PUB. POL’Y 67, 88-89 (2011).

⁸⁹ OHCHR, LAUNCH OF THE INFORMATION SERIES ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (2015), <http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/Flyer%20Launch%20Event%20Information%20Series%20SRHR%20final.pdf> (emphasis added).

⁹⁰ OHCHR, INFORMATION SERIES ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS: ABORTION, http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf.

⁹¹ *Id.* The OHCHR also cited the non-binding Beijing Platform for Action, which was adopted at the 1995 Fourth World Conference on Women, stating “in circumstances where abortion is not against the law, health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible. Additional measures should be taken to safeguard women’s health.” *Id.* at 1. As with the Cairo Programme of Action, this statement does not establish a right to abortion as inferred by a woman’s right to health. On the contrary, it indicates that abortion is illegal in some nations and may threaten a woman’s health.

Article 24 of the CRC, “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health [and] . . . shall strive to ensure that no child is deprived of his or her right of access to such health care services.”⁹² However, as discussed in *infra* Section IV.A.1.c, interpreting Article 24 to include a right to abortion conflicts with the CRC preamble’s explicit reference to the vulnerability of unborn children in describing the rationale for the CRC’s protections.

The Committee on the Rights of the Child did not mention the CRC’s reference to protection for unborn children in its 2016 concluding observations on Ireland, in which it criticized Ireland’s domestic abortion law which allows for abortion only when pregnancy poses a “real and substantial risk” to the mother’s life.⁹³ In spite of Ireland’s sovereign decision to balance the rights of the unborn child against the rights of the mother, the Committee recommended that Ireland “[d]ecriminalize abortion in all circumstances and review its legislation with a view to *ensuring access by children to safe abortion. . .*”⁹⁴ By stating that Ireland’s CRC obligations required that the government “ensure access” to abortions, the Committee effectively read a right to abortion into the CRC’s right to health. In order to fulfill this right, Ireland would need to ensure sufficient abortion providers and facilities—measures that Ireland, whose Constitution explicitly protects unborn life, certainly did not anticipate when it ratified the CRC.⁹⁵ Moreover, requiring medical practitioners to provide abortion services could violate their explicit right to freedom of thought, conscience, and religion under Article 18 of the ICCPR, to which Ireland is a party, as well as freedom of opinion and expression under Article 19 of the ICCPR.

⁹² CRC, *supra* note 45, art. 24(1).

⁹³ CRC 2016 Concluding Observations on Ireland, *supra* note 77, ¶ 57.

⁹⁴ *Id.* ¶ 58(a) (emphasis added).

⁹⁵ *See infra* text corresponding to notes 101-10 (quoting the treaty monitoring bodies for the CEDAW and the International Covenant on Economic, Social and Cultural rights as requiring states to subordinate the conscientious objection of medical providers to those seeking to exercise an inferred right to abortion).

In addition to the OHCHR and the Committee on the Rights of the Child, the treaty monitoring body for the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁹⁶ has also asserted a right to abortion from the right to health. Article 12 of CEDAW states:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.⁹⁷

Although Article 12 of the CEDAW contains no reference to abortion, and the travaux of CEDAW demonstrate that the drafters did not consider “family planning” or other CEDAW terminology to create a right to abortion, “[t]he CEDAW Committee regularly appeals to Article 12(1) of CEDAW to support abortion rights.”⁹⁸ In fact, among the U.N. treaty monitoring bodies, the CEDAW Committee “is perhaps the most insistent on a human right to abortion,”⁹⁹ having criticized over one hundred states parties’ domestic restrictions on abortion on the basis of non-binding U.N. publications.¹⁰⁰ For example, in 2014 the CEDAW Committee, in

⁹⁶ Convention on the Elimination of All Forms of Discrimination Against Women, art. 11.1(f), Dec. 21, 1965, U.N. Doc. A/34/46, 1249 U.N.T.S. 13; 19 I.L.M. 33 [hereinafter CEDAW].

⁹⁷ *Id.* art. 12(1), (2).

⁹⁸ Finegan, *supra* note 79, at 124-25.

⁹⁹ *Id.* at 124; *see also* Joanne Pedone & Andrew R. Kloster, *New Proposals for Human Rights Treaty Body Reform*, 22 J. TRANSNAT’L L. & POL’Y 29, 50-52 (2012-2013) (“The clearest example of [the CEDAW Committee’s] overstepping can be seen in the context of abortion.”).

¹⁰⁰ *See* Pedone & Kloster, *supra* note 99, at 52 (stating that the CEDAW Committee has “criticized well over eighty nations for having restrictions on abortion, based on the authority of its very own General Recommendation

connection with a woman's right to health, recommended that Peru "[e]nsure the availability of abortion services" and "[e]nsure that the exercise of conscientious objection by health professionals does not impede effective access by women to reproductive health-care services, *including abortion*."¹⁰¹ Considering that the ICCPR, to which Peru is a party,¹⁰² explicitly guarantees the right to freedom of conscience, and neither the text of the CEDAW nor its travaux provide for a right to abortion, the CEDAW Committee's interpretation raises significant concerns that the Committee has overstepped its treaty mandate.¹⁰³

In line with pro-abortion rights efforts by the OHCHR, the CRC Committee, and the CEDAW Committee, the Committee on Economic, Social, and Cultural Rights (CESCR), which oversees state party compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), published in 2016 General Comment No. 22, which sought to interpret the ICESCR's right to sexual and reproductive health to include a right to abortion.¹⁰⁴ Like the CEDAW Committee, the CESCR even went so far as to assert that states parties were required to ensure that the "[u]navailability of goods and services due to ideologically based policies or practices, such as the refusal to provide services based on conscience, . . . not be a barrier to accessing [abortion] services."¹⁰⁵ The CESCR would specifically require states to supply "[a]n adequate number of health-

Number 24.'). A more recent publication accounts for subsequent instances of the Committee's admonishments. *See* De Jesus, *supra* note 85, at 623.

¹⁰¹ CEDAW, Concluding observations on the combined seventh and eighth periodic reps. of Peru, P 36(d), U.N. Doc. CEDAW/C/PER/CO/7-8 (July 24, 2014) ¶¶ 36(b), (d), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/PER/CO/7-8&Lang=En (emphasis added).

¹⁰² *See Status of Ratification, Peru*, OHCHR, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited Feb. 23, 2018).

¹⁰³ *See infra* Section III.B; *see also* Pedone & Kloster, *supra* note 99, at 49-54.

¹⁰⁴ Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No. 22 on the Right to Sexual and Reproductive health (Art. 12 of the ICESCR), P 28, U.N. Doc. E/C.12/GC/22 (Mar. 4, 2016), <https://www.escr-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health> [hereinafter CESCR General Comment No. 22].

¹⁰⁵ *Id.* ¶ 14.

care providers willing and able to provide [abortion] . . . in both public and private facilities.”¹⁰⁶ In addition to public and private healthcare practitioners and facilities, the Committee also stated that the inferred right to abortion required states to prohibit conscientious objections of private health insurance companies.¹⁰⁷ According to the CESCR, state parties’ duty to fulfill the “right to abortion” would also require the “adopt[ion] [of] appropriate legislative, administrative, budgetary, judicial, promotional and other measures. . . .”¹⁰⁸ Perhaps most troubling of all is the Committee’s suggestion that states must “take affirmative measures to eradicate social barriers in terms of norms *or beliefs* that inhibit individuals of different ages and genders, women, girls and adolescents from autonomously exercising their right to sexual and reproductive health,”¹⁰⁹ which the Committee interprets to include a right to abortion.¹¹⁰ If the CESCR’s standard were to be strictly enforced, religious organizations, and even individuals, would presumably be prohibited from communicating their belief that abortion is the termination of a human being, in spite of treaty-affirmed rights to freedom of opinion and expression.

To support its pro-abortion rights interpretation of the right to sexual and reproductive health, the CESCR does not cite a treaty, or even a U.N. consensus document, but rather a resolution adopted by the Committee of Ministers of the Council of Europe—hardly a fair representation of the global views regarding abortion, and certainly not binding on many ICESCR states.¹¹¹ Moreover, the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 60.

¹⁰⁸ *Id.* ¶ 45.

¹⁰⁹ *Id.* ¶ 48.

¹¹⁰ *Id.* ¶¶ 28, 34 (“A wide range of laws, policies and practices undermine the autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or *restrictive abortion laws*.”) (emphasis added).

¹¹¹ *Id.* at n.21.

CESCR is not authorized to judge state party compliance on the basis of anything but the ICESCR's requirements.¹¹²

The CEDAW Committee has likewise cited non-binding European standards in support of its effort to create a right to abortion. For example, in 2000 the Committee criticized Luxembourg's abortion laws, which the Committee considered "anachronistic."¹¹³ The CEDAW Committee further stated "that the Government appear[ed] to lack the commitment to review and adapt this legislation to changing attitudes and developments in the European region."¹¹⁴ At the time, Luxembourg allowed for abortion when a physician determined the procedure was necessary to preserve a woman's life or health, as well as in cases where the pregnancy was the result of rape or incest.¹¹⁵ Luxembourg also permitted abortion on the basis of fetal impairment, and even social or economic considerations.¹¹⁶ Evidently the CEDAW Committee was not satisfied, as Luxembourg's domestic laws did not allow abortion on demand.¹¹⁷

Nowhere in the CEDAW treaty mandate is the Committee authorized to pressure a state to accommodate the "changing attitudes and developments" within a region, particularly on the basis of a right that does not expressly appear in international law. Furthermore, the Committee's censure arguably violated the U.N. Charter's prohibition against intervention in matters exclusively within national jurisdiction, such as abortion.¹¹⁸ Nonetheless, in 2012 Luxembourg changed its laws on abortion at least in part because of

¹¹² Pedone & Kloster, *supra* note 99 at 42 (quoting a former HRC member as stating that this practice "rais[es], at a minimum, issues of mandate and competency").

¹¹³ Rep. of the Committee on the Elimination of Discrimination against Women: Concluding Comments by the Committee: Germany, U.N. Committee on the Elimination of Discrimination against Women, 22nd Sess., P 318, U.N. Doc. A/55/38 (2000) ¶ 406, <http://www.un.org/womenwatch/daw/cedaw/reports/a5538.pdf>.

¹¹⁴ *Id.*

¹¹⁵ Zorzi, *supra* note 15, at 409.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *supra* notes 30-32 and accompanying text.

the pressure from the CEDAW Committee to conform to European norms.¹¹⁹

Like the OHCHR, the World Health Organization (WHO), a specialized U.N. agency,¹²⁰ has contributed to the U.N. treaty monitoring bodies' "[c]onsiderable normative expansion . . . [of] reproductive health and rights."¹²¹ In 2012, the WHO published the second edition of *Safe Abortion: Technical and Policy Guidance for Health Systems*.¹²² The publication asserts that "[t]he fulfilment of human rights requires that women can access safe abortion when it is indicated to protect their health."¹²³ In support of this proposition, the WHO cites an extensive list of non-binding treaty committee general comments and concluding observations, as well as the Maputo Protocol, which applies only to the specific African nations that have ratified that treaty.¹²⁴

In spite of the absence of a right to abortion in international law, the WHO, like the CESCR and the CEDAW Committee, goes so far as to suggest that the inferred right trumps explicitly guaranteed rights to freedom of thought, conscience, and religion, and even requires states to force unwilling healthcare providers to perform abortions, stating:

While the right to freedom of thought, conscience, and religion is protected by international human rights law, international human rights law also stipulates that freedom to manifest one's religion or beliefs might be subject to limitations necessary to protect the fundamental human rights of others.

¹¹⁹ Zorzi, *supra* note 15, at 410.

¹²⁰ *Funds, Programmes, Specialized Agencies and Others*, UNITED NATIONS, <http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/> (last visited Feb. 19, 2018).

¹²¹ Marks, *supra* note 83, at 110.

¹²² *See generally* Safe Abortion, *supra* note 51.

¹²³ *Id.* at 92; *see also id.* at 64 ("Abortion laws and services should protect the health and human rights of all women, including adolescents. . . . Emergency treatment of abortion complications . . . cannot replace the protection of women's health and their human rights afforded by safe, legal induced abortion.").

¹²⁴ *Id.* at 99, n.9.

Therefore laws and regulations should not entitle providers and institutions to impede women's access to lawful health services. Health-care professionals who claim conscientious objection must refer the woman to another willing and trained provider in the same, or another easily accessible health-care facility, in accordance with national law. Where referral is not possible, *the health-care professional who objects must provide abortion to save the woman's life or to prevent damage to her health.*¹²⁵

Exactly how a state might force an objecting healthcare professional to provide an abortion is unclear.¹²⁶ The WHO provides no practical suggestions.

Despite efforts by NGOs and U.N. treaty monitoring bodies, agencies, and offices to establish a right to abortion through the right to health, in 2011 Thoraya Obaid, upon completing ten years as executive director of the U.N. Population Fund, stated, "We, UNFPA, are mandated to consider abortion within the context of public health, but never as a right, as some NGOs do. . . . Abortion is a national issue to be decided by national laws and legislations."¹²⁷ She could have added "and U.N. treaty monitoring bodies, agencies, and offices" after "NGOs."

3. Inferring a Right to Abortion from Other Rights

In addition to the right to life and the right to health, U.N. treaty committees have sought to infer a right to abortion from the right to be free from torture and from cruel, inhuman or degrading treatment, the right to privacy, the right to equality before the law,

¹²⁵ *Id.* at 96 (internal citations omitted) (emphasis added).

¹²⁶ The WHO's troubling suggestion is not entirely unprecedented. In 2015 Sweden attempted to force a Christian midwife to perform abortions. *See Swedish Anti-Abortion Midwife Loses Court Case*, BBC NEWS (Apr. 13, 2017), <http://www.bbc.com/news/world-europe-39587154>.

¹²⁷ Katherine Marshall, *Navigating the Turbulent Waters of Religion and Women's Rights: An Interview with Thoraya Obaid*, HUFFINGTON POST (Jan. 15, 2011), https://www.huffingtonpost.com/katherine-marshall/courageous-in-navigating-_b_806313.html.

and the equal right of men and women to the enjoyment of all civil and political rights.¹²⁸

a. The Right to Freedom from Torture and CIDTP

The ICCPR and the Convention Against Torture (CAT) obligate states parties to protect their citizens from torture and “cruel, inhuman or degrading treatment or punishment” (CIDTP).¹²⁹ While neither the ICCPR nor the CAT mention abortion, the HRC and the Committee Against Torture, the treaty monitoring body for the CAT, have asserted that numerous states parties have violated their obligation to prevent CIDTP because of domestic restrictions against abortion.¹³⁰ The HRC’s 2016 decision in *Mellet v. Ireland*¹³¹ and

¹²⁸ See, e.g., Views of the Human Rights Comm., Comm’n No. 1608/2007, L.M.R. v. Argentina, P 8.5, 9.4, 10 U.N. Doc. CCPR/C/101/D/1608/2007 (Apr. 28, 2011) (finding that Argentina had violated Article 2 of the ICCPR (failure to provide judicial remedy) in connection with Article 3 of the ICCPR (the “equal right of men and women to the enjoyment of all civil and political rights”) on account of the fact that only women could potentially have abortions and therefore Argentina’s prohibition against the procedure amounted to discriminatory treatment against the author of the communication). The WHO would expand upon this list of human rights bases for an inferred right to abortion, stating that, in addition to the aforementioned rights, states that do not “provide comprehensive sexual and reproductive health information and services to women and adolescents, eliminate regulatory and administrative barriers that impede women’s access to safe abortion services and provide treatment for abortion complications . . . may not meet their treaty and constitutional obligations to respect, protect and fulfil the right to . . . confidentiality, information and education.” Safe Abortion, *supra* note 51, at 88 (emphasis added).

¹²⁹ ICCRP, *supra* note 44, art. 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2(1), 16(1) Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

¹³⁰ See Alyson Zureick, *(En)Gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment*, 38 FORDHAM INT’L L.J. 99, 100-101, 125-131 (2015), stating: International law has long considered the regulation of abortion to be a prerogative of the State. In recent years, however, international human rights bodies have begun to consider the conformity of domestic abortion regulations with States’ human rights obligations [and examining a] trend among human rights bodies: namely, their willingness to find that denying or obstructing a woman’s access to abortion can amount to cruel, inhuman, or degrading treatment (“CIDT”) under multiple human rights treaties. *Id.* at 100.

¹³¹ *Mellet v. Ireland*, *supra* note 1, ¶ 7.4.

its 2017 nearly identical decision in *Whelan v. Ireland*¹³² provide recent examples of this practice.

Mellet v. Ireland involved a woman who desired to have an abortion when she discovered, in her twenty-first week of pregnancy, that her baby had a congenital heart defect that would result in the baby's death "in utero or shortly after birth."¹³³ Given that Ireland's laws did not permit abortion in Ms. Mellet's situation, she traveled to England to terminate her baby's life.¹³⁴ Citing only its own non-binding general comment, the HRC found that because Ireland permits abortion only when necessary to save the mother's life, "the State party had subjected Ms. Mellet to conditions of intense physical and mental suffering."¹³⁵ The bases for the HRC's finding were essentially the facts that Ms. Mellet had to travel to England to obtain the abortion; that she experienced "shame and stigma associated with the criminalization of abortion of a fatally ill foetus;" and that she had to cover her own expenses for the trip and procedure.¹³⁶ In spite of Ireland's explicit legal protection of unborn life, the HRC did not discuss how Ms. Mellet's twenty-three-week-old fetus, who had a heartbeat and was capable of experiencing pain, may have suffered torture or cruel, inhuman, or degrading treatment on account of the feticide's impact on the unborn baby's body.¹³⁷

¹³² *Whelan v. Ireland*, *supra* note 5, ¶ 7.7.

¹³³ *Mellet v. Ireland*, *supra* note 1, ¶ 2.1.

¹³⁴ *Id.* ¶ 2.2.

¹³⁵ *Id.* ¶ 7.4.

¹³⁶ *Id.*

¹³⁷ *Mellet v. Ireland*, *supra* note 1, ¶ 2.3. According to "[a] wealth of anatomical, behavioral and physiological evidence . . . the developing human fetus is capable of experiencing tremendous pain by 20 weeks post-fertilization." Doctors on Fetal Pain, <http://www.doctorsonfetalpain.com/fetal-pain-the-evidence/> [hereinafter Doctors on Fetal Pain]. As medical doctors have explained, [p]ain receptors are present throughout the unborn child's entire body by no later than 16 weeks after fertilization, and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks. For unborn children, says Dr. Paul Ranalli, a neurologist at the University of Toronto, 20 weeks is a "uniquely vulnerable time, since the pain system is fully established, yet the higher level pain-modifying system has barely begun to develop." As a result, unborn babies at this age probably feel pain more intensely than adults. *Id.* Furthermore, [b]y 8 weeks after fertilization, the unborn child reacts to touch. By 20 weeks post-fertilization,

b. The Right to Privacy

In *Mellet v. Ireland*, the HRC also found that Ireland had violated its obligation to not arbitrarily interfere with Ms. Mellet's right to privacy.¹³⁸ Article 17 of the ICCPR states, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation [and] [e]veryone has the right to the protection of the law against such interference or attacks."¹³⁹ The HRC "consider[ed] that the balance that Ireland has chosen to strike between protection of the foetus and the rights of the woman in this case [could not] be justified," and by not providing Ms. Mellet with an abortion in Ireland, the state party caused an unreasonable and arbitrary violation of her Article 17 right to privacy.¹⁴⁰ As with its pro-abortion interpretation of the right to freedom from CIDTP, the HRC cited only its own non-binding publications to support its finding that "a woman's decision to request termination of pregnancy" is inferred by her right to privacy.¹⁴¹

c. The Right to Equality Before the Law (Non-Discrimination)

Article 26's prohibition against discrimination was the third basis upon which the HRC determined that Ireland had violated its ICCPR obligations in not providing Ms. Mellet with an abortion. Article 26 states:

the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human—for example, by recoiling. Surgeons entering the womb to perform corrective procedures on unborn children have seen those babies flinch, jerk and recoil from sharp objects and incisions. In addition, ultrasound technology shows that unborn babies at 20 weeks and earlier react physically to outside stimuli such as sound, light and touch. *Id.* See also *infra* notes 258-63 and accompanying text.

¹³⁸ *Mellet v. Ireland*, *supra* note 1, ¶ 7.8.

¹³⁹ ICCPR, *supra* note 44, art. 17.

¹⁴⁰ *Mellet v. Ireland*, *supra* note 1, ¶ 7.8.

¹⁴¹ *Id.* ¶ 7.7. The HRC came to the same conclusion in *Whelan v. Ireland*. See *Whelan v. Ireland*, *supra* note 5, ¶ 7.9 (citing the HRC's non-binding decision in *Mellet v. Ireland*).

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law . . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴²

With respect to discrimination based on gender, the HRC “note[d] the author’s claim that Ireland’s criminalization of abortion subjected her to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination.”¹⁴³ The Committee did not further elaborate on, or provide its own analysis of, the connection between a right to abortion and gender discrimination. Certainly, carrying a child to term impacts the mother in ways that the father cannot experience physically, mentally, or socially. However, as the HRC itself stated, discrimination involves a “differentiation of treatment.”¹⁴⁴ In denying Ms. Mellet an abortion, Ireland did not treat Ms. Mellet differently than it treats male citizens by, for example, depriving her of a state job or medical coverage because of her pregnancy. Ireland does not permit the termination of human life in utero under any circumstances other than when the mother’s life is determined to be in jeopardy. Ireland is not responsible for the fact that only women are biologically capable of carrying a child, and it certainly did not discriminate against Ms. Mellet on the basis of her gender in denying her an abortion.

The HRC also found that Ireland’s denial of an abortion in Ms. Mellet’s case constituted discrimination on the basis of socio-economic circumstances. Specifically, Ireland’s public health system would have covered Ms. Mellet’s medical expenses if she had carried

¹⁴² ICCRP, *supra* note 44, art. 26.

¹⁴³ *Id.*

¹⁴⁴ *Mellet v. Ireland*, *supra* note 1, ¶ 7.11 (“[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”).

her baby to term, but she had to pay out of pocket for the costs of traveling to and having an abortion in England.¹⁴⁵ However, Ireland does not provide abortions to *any person* under Ms. Mellet's circumstances. The fact that Ms. Mellet had to cover her own expenses to procure in another country a procedure that was illegal under her own nation's laws did not establish differentiation of treatment. Accordingly, as with its gender discrimination analysis, the Committee did not satisfy its own "differentiation of treatment" criteria with respect to discrimination on the basis of socio-economic status. As HRC member Anja Seibert-Fohr stated in her partial dissent in the *Mellet* matter, as well as in the nearly identical 2017 *Whelan* matter, "Difference in treatment requires comparable situations in order to give rise to discrimination."¹⁴⁶

B. Customary International Law Does Not Establish a Right to Abortion

In addition to treaties, "international custom, as evidence of a general practice accepted as law," forms the second of the two primary sources of international law.¹⁴⁷ The Restatement provides the classic definition of customary international law (CIL), stating, "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."¹⁴⁸ As discussed below, the "general and consistent practice of states" does not affirm abortion as a human right.¹⁴⁹

¹⁴⁵ *Id.* ¶ 7.10.

¹⁴⁶ *Mellet v. Ireland*, *supra* note 1, ¶ 4; *Whelan v. Ireland*, *supra* note 5, at 22, ¶ 4.

¹⁴⁷ ICJ Statute, *supra* note 20, art. 38(1)(b).

¹⁴⁸ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (Am. Law Inst. 1987).

¹⁴⁹ *See* Saunders, *supra* note 88, at 81 ("despite the frequent representations of pro-abortion . . . advocates [regarding a right to abortion], international law--customary or otherwise--does not actually support their claims or objectives"); *see also* De Jesus, *supra* note 85, at 618 ("[N]o international norm of customary international law recognizes a human right to take the life of an unborn child through abortion or mandates the legalization of abortion.").

When states ratify human rights treaties, they agree to give the rights contained therein effect in their national legislation. For example, Article 2 of the ICCPR provides:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.¹⁵⁰

If states considered themselves bound by treaties or customary international law to provide access to abortion, their domestic laws would reflect that belief, and their courts would hold accountable those who restrict others from obtaining an abortion. A global survey of domestic legislation on abortion, however, reflects an inconsistency that unravels any claim to a right to abortion as a matter of CIL,¹⁵¹ other than a possible regional custom in Africa.¹⁵² States' laws range from absolute prohibitions against abortion under any circumstances to allowing abortion on demand (simply because the mother does not want the baby) up to a certain point of the pregnancy.¹⁵³ In fact, as discussed in *infra* Section V.B, because of the

¹⁵⁰ ICCPR, *supra* note 44, art. 2(2).

¹⁵¹ Barbara Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict Between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. OF WOMEN & L. 271, 306 (2017) (“The parameters for allowable abortion vary drastically from country to country.”); *see also* Pedone & Kloster, *supra* note 99, at 50 (“International consensus on the topic has proven impossible because countries hold widely divergent views. Consequently, the negotiation of many international human rights treaties that could address abortion, even tangentially, has resulted in an agreement to reserve the issue for states to resolve individually.”); Eliza Mackintosh, *Abortion Laws Around the World: From Bans to Personal Choice*, CNN (Jan. 25, 2017), <http://www.cnn.com/2017/01/25/health/abortion-laws-around-the-world/> (“Abortion laws vary dramatically around the world -- in some countries it’s a personal choice, in others it’s flatly illegal, and in many countries abortions are only accepted in certain situations such as fetal impairment or in cases of rape.”).

¹⁵² *See supra* note 24 (discussing the Maputo Protocol).

¹⁵³ Billauer, *supra* note 151, at 306-07.

lack of international consensus on abortion, “[i]n April 2015, for the first time in history, the United Nations Commission on Population and Development concluded without an outcome document.”¹⁵⁴

Aware of the fact that CIL does not presently recognize a right to abortion, it appears that U.N. treaty monitoring bodies, offices, and agencies anticipate that if they can assert a right to abortion with sufficient force and frequency, enough nations will change their domestic laws to comply with the asserted right, thereby proving sufficient state practice with *opinio juris* to constitute a new rule of customary international law: a self-fulfilling prophecy. Similarly, the U.N. might expect that by pressuring enough states to liberalize their abortion laws they can establish abortion-friendly “subsequent practice” by which to reinterpret human rights treaties under the Vienna Convention on the Law of Treaties (VCLT) and therefore build a strong case against resistant nations.¹⁵⁵

III. TREATY INTERPRETATION AND THE SURREPTITIOUS EFFORT TO CRAFT A RIGHT TO ABORTION

In partnership with pro-choice NGOs, U.N. treaty monitoring bodies, offices, and agencies have sought to push a right to abortion through international law’s back door with right-by-inference treaty interpretations that could, if enough states respond by changing their domestic abortion laws, lead to a new rule of customary international law. However, as Professor Mary Ann Glendon has said, “it is a basic principle of interpretation that fundamental rights cannot be created or destroyed by implication.”¹⁵⁶

A. Treaty Interpretation

The VCLT¹⁵⁷ is considered “far and away the most legally authoritative guide to the accurate interpretation of . . . international

¹⁵⁴ Johanna Kalb, *Human Rights Proxy Wars*, 13 STAN. J.C.R. & C.L. 53, 76 (2017).

¹⁵⁵ See VCLT, *supra* note 82, art. 31(3)(b).

¹⁵⁶ Glendon, What Happened at Beijing, *supra* note 87.

¹⁵⁷ VCLT, *supra* note 82.

legal treaties.”¹⁵⁸ As of June 2017, 114 states have ratified the VCLT.¹⁵⁹ Under Article 31 of the VCLT, states parties agree that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁶⁰ Article 31 further provides that treaty terms can have special meanings, if it is determined that such was the intention of the parties.¹⁶¹ Where the meaning of a treaty term remains uncertain, clarification may be sought from the travaux préparatoires.¹⁶²

The term “abortion” does not appear in any U.N. human rights treaty, and states have agreed that abortion is not included within the term “family planning.”¹⁶³ As such, one would expect treaty monitoring bodies to justify their interpretations in accordance with accepted treaty interpretation methodology. However, “the manifold ‘concluding observations’ concerning abortion simply assert that the Articles in question contain a right to abortion,”¹⁶⁴ despite the fact that the travaux to several of the treaties reveal that the states parties specifically agreed to leave the matter of abortion up to each state.¹⁶⁵

¹⁵⁸ Finegan, *supra* note 79, at 91.

¹⁵⁹ Status of Vienna Convention on the Law of Treaties, U.N. TREATY COLLECTIONS, https://treaties.un.org/pages/View_DetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (last visited Feb. 23, 2018).

¹⁶⁰ VCLT, *supra* note 82, art. 31(1). Article 31 of the VCLT is considered a reflection of customary international law. Finegan, *supra* note 79, at n.11.

¹⁶¹ VCLT, *supra* note 82, art. 31(4).

¹⁶² *Id.* art. 32.

¹⁶³ Pedone & Kloster, *supra* note 99, at 44; *see also id.* at 51, stating, Article 12 [of the CEDAW] contains the phrase “family planning,” and two [U.N.] conferences in 1994 and 1995 expressly confirmed that states did not understand “family planning” to include abortion rights. Nonetheless, just four years later in 1999, the CEDAW Committee issued General Recommendation 24, asserting “family planning” includes a right to abortion. It cited to no authority for this proposition.

¹⁶⁴ Finegan, *supra* note 79, at 122.

¹⁶⁵ *See supra* notes 79-82 and accompanying text regarding the CRC travaux. *See* Finegan, *supra* note 79, at n.151 regarding CEDAW travaux.

B. The Limits of Treaty Monitoring Body Authority

The core U.N. human rights treaties provide for the creation of a body of between ten and twenty-three independent experts charged with monitoring state party compliance.¹⁶⁶ The treaty monitoring body mandates authorize these experts to:

1. Monitor the periodic reports of States Parties;
2. Honor States Parties' requests to send a delegation during the consideration of their State Party's periodic report;
3. Issue summaries of States Parties' compliance in treaty body annual reports; and
4. Issue collective, non-binding, and non-critical comments, suggestions, and recommendations on States Parties' periodic reports.¹⁶⁷

Treaty monitoring bodies have not, however, been given authority to issue “freestanding legal interpretations divorced from the consideration of States Parties' [periodic] reports.”¹⁶⁸ In addition, as Michael O'Flaherty observed while serving on the HRC, some of the Committees' concluding observations “bear little relationship to the list of issues” that the treaty bodies submit to states parties prior to reviewing the states' periodic reports.¹⁶⁹ Furthermore, although the treaty mandates limit the monitoring bodies' comments to the states parties' compliance with the relevant treaty, more recent comments “incorporate other treaties, conventions, and statements extraneous to the treaty, and their opinions often go far beyond the text of the treaty.”¹⁷⁰

¹⁶⁶ Pedone & Kloster, *supra* note 99, at 31; *Human Rights Bodies*, OHCHR, http://www.ohchr.org/EN/HRBodies/___Pages/HumanRightsBodies.aspx (last visited Feb. 23, 2018).

¹⁶⁷ Pedone & Kloster, *supra* note 99, at 34 (internal citations omitted).

¹⁶⁸ *Id.* at 44.

¹⁶⁹ O'Flaherty, *supra* note 7.

¹⁷⁰ Pedone & Kloster, *supra* note 99, at 43, 45, 49; *see also* O'Flaherty, *supra* note 7 (“The non-binding nature of concluding observations is all the more evident when account is taken of the extent to which treaty bodies make recommendations on matters extraneous to the actual treaty obligations of the States Parties. . .”).

In agreeing to the treaty provisions that created the monitoring bodies and determined the extent of their authority, nations envisioned treaty bodies that would engage in an objective evaluation of state compliance in connection with the states' periodic reports.¹⁷¹ Instead, the treaty committees have exceeded the limits of their authority by reinterpreting treaty obligations and, in spite of the non-binding nature of their Comments and Concluding Observations, "authoritatively instruct[ing] . . . State Part[ies] to make detailed changes to . . . domestic laws and [even their] international obligations."¹⁷² These activities arguably violate Article 2(7) of the U.N. Charter, which prohibits the U.N. from interfering in matters that are essentially within the domestic jurisdiction of the states parties.¹⁷³

The CEDAW Committee, in particular, has far exceeded its mandate, aggressively policing states on the domestic matter of abortion, on the basis of questionable treaty interpretations.¹⁷⁴ O'Flaherty has criticized the CEDAW Committee for, like the HRC, citing external sources and raising issues extraneous to the CEDAW. He states that this practice "rais[es], at a minimum, issues of mandate and competency."¹⁷⁵ Former CEDAW Committee member, Dr. Krisztina Morvai, has also criticized the CEDAW Committee's overstepping, "not[ing] that poorer countries 'are regularly challenged about their human rights obligations and are often dependent on aid,'

Michael O'Flaherty was a member of the Human Rights Committee when he wrote *The Concluding Observations of United Nations Human Rights Treaty Bodies*.

¹⁷¹ Pedone & Kloster, *supra* note 99, at n.14 (citing the 1989 U.N. Secretary General as stating, in an official U.N. document, "In order to maintain a constructive emphasis on the nature of the work of the Committees and in order to facilitate a consensus-based approach, the treaty bodies have [correctly, in my view] sought to avoid any inference that they are passing judgment on the performance of a given State party on the basis of an examination of its report.").

¹⁷² *Id.* at 40, 42-43. For example, in 2010, the Committee Against Torture instructed Liechtenstein to renegotiate a 1982 treaty it had concluded with Austria. *Id.* at 42.

¹⁷³ See U.N. Charter art. 2, ¶ 7.

¹⁷⁴ Pedone & Kloster, *supra* note 99, at 50.

¹⁷⁵ *Id.* at 42.

which leaves them ‘particularly vulnerable’ to treaty body pressure to change their cultural norms.’¹⁷⁶

The Committee on the Rights of the Child has also stepped beyond its mandate in an effort to interpret the CRC to require states to provide access to abortion.¹⁷⁷ Although the CRC Committee’s mandate provides for “general recommendations” with respect to state party periodic reports, in 2001 the Committee began issuing thematic “general comments” disconnected from state submissions that, for example, “urg[e] states ‘to develop and implement programmes that provide access to sexual and reproductive health services, including . . . safe abortion services where abortion is not against the law. . . .’¹⁷⁸ In addition, the CRC Committee has invited NGOs to “days of thematic discussion” that yield “adopted recommendations.”¹⁷⁹ This is precisely what the HRC did in 2015 in preparation for its Draft General Comment 36, which sought to redefine Article 6 (right to life) of the ICCPR to explicitly permit abortion and exclude unborn children from the Article’s protection.¹⁸⁰

Like the CEDAW Committee and the Committee on the Rights of the Child, the HRC has gone beyond the limits of its treaty-based authority and “act[ed] ultra vires [in] seek[ing] to alter, add to, or diminish the rights recognized by the ICCPR.”¹⁸¹ Numerous

¹⁷⁶ *Id.* at n.79.

¹⁷⁷ De Jesus, *supra* note 85, at 634-35.

¹⁷⁸ *See, e.g., id.* at n.44 (citing Comm. on the Rights of the Child, General Comment No. 4 (2003)).

¹⁷⁹ Pedone & Kloster, *supra* note 99, at 173.

[T]he CRC has certainly overstepped its mandate with its own organization and execution of “days of thematic discussion.” While it is permitted to request the General Assembly to recommend to the U.N. Secretary General that the Secretariat conduct “studies on specific issues relating to the rights of the child,” the CRC itself has held days of thematic discussion on eighteen occasions. In further contravention of its mandate, the CRC has “adopted recommendations” following the conclusion of each annual conference. *Id.*

¹⁸⁰ *See supra* Section II.A.1.a.i.

¹⁸¹ Finegan, *supra* note 79, at 124 (“It is not clear whether the HRC believes that its abortion observations are incontrovertible, self-evident, and in need of no justification whatsoever, or whether it believes that it has the power to develop human rights law beyond . . . what is provided for in the ICCPR.”).

scholars, including some who support the HRC's practices, acknowledge that the Committee has acted outside its mandate.¹⁸²

The treaty monitoring bodies have not engaged in these mandate excesses in isolation. As discussed below, “NGOs have been using treaty bodies as the backdoor to furthering their interests when domestic political efforts have met insurmountable resistance.”¹⁸³ Cooperation with outside interests to transform treaty obligations surely was not what states anticipated when they agreed to monitoring bodies that would be comprised of impartial and independent experts of “high moral character and recognized competence in the field of human rights.”¹⁸⁴ Even Michael O’Flaherty, while a member of the HRC, wrote that the accuracy and functionality of treaty body concluding observations was compromised, at least in part, by “the lack of independence or expertise of significant numbers of treaty body members.”¹⁸⁵

C. The Concerted Effort to Create a Right to Abortion

In 1984, international human rights scholar Philip Alston prophetically wrote:

As the perceived usefulness of attaching the label “human right” to a given goal or value increases, it can be expected that a determined effort will be made by a wide range of special interest groups to locate their cause under the banner of human rights. Thus, in the course of the next few years, UN organs will be under considerable pressure to proclaim new human rights without first having given adequate

¹⁸² See *id.* at n.147; see also Pedone & Kloster, *supra* note 99, at 41 (“[E]ven experts like Alston admit, giving treaty bodies the power to pressure States Parties to take a certain course of action fundamentally changes their role.”).

¹⁸³ Pedone & Kloster, *supra* note 99, at 76.

¹⁸⁴ ICCPR, *supra* note 44, art. 28(2); see also CRC, *supra* note 45, art. 43(2); CEDAW, *supra* note 96, art. 17(1).

¹⁸⁵ O’Flaherty, *supra* note 7.

consideration to their desirability, viability, scope or form.¹⁸⁶

Alston's prediction has come to pass. By 1994, a movement was underway to create a right to abortion through non-legislative means. Reporting on her experience at the 1994 U.N. Conference on Population and Development in Cairo, Mary Ann Glendon stated that, "an abortion rights initiative led by a hard-edged U.S. delegation pushed all other population and development issues into the background."¹⁸⁷ The following year at the U.N. Fourth World Conference on Women in Beijing, Professor Glendon observed:

A minority coalition, led by the powerful fifteen-member European Union negotiating as a bloc, was pushing a version of the sexual and abortion rights agenda that had been rejected by the Cairo conference. The EU-led coalition was so intent on its unfinished Cairo agenda that it was stalling negotiations on other issues. Equally disturbing, the coalition was taking positions with ominous implications for universal human rights.¹⁸⁸

Notwithstanding these efforts, "the Beijing conference had no authority to add to or tinker with the corpus of universal human rights."¹⁸⁹

¹⁸⁶ Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 A.J.I.L. 607, 614 (1984) [hereinafter Alston, *Conjuring Up New Human Rights*]. Alston has held numerous high-level positions at the U.N. See Mr. Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, OHCHR, <http://www.ohchr.org/EN/Issues/Poverty/Pages/PhilipAlston.aspx> (last visited Feb. 23, 2018).

¹⁸⁷ Glendon, What Happened at Beijing, *supra* note 87.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* ("The UN historically has conducted that process with great care and gravity, most recently at the 1993 Human Rights Conference in Vienna. It would indeed be a dark day if human rights could be revised in disorderly negotiating sessions such as those where the Beijing health sections were rammed through.").

In 1996, a year after the Beijing conference, the lobbying relationship that Alston had foreseen between NGOs and treaty monitoring bodies played out in a conference in Glen Cove, New York.¹⁹⁰ The gathering was organized and run by pro-choice lobbyists, such as the Center for Reproductive Rights (CRR). The lobbyists invited representatives from the Committee on the Rights of the Child, the HRC, the CEDAW Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, and the Committee on Economic, Social, and Cultural Rights, as well as other U.N. representatives, all of whom attended in their official capacity.¹⁹¹ Financial support for the meeting was provided by the U.N. Population Fund (UNPF), the U.N. Division for the Advancement of Women, and the OHCHR, which oversees the treaty monitoring bodies¹⁹² and has promoted an international right to abortion.¹⁹³

The report that emerged from the meeting “outlin[ed] a strategy to force an international right to abortion.”¹⁹⁴ For example, the report instructed the CEDAW Committee to “apply the right to non-discrimination on the ground of gender, in relation to the criminalization of medical procedures which are only needed by women, such as abortion.”¹⁹⁵ At the meeting, members of the HRC also laid out a process for using various provisions of the ICCPR, including Article 6 (right to life) and Article 12 (the right to privacy), to support a right to abortion.¹⁹⁶ The CEDAW Committee followed this strategy in General Comment 24, and the HRC Committee applied the strategy in *Mellet v. Ireland*, *Whelan v. Ireland*, and Draft

¹⁹⁰ See Saunders, *supra* note 88, at n.101; see also Pedone & Kloster, *supra* note 99, at 54.

¹⁹¹ Pedone & Kloster, *supra* note 99, at 54, n.111.

¹⁹² *Id.* at 54, n.110.

¹⁹³ See text accompanying *supra* notes 89-91.

¹⁹⁴ Saunders, *supra* note 88, at n.101.

¹⁹⁵ Pedone & Kloster, *supra* note 99, at 55 (citing Round Table of Human Rights Treaty Bodies on Human Rights Approaches to Women’s Health, with a Focus on Sexual and Reproductive Health Rights).

¹⁹⁶ *Id.* at n.115.

Comment 36, among numerous other comments, recommendations, and concluding observations.¹⁹⁷

This intertwining of NGO and U.N. interests goes even deeper: many of the U.N. officials in attendance at the Glen Cove meeting also held board positions at the time with one or more of the NGOs that were advocating for a right to abortion at the Glen Cove meeting.¹⁹⁸ For example, while serving on the board of directors for the CRR, Nafis Sadik was also the executive director of the UNPF.¹⁹⁹ In addition, “at the time of the meeting half the members of the [CEDAW Committee] were simultaneously serving on the boards of one or more of the NGOs seeking to change the operation of the treaty bodies.”²⁰⁰

The NGO-U.N. joint effort to establish a right to abortion was further exposed in 2003 when a series of internal CRR memos detailing a plan to create a right to abortion was leaked to the U.S. Congress.²⁰¹ The memos boldly stated, “There is a stealth quality to the work . . . We are achieving incremental recognition of values without a huge amount of scrutiny from the opposition.”²⁰² The CRR accurately described the effectiveness of their stealth efforts. In fact,

¹⁹⁷ See *supra* Section II.A.

¹⁹⁸ Pedone & Kloster, *supra* note 99, at 55, n.115.

¹⁹⁹ *Id.* at 55, n.117.

²⁰⁰ *Id.* at 55.

²⁰¹ Kalb, *supra* note 154, at 68.

²⁰² *Id.*; see also Saunders, *supra* note 88, at 79-80, providing an excerpt from the CRR’s “Summary of Strategic Planning,” which states:

The [International Legal Program]’s overarching goal is to ensure that governments worldwide guarantee reproductive rights out of an understanding that they are legally bound to do so. . . . Supplementing . . . treaty-based standards and often contributing to the development of future hard norms are a variety of “soft norms.” These norms result from interpretations of human rights treaty committees, rulings of international tribunals, resolutions of intergovernmental political bodies, agreed conclusions in international conferences[,] and reports of special rapporteurs. (Sources of soft norms include: the European Court of Human Rights, the CEDAW Committee, provisions from the Platform for Action of the Beijing Fourth World Conference on Women, and reports from the Special Rapporteur on the Right to Health). A member of the United States Congress entered this document into the Congressional Record in 2003. Saunders, *supra* note 88, at nn.50-51 (citing 149 CONG. REC. E2534, E2535 (2003)).

it was the CRR who in 2005, together with two Latin American pro-choice NGOs, represented the young woman in *K.L. v. Peru*, in which the HRC proclaimed that Peru's refusal to provide an abortion in a non-life-threatening pregnancy violated the woman's rights to privacy, freedom from torture or CIDTP, and special care for minors.²⁰³ The CRR also filed the petitions for Amanda Mellet and Siobhán Whelan, in which the HRC determined, in 2016 and 2017, respectively, that Ireland's domestic abortion laws violated rights to privacy, non-discrimination, and freedom from torture or CIDTP.²⁰⁴ The CRR is not the only pro-choice lobbying group that has sought to push a right to abortion into international law through the U.N. treaty monitoring system. For example, the International Women's Health Coalition has stated:

The international conference and human rights documents . . . do not explicitly assert a woman's right to abortion, nor do they legally require safe abortion services as an element of reproductive health care. Moreover, the ICPD [UN International Conference on Population and Development, 1994] and FWCW [Fourth World Conference on Women, 1995] agreements recognize the wide diversity of national laws and the sovereignty of governments in

²⁰³ Human Rights Comm., Commc'n. No. 1153/2003, *K.L. v. Peru*, U.N. Doc. CCPR/C/85/D/1153/2003, ¶ 6.6 (Oct. 24, 2005), accessible at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f85%2fD%2f1153%2f2003&Lang=en.

²⁰⁴ Press Release, Center for Reproductive Rights, U.N. Committee Finds Ireland's Abortion Laws Are Cruel, Inhumane and Degrading (June 9, 2016), <https://www.reproductiverights.org/press-room/un-committee-finds-irelands-abortion-laws-are-cruel-inhumane-and-degrading> ("In November 2013, the Center for Reproductive Rights filed a complaint on behalf of Amanda Mellet before the United Nations Human Rights Committee, arguing that Ireland's restrictive abortion laws violated her basic human rights by subjecting her to severe mental suffering and anguish."); Press Release, Center for Reproductive Rights, U.N. Committee: Criminalization of Abortion in Ireland Violates Woman's Human Rights, New Decision Marks Second Time the U.N. Human Rights Committee Calls for Abortion Law Reform in Ireland (June 13, 2017), <https://www.reproductiverights.org/press-room/un-committee-criminalization-of-abortion-in-ireland-violates-womans-human-rights-0>.

determining national laws and policies. Despite these qualifications, however, the conference documents and human rights instruments—*if broadly interpreted and skillfully argued*—can be very useful tools in efforts to expand access to safe abortion.²⁰⁵

What pro-choice advocates and members of the U.N. treaty monitoring bodies seem to be seeking is not a woman's ability to procure a safe abortion in connection with life-saving treatment for the mother, but an altogether unrestricted right to terminate the life of her child, at any point in the pregnancy and for any reason.²⁰⁶ For example, attorneys for CRR wrote:

[S]ignificant progress has recently been made within international and regional human rights discourses requesting States Parties to liberalise abortion laws and actualise women's right to safe abortion services. The recognition by treaty-monitoring bodies that restrictive abortion laws may force women to seek illegal, and hence, unsafe abortions which threaten their lives, can be used by advocates to support *abortion on request or for socio-economic reasons*.²⁰⁷

Likewise, with respect to the 2016 case of *Mellet v. Ireland*, Professor Fiona De Londras argues that the HRC's decision “not only further reinforces the need for constitutional change in Ireland in situations of fatal foetal abnormality, but *in all situations where abortion is sought*.”²⁰⁸

In promoting an unrestricted right to abortion by extension from explicit treaty-guaranteed human rights, U.N. treaty committees

²⁰⁵ Saunders, *supra* note 88, at 80.

²⁰⁶ See, e.g., De Londras, *supra* note 78 (arguing for an expansion of CIDT to include every denial of abortion).

²⁰⁷ Zampas & Gher, *supra* note 7 (emphasis added). Zampas and Gher go on to say, “If . . . the [Maputo] Protocol is not interpreted to recognise socio-economic grounds for abortion, then the asserted socio-economic basis can and should be subsumed under physical or mental health grounds.” *Id.*

²⁰⁸ De Londras, *supra* note, 78 (emphasis added).

have told sovereign nations they “must provide women with the means to abort their unborn children in public medical facilities . . . generally whenever the unborn child is undesired.”²⁰⁹ As mentioned above, in 2016 the Committee on the Rights of the Child urged Ireland to “[d]ecriminalize abortion *in all circumstances* and review its legislation with a view to *ensuring access by children to safe abortion* and post-abortion care services. . . .”²¹⁰ It is ironic that the effort to establish a right to abortion is finding its basis in the very treaties that were born out of the Universal Declaration of Human Rights, which proclaims: “the inherent dignity and . . . the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world. . . .”²¹¹ and yet the most vulnerable members of the human family—the unborn—are almost never mentioned in Committee communications.

Treaty monitoring bodies fulfill a vital purpose when they remain within their mandate as “non-adversarial facilitator[s] [that] help States Parties examine their human rights records . . . [and] engage States Parties in a constructive dialogue on human rights issues pertinent to the treaty.”²¹² It is an altogether different scenario, however, when treaty monitoring bodies exceed their mandate and work in concert with special interest NGOs to create a human right that states never agreed to fulfill, and then repeatedly and openly criticize states for not measuring up to that expectation. At that point, the monitoring body loses credibility. While their pressure

²⁰⁹ De Jesus, *supra* note 85, at 622-23 (emphasis added).

²¹⁰ CRC 2016 Concluding Observations on Ireland, *supra* note 77, ¶ 58(a) (emphasis added).

²¹¹ UDHR, *supra* note 37, pmb. ¶ 1 (emphasis added). The U.N. has even asserted itself into the African regional human rights system. In 2016, a group of U.N. experts, together with the African Commission on Human and People’s Rights, “urged the President of Sierra Leone . . . to sign the 2015 Safe Abortion Bill . . . without further delay.” The Bill “is aimed at ensuring women’s and adolescents’ access to safe services regarding abortion and authorizes the termination of a pregnancy *under any circumstances* up to 12 weeks. . . .” Press Release, U.N. and African Experts Urge Sierra Leone’s President to Save Millions of Women’s Lives by Signing the 2015 Safe Abortion Bill, (Jan. 28, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16994&LangID=E>.

²¹² Pedone & Kloster, *supra* note 99, at 74.

tactics may be effective in cases of vulnerable nations dependent on international aid, once more resistant states parties start speaking up about treaty body overstepping, other nations may gain courage to resist as well. It is not surprising that some are calling for treaty body reform and denunciation of efforts to read a right to abortion into U.N. human rights treaties.²¹³

D. State Pushback

States have begun to push back against the effort to create a right to abortion out of established human rights. For example, at the 2017 U.N. Commission on the Status of Women, the United States clearly stated its position that the right to abortion does not exist in international law and, while the United States “is the largest donor of bilateral reproductive health and family planning assistance” such assistance will not include abortion services.²¹⁴ Likewise, in spite of pressure U.N. Special Rapporteurs have aimed at Honduras to liberalize its national abortion laws, in 2017 the Honduran Parliament voted against such changes in legislation, seventy-seven to five, with eight abstentions.²¹⁵ Pakistan and Cameroon have both stated that

²¹³ See *id.* at 77-82 (suggesting treaty amendment, state denouncement of treaty monitoring body overstepping, ethics rules for treaty monitoring body membership, and adherence to treaty body mandates). See also De Jesus, *supra* note 85, at 634-35 (“Ultra vires interpretations in favor of creating abortion rights in Latin America and the Caribbean through the CRC . . . should be denounced by states parties as illegitimate and irrelevant for the purposes of binding treaty interpretation.”). But see Pedone & Kloster, *supra* note 99, at 30, n.2, (noting calls for greater enforcement by treaty bodies).

²¹⁴ *Explanation of Position on Agreed Conclusions at the 2017 UN Commission on the Status of Women*, UNITED STATES MISSION TO THE UNITED NATIONS (Mar. 24, 2017), <https://usun.state.gov/remarks/7724>.

²¹⁵ *Honduras Needs Progressive Reform of Abortion Law to Advance Women’s Human Rights, Say UN Experts*, OHCHR (Apr. 28, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21549&LangID=E>; *Honduras Votes in Favour of Life Despite Outside Pressure*, ADF INT’L (May 10, 2017), <https://adfinternational.org/detailspages/press-release-details/honduras-votes-in-favour-of-life-despite-outside-pressure>; see also Ligia M. De Jesus, *Treaty Interpretation of the Right to Life Before Birth by Latin American and Caribbean States: An Analysis of Common International Treaty Obligations and Relevant State Practice at International Fora*, 26 EMORY INT’L L. REV. 599, 626 (“Latin American states have persistently opposed unilateral attempts to read abortion rights or obligations to legalize abortion into

pressure by the CEDAW Committee to change domestic abortion laws conflicts with their national consensus that a fetus is a child, children are a vital part of society, and abortion is murder.²¹⁶

Ireland has also asserted its sovereign prerogative to determine domestic law on abortion. In 2013, in response to the complaint filed with the U.N. Human Rights Committee in the matter of *Mellet v. Ireland*, Ireland asserted that its “constitutional and legislative framework reflects the nuanced and proportionate approach to the considered views of the Irish Electorate on the profound moral question of the extent to which the right to life of the foetus should be protected and balanced against the rights of the woman.”²¹⁷ Nonetheless, Ireland paid Ms. Mellet an *ex gratia* sum of €30,000 (approximately \$35,000 USD).²¹⁸ Whether Ireland will offer payment to Siobhán Whelan, the complainant in the factually similar 2017 HRC decision against Ireland, and other Irish women who have traveled out of the country for an abortion, remains to be seen.²¹⁹ More significant is the question of whether Ireland will vote in 2018 to overturn its constitutional protection for unborn life, as the HRC claims the nation is obligated to do in order to comply with the Committee’s interpretation of the ICCPR.²²⁰

IV. RIGHTS OF THE UNBORN IN INTERNATIONAL LAW

Pro-choice advocates and U.N. treaty monitoring bodies, offices, and agencies typically look at the abortion issue solely in the context of the mother’s rights. They neglect to consider that the U.N. human rights treaties ensuring the rights to life, to health, to be free from cruel, inhuman or degrading treatment or punishment, and to

international treaties and non-binding international conference outcome documents. . .”).

²¹⁶ Pedone & Kloster, *supra* note 99, at n.79.

²¹⁷ *Mellet v. Ireland*, *supra* note 1, ¶ 4.2.

²¹⁸ Aidan Lonergan, *Ireland’s €30,000 Compensation to Woman Who Travelled to Britain for Abortion Could Now See Others Seek Reparations*, THE IRISH POST (Dec. 2, 2016), <http://irishpost.co.uk/irelands-e30000-compensation-woman-travelled-britain-abortion-now-see-others-see-reparations/>.

²¹⁹ See Whelan v. Ireland, *supra* note 5.

²²⁰ See *supra* note 16 and accompanying text.

be free from discrimination—rights from which they seek to infer a right to abortion—arguably guarantee those same rights to the unborn. John Keown, professor at Georgetown University’s Kennedy Institute of Ethics, states that in researcher Rita Joseph’s book, *Human Rights and the Unborn Child*,

Joseph argues cogently and clearly that an unborn child’s right to life is far more plausibly grounded in [international human rights treaties] than is a right to abortion . . . [;]however, . . . the unborn child’s rights have “been obscured for some decades now by the rise of a new pro-abortion ideology in the form of radical feminism,” which has conducted “a masterly campaign of ideological reinterpretation.”²²¹

Indeed, many parties to the relevant U.N. human rights treaties had domestic laws protecting unborn life at the time of ratification and did not intend that their treaty obligations would abrogate those laws.²²²

An examination of the regional human rights systems’ treatment of abortion and the unborn is beyond the scope of this paper. However, it is worth noting that though the Maputo Protocol in Africa, discussed above, recognizes a woman’s right to abortion under specific circumstances, the Inter-American human rights system’s American Convention on Human Rights protects an unborn person’s right to life from the moment of conception.²²³ The American Convention states, “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”²²⁴ As of June 2017, twenty-three of thirty-five

²²¹ John Keown, *International Law and the Unborn Child*, NATIONAL REVIEW (Sept. 24, 2010, 11:00 AM), <http://www.nationalreview.com/bench-memos/247662/international-human-rights-law-and-unborn-child-john-keown>.

²²² Finegan, *supra* note 79, at 100.

²²³ See *supra* text accompanying notes 24-26.

²²⁴ American Convention on Human Rights, art. 4(1), Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978).

Organization of American States parties have ratified the American Convention.²²⁵

A. Rights of the Unborn in U.N. Treaties

As discussed in *supra* Part II of this paper, neither global human rights treaties nor customary international law recognize a right to abortion. Where U.N. treaty monitoring bodies, offices, and agencies assert such a right as inferred from any right but the mother's competing right to life, such an assertion pits the most essential human right—the right to life—against inferior rights, such as health, privacy, and freedom from discrimination.²²⁶ U.N. treaty monitoring bodies, offices, and agencies often avoid this conflict by not discussing the unborn at all, in spite of treaty language that supports the inclusion of the unborn as human beings entitled to dignity and human rights. On the rare occasion that a U.N. publication does mention the competing rights of the unborn, it unilaterally denies such rights without a sound explanation.²²⁷

1. The Right to Life

a. Under the UDHR

The preamble of the Universal Declaration of Human Rights states that “all members of the human family” have inherent dignity, and therefore “equal and inalienable rights.”²²⁸ Given that science

²²⁵ Venezuela's denunciation of the American Convention became effective in September 2013. Organization of American States, Press Release, IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention, (Sept. 10, 2013), http://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp.

²²⁶ As the OHCHR has stated, the right to life “is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.” Human Rights Committee, General Comment 6, art.6, ¶ 1 (16th session, 1982), <http://www.refworld.org/docid/45388400a.html>.

²²⁷ See, e.g., *infra* Section IV.A.1.b (discussing the HRC's unsatisfying answer to why the ICCPR should be interpreted to allow for the right to abortion even though the Convention prohibits application of the death penalty with respect to pregnant women).

²²⁸ UDHR, *supra* note 37, pmb1.

establishes that the unborn are “human beings” from the moment of conception,²²⁹ the UDHR arguably supports their inclusion in the Declaration’s protections. In addition, Article 3 states, “*Everyone* has the right to life, liberty and security of person.”²³⁰ This broad wording “enshrines the right to life in a manner that has left it vulnerable to interpretation by abortion opponents who argue that a fetus is included in ‘everyone’ and, therefore, abortion would be a violation of the Declaration.”²³¹

On the other hand, pro-choice advocates have argued that Article 1’s statement that “[a]ll human beings are *born* free and equal in dignity and rights” precludes an interpretation of the UDHR that includes the unborn.²³² They consider the drafters’ rejection of a proposal to remove the term “born” as evidence of an intentional exclusion of the unborn from the UDHR’s protections.²³³ However, “as Johannes Morsink shows in his study into the origins of the UDHR, debates over the retention or rejection of the term ‘born’ did not center on the question of abortion or the moral status of fetal life, but on whether human rights are inherent to human nature or, instead, are attributed to human beings from some source extrinsic to their very existence, such as society or law.”²³⁴ In fact, the travaux record that René Cassin, one of proposers of the term, as well as

²²⁹ See *When Human Life Begins*, AMERICAN COLLEGE OF PEDIATRICIANS (Mar. 2017), <https://www.acped.org/the-college-speaks/position-statements/life-issues/when-human-life-begins>, explaining that:

The predominance of human biological research confirms that human life begins at conception—fertilization. At fertilization, the human being emerges as a whole, genetically distinct, individuated zygotic living human organism, a member of the species *Homo sapiens*, needing only the proper environment in order to grow and develop. The difference between the individual in its adult stage and in its zygotic stage is one of form, not nature.

²³⁰ UDHR, *supra* note 37, art. 3 (emphasis added).

²³¹ Choudhury, *supra* note 34, at 283.

²³² UDHR, *supra* note 37, art. 1; Finegan, *supra* note 79, at 93.

²³³ See, e.g., Zampas & Gher, *supra* note 7.

²³⁴ Finegan, *supra* note 79, at 93-94. The inclusion of the term “born” “echoes Rousseau’s Social Contract and Article 1 of the 1789 French Declaration of the Rights of Man and the Citizen, which Rousseau helped inspire (‘Men are born and remain free and equal in rights’).” *Id.* at 95. “Rousseau’s moral opposition to abortion indicates that he had no difficulty employing “born” as a signifier without implying that the value of “humanity” has no pre-natal application.” *Id.*

Chilean delegate Hernan Santa Cruz, who also supported its inclusion, both stated their approval of including the unborn as holders of human rights during the drafting of the Declaration.²³⁵ Likewise, Charles Malik, the Lebanese delegate, requested that the summary record reflect that the Chinese, Soviet, and English delegates' desire to omit the phrase "from the moment of conception" from the UDHR's recognition of the right to life was from an interest in textual concision.²³⁶ Moreover, the three delegates considered inclusion of the unborn "to be implied in the general terms of [Article 3]."²³⁷ While there was a discussion of explicitly extending the right to life to the unborn, the proposal was rejected out of consideration for the fact that some nations allowed abortion under certain circumstances, as well as from a desire to maintain brevity in the language of the UDHR.²³⁸ Accordingly, considering the UDHR's preamble, text, and travaux, the Declaration could be interpreted to permit, but not necessarily require, inclusion of the unborn in the right to life. To interpret the Declaration or its derivative human rights instruments to include a right to abortion, however, requires an interpretive stretch that involves several intratextual contradictions.²³⁹

b. Under the ICCPR

In broad language that echoes the UDHR, Article 6(1) of the ICCPR states, "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*"²⁴⁰ As the U.N. Office of the High Commissioner for Human Rights (OHCHR) has stated, the right to life enunciated in Article 6

²³⁵ Finegan, *supra* note 79, at 95-96.

²³⁶ *Id.* at 96-97.

²³⁷ *Id.* At this point in the drafting history, present-day Article 3 was draft Article 4. *Id.* at 96.

²³⁸ *Id.* at 96. Finegan notes that "no delegate argued in favor of retaining the term 'born' on the basis that it meant that only actual physically born human beings could claim human rights." *Id.* at 94.

²³⁹ See, e.g., *infra* Section IV.A.1.b. (discussing the prohibition against applying the death penalty to a pregnant convict in the context of the ICCPR) and notes 266-70 (regarding sex-selective abortion and gender discrimination, which is prohibited by Article 7 of the UDHR).

²⁴⁰ ICCPR, *supra* note 44, art. 6(1) (emphasis added).

of the ICCPR “is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4).”²⁴¹ The inclusion of unborn human beings in Article 6(1)’s protections logically flows from Article 6(5)’s prohibition against imposing the death penalty upon pregnant women.

Article 6(5) of the ICCPR states, “[The] [s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”²⁴² A harmonious interpretation of Article 6(1)’s broadly stated right to life and Article 6(5)’s prohibition recognizes the status of the unborn child as a human being separate from his or her mother. Any other interpretation would render the prohibition meaningless. Accordingly, “it is more plausible to judge that Article 6(1) protects the right to life of the unborn to some indeterminate extent than to judge that it does not protect the right to life of the unborn to any extent.”²⁴³ A legal scholar who studied the entire ICCPR legislative history found that the drafters specifically included Article 6(5)’s prohibition “out of consideration for ‘the interests of the unborn child.’”²⁴⁴ Several other scholars have reached the same conclusion based on their reading of the travaux.²⁴⁵ One draft of the ICCPR specifically states, “The principal reason for providing . . . that the death sentence should not be carried out on pregnant

²⁴¹ Human Rights Committee, General Comment 6, art.6, ¶ 1 (16th session, 1982), <http://www.refworld.org/docid/45388400a.html>.

²⁴² ICCPR, *supra* note 44, art. 6(5).

²⁴³ Finnegan, *supra* note 79, at 107.

²⁴⁴ *Id.* at 108. Finnegan states:

What becomes clear from reading the entirety of the debates is the extent to which supporters of the provision based their support on the full humanity of the unborn child. Delegates from Peru, Indonesia, India, Canada, Israel, and Japan each referenced the need to protect either the “child” or “children” or “persons” from the death penalty, while referring specifically to the unborn. The provision was adopted by fifty-three votes to five, with fourteen abstentions. No delegate voiced opposition to the paragraph on the grounds that it protected the unborn child.

Id.

²⁴⁵ *Id.*

women was to save the life of an innocent unborn child.”²⁴⁶ Furthermore, Article 6(5) does not specify a point in the prenatal human being’s development at which the prohibition becomes operative: it applies from the moment of conception. Article 6(1)’s right to life should include the unborn so as to not render Article 6(5)’s prohibition meaningless.

The Human Rights Committee fails to reconcile the contradiction between excluding unborn human beings from Article 6(1)’s right to life and Article 6(5)’s prohibition against applying the death penalty to pregnant women. In Draft Comment 36, the Committee states, “The special protection afforded to pregnant women stems from an interest in protecting the rights and interests of affected family members, including the the [sic] *unborn fetus* and the fetus’s father.”²⁴⁷ The HRC then contradicts itself, stating, “the Committee cannot assume that Article 6 imposes on State parties an obligation to recognize the right to life of unborn children.”²⁴⁸ How is it that the competing rights of an unborn human being, as well as the rights of his or her father, conflict with the killing of the unborn child (at no specified stage of the child’s development) in the context of the execution of a criminally convicted mother, but not in the context of a mother’s right to abort her child in any other situation?²⁴⁹ This logical impasse stems from the fact that “abortion, insofar as it is successful, always involves ‘the deliberate killing of an innocent human being.’”²⁵⁰

c. Under the CRC

While the travaux and a harmonious reading of the provisions of the ICCPR support an interpretation of the Covenant that includes prenatal human beings in the right to life, the Convention on

²⁴⁶ G.A. Rep. of the Third Comm., 12th Sess., U.N. Doc. A/3764 (Dec. 6, 1957), <http://dag.un.org/handle/11176/289512?show=full>.

²⁴⁷ Draft General Comment No. 36, *supra* note 66, ¶ 50 (emphasis added).

²⁴⁸ *Id.* ¶ 7.

²⁴⁹ See *supra* Section II.A.1 (discussing abortion and the mother’s right to life).

²⁵⁰ John M. Breen, *Love, Truth, and the Economy: A Reflection on Benedict XVI’s Caritas in Veritate*, 33 HARV. J.L. & PUB. POL’Y 987, 1006 (2010).

the Rights of the Child *explicitly* recognizes the unborn as holders of human rights. Through Article 6(1) of the CRC, “States Parties recognize that *every child* has the inherent right to life.”²⁵¹ Article 1 defines a “child” for purposes of the Convention as “*every human being* below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”²⁵² As others have noted, Article 1’s definition provides a ceiling, but not a floor, in terms of the age of the child who is to be included in the Convention’s protections.²⁵³ Furthermore, the preamble states 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.*”²⁵⁴ Although the CRC’s text, especially in light of the preamble, provides strong support for the inclusion of the unborn as children entitled to protection of the right to life, the travaux of the CRC indicate that the drafters did not intend to forbid abortion in every situation, as the domestic laws of some of the negotiating states allowed abortion under certain circumstances.²⁵⁵ Nonetheless, in the VCLT’s hierarchy

²⁵¹ CRC, *supra* note 45, art. 6(1) (emphasis added).

²⁵² *Id.* art. 1.

²⁵³ See, e.g., Rutkow & Lozman, *supra* note 31, at 186.

²⁵⁴ CRC, *supra* note 45, pmb. ¶ 9 (emphasis added). While the preamble itself is not legally binding on states parties, the Vienna Convention on the Law of Treaties instructs that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” and that the preamble is one of three parts of the treaty, along with the text and annexes, that comprise the treaty’s “context.” VCLT, *supra* note 82, art 31(1)-(2). See Janoff, *supra* note 82, at 168-69 (noting that the preambular reference to the unborn child informs the definition of “child” for purposes of the Convention’s protections). See also Finegan, *supra* note 79, at 117 (“The preamble to a treaty, as Alston acknowledges, enunciates the broad general principles relevant to the treaty. The ninth preambular paragraph [of the CRC] thus enunciates the principle that what proceeds it concerns all children, born and unborn. No article of the UNCRC comes close to contradicting this principle.”). *But see* Stewart, *supra* note 31, at 167 (“The Convention cannot fairly be read to require legislative action to protect the fetus because the text of Article 6 is silent on this subject, despite the reference in the ninth preambular paragraph. . .”). Stewart supports this position by referencing the travaux, which indicate that “a credible effort was made during the drafting process to ensure that the Convention is ‘abortion neutral.’” *Id.* at 178.

²⁵⁵ See Stewart, *supra* note 31, at 178 (“A credible effort was made during the drafting process to ensure that the Convention is ‘abortion neutral.’”); see also Finegan, *supra* note 79, at 120-21. Finegan concedes that

of interpretive aids, the “preamble ranks higher than the travaux as a hermeneutic key.”²⁵⁶

In addition to the preamble and the travaux, the VCLT provides that reference may be made to the states parties’ subsequent practice when interpreting a treaty.²⁵⁷ Given the range of CRC states parties’ positions on abortion and the status of the unborn, subsequent practice is not dispositive on whether the term “child” includes the unborn.²⁵⁸ The varied subsequent practice may indicate, however, that the states parties intended to allow each state to balance the unborn person’s right to life with the adolescent mother’s rights. Overall, given the preamble’s clear inclusion of the unborn as being entitled to legal protection, as well as the VCLT’s hierarchy of interpretive methods, there is more support for the CRC’s protection of the unborn than not.

2. Other Rights in U.N. Human Rights Treaties

While certain rights obviously do not apply to a prenatal person, such as the freedom from arbitrary arrest or the freedom to dispose of wealth, states may consider rights such as the right to health and the right to be free from torture and from cruel, inhuman, or degrading treatment (CIDT) as applicable to unborn human

it remains unwarranted to claim that the UNCRC protects the unborn child’s right to life to an extent that renders all forms of abortion impermissible. A thorough analysis of the travaux precludes such a conclusion, since sensitivities over domestic abortion laws were the reason for omitting an even more explicit affirmation of the human rights of unborn children. So it is partially correct to describe the final text of the UNCRC as a compromise of sorts. Yet it was very far from an entirely neutral compromise, as the unborn child’s status as a bearer of human rights was explicitly recognized even if the implications of this status vis-à-vis abortion, in particular, were not positively unpacked with the degree of specificity and precision associated with statute law.

Id.

²⁵⁶ Finegan, *supra* note 79, at 118. Article 32 of the VCLT allows recourse “to the supplementary means of interpretation ‘in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.’” *Id.*

²⁵⁷ See VCLT, *supra* note 82, art. 31(3)(b).

²⁵⁸ See *supra* Section II.B.

beings where interpretive methods under the VCLT do not yield a contrary result.

The right to freedom from torture or CIDT is an especially relevant right for the unborn human being, considering the early gestational point at which a baby can feel the extreme pain inherent to abortion techniques.²⁵⁹ In fact, as of March 2016, twelve states within the United States of America prohibit abortion after twenty weeks because of fetal pain.²⁶⁰ Recognizing the medical reality of fetal pain, Utah requires physicians to administer anesthesia to prenatal children of twenty gestational weeks or later prior to their abortion.²⁶¹ On October 3, 2017, the U.S. House of Representatives passed the Pain-Capable Unborn Child Protection Act, which would ban most abortions after the twentieth week of pregnancy.²⁶²

²⁵⁹ See Doctors on Fetal Pain, *supra* note 137.

²⁶⁰ Ashley Fantz, *Utah Passes 'Fetal Pain' Abortion Law Requiring Anesthesia*, CNN (Mar. 29, 2016, 3:24 PM), <http://www.cnn.com/2016/03/29/health/utah-abortion-law-fetal-pain/index.html>.

²⁶¹ *Id.* While CNN is quick to denounce the Utah bill's recognition of fetal pain, the medical concept is well-documented. For example, in 2011 the Harvard Mahoney Neuroscience Institute published an article noting that various studies published in the early 1980s reported finding a high density of a chemical messenger called substance P in areas of the fetal brain associated with pain perception and response. Although substance P is one of several neurotransmitters in the central nervous system, it is the only one shown to play a role in transmitting pain impulses. THE HARVARD MAHONEY NEUROSCIENCE INSTITUTE LETTER, THE LONG LIFE OF EARLY PAIN 2 (2011), https://hms.harvard.edu/sites/default/files/HMS_OTB_Winter11_Vol17_No1.pdf; see also Johnnye S. Johnson, *Fetal Pain: Life in Troubled Waters*, 16 J PERINATAL EDUC. 44, 45 (2007) ("The belief . . . that fetuses . . . 'feel no pain' is not true. It is, in fact, a tragic medical myth, one that professional groups such as the American Academy of Pediatrics (2000) and the National Association of Neonatal Nurses have worked in recent years to debunk.") (internal citations omitted).

²⁶² Mike DeBonis and Jenna Johnson, *With Trump's Backing, House Approves Ban on Abortion After 20 Weeks of Pregnancy*, WASH. POST. (Oct. 3, 2017), https://www.washingtonpost.com/powerpost/with-trumps-backing-house-approves-ban-on-abortion-after-20-weeks-of-pregnancy/2017/10/03/95c64786-a86c-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.5ac83b3191d6. The Washington Post has predicted that the bill will not pass the Senate. *Id.*

In addition to the physical torture a baby experiences in an abortion, at least by the twenty-week stage of development, medical evidence has shown that the unborn human being is capable of suffering psychological or emotional trauma.²⁶³ It is hard to imagine that the experience of being injected with a feticide that causes a heart attack or being “torn limb from limb,” as occurs in the “dilation and evacuation” method of abortion, would not wreak emotional havoc on a human being that rises to the level of torture or cruel, inhuman, or degrading treatment.²⁶⁴ U.N. treaty monitoring bodies should at least balance these facts against their efforts to infer a right to abortion through the mother’s right to privacy and other rights of the mother that should carry less weight than freedom from torture or CIDT.

3. The Prohibition Against Discrimination

All the principal human rights treaties prohibit denying the rights guaranteed therein on the basis of discrimination. For example,

²⁶³ See Johnson, *supra* note 260, at 45 .

²⁶⁴ U.S. Supreme Court Justice Anthony Kennedy described the “dilation and evacuation” method of abortion as follows: The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn from limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that “when you pull out a piece of the fetus, let’s say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, . . . the fetus [is] alive.” Dr. Carhart has observed fetal heartbeat via ultrasound with “extensive parts of the fetus removed,” and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born “as a living child with one arm.” At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart’s words, the abortionist is left with “a tray full of pieces.

Stenberg v. Carhart, 530 U.S. 914, 958-959 (2000) (Kennedy, J., dissenting, joined by Rehnquist, C.J. (internal citations omitted)). See also *The Basics*, DOCTORS ON FETAL PAIN, <http://www.doctorsonfetalpain.com/fetal-pain-the-evidence/> (last visited Feb. 23, 2018). The other common method of abortion is by injection of digoxin into the baby’s heart, causing a fatal heart attack, after which “[t]he dead baby is then removed from his or her mother by dismemberment.” *Id.* Only seventeen of the fifty U.S. states ban abortion after the twentieth week of pregnancy. See *State Policy Updates Major Develops in Sexual and Reproductive Health*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> (last visited Feb. 23, 2018).

Article 2(1) of the CRC prohibits discrimination on any basis, instructing states parties to

respect and ensure the rights set forth in the [CRC] to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²⁶⁵

Many children are aborted on the basis of disability that is detected in utero.²⁶⁶ It could be argued that domestic laws that permit abortion in the case of disability, but would otherwise disallow abortion in the particular situation, promote a violation of the unborn human being's right to be free from discrimination. As an alternative to such discrimination, states could address the undeniable challenges mothers face in raising a child with disabilities by providing support services that meet the mother's and child's needs in each unique situation.

Abortion can also constitute a violation of the prenatal human being's rights on the basis of gender discrimination. In 2006, the Committee on the Rights of the Child published General Comment No. 7, Implementing Child Rights in Early Childhood, explicitly identifying sex-selective abortion as a violation of the unborn girl's human rights, specifically her right to life. The General Comment states, "Discrimination against girl children is a *serious violation of rights*, affecting their survival and all areas of their young lives as well as restricting their capacity to contribute positively to

²⁶⁵ CRC, *supra* note 45, art. 2(1) (emphasis added).

²⁶⁶ For example, in the United Kingdom, ninety percent of women who discover their child has Down's syndrome choose to abort. Alison Gee, *A World Without Down's Syndrome?*, BBC NEWS MAGAZINE (Sept. 29, 2016), <http://www.bbc.com/news/magazine-37500189>; see also *Ethics Guide, Disability in the Foetus*, BBC, <http://www.bbc.co.uk/ethics/abortion/philosophical/disability.shtml> (last visited Feb. 23, 2018).

society.”²⁶⁷ As an example of discrimination that violates a female child’s rights, the Committee then states, “They may be victims of *selective abortion*. . . .”²⁶⁸ Likewise, the outcome document for the Cairo conference identified sex-selective abortion as discrimination against female children, which the document described as “harmful and unethical.”²⁶⁹ Similarly, the outcome document for the 1995 Beijing conference stated, “Acts of violence against women also include . . . *prenatal sex selection*.”²⁷⁰

It is hard to reconcile how aborting a child on the basis of gender is “harmful and unethical,” a “serious violation of rights,” and “violence against women,” while U.N. treaty committees and certain U.N. offices and agencies, such as the WHO and OCHCR, consider it a mother’s right to abort her child on other grounds. Moreover, in light of the Cairo and Beijing outcome documents’ general negative comments about abortion, as well as their condemnation of sex-selective abortion, it is ironic that the U.N. treaty committees and pro-choice NGOs continue to cite the conference documents in support of an inferred right to abortion.²⁷¹

B. Customary International Law and Protection for the Unborn

Considering the wide range of state positions on abortion, there is not sufficiently consistent state practice to establish a global customary rule of law regarding the unborn human being’s right to life.²⁷² There may, however, be a regional custom of recognizing the rights of the unborn. For example, in Latin America and the Caribbean, “state practice . . . subsequent to the ratification of the [Convention on the Rights of the Child], demonstrates that states

²⁶⁷ U.N. Comm. on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Education, U.N. Doc. CRC/C/GC/7/Rev.1, ¶ 11.b.i (Sept. 20, 2006), <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>.

²⁶⁸ *Id.*

²⁶⁹ Cairo Conference, *supra* note 91, at 34.

²⁷⁰ Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Beijing Declaration and Platform for Action, ¶ 115, U.N. Doc. DPI/1766/Wom, Annex 1 (Feb. 1996) (emphasis added).

²⁷¹ *See supra* notes 89-93 and accompanying text.

²⁷² *See supra* Section II.B.

parties . . . have consistently understood it to ban elective abortion, in spite of CRC Committee recommendations to the contrary, and to mandate state protection of unborn life throughout pregnancy, from conception to birth.”²⁷³

V. ADDITIONAL PROBLEMS ARISING FROM THE BACKDOOR PUSH FOR A RIGHT TO ABORTION

As already discussed, the non-legislative attempt to create a right to abortion produces numerous problems: violations of state sovereignty; loss of U.N. treaty body legitimacy; practical issues of state fulfillment of a right to abortion, such as violating the right to conscientious objection of medical professionals, owners of medical facilities, and private insurance companies; and, most importantly, a violation of the competing rights of the unborn child. In addition to these issues, the backdoor push to create a right to abortion threatens to devalue other human rights by dilution, stymies human rights progress in other areas, and could eventually create a schism wherein human rights are no longer considered universal.²⁷⁴

A. Devaluation of Existing Human Rights

The assertion of an inferred right to abortion threatens to devalue the human rights that states carefully negotiated and explicitly agreed to recognize in binding human rights treaties. In Professor Stephen P. Marks’ words, “[I]t would weaken the idea of human rights in general if numerous claims or values were indiscriminately proclaimed as human rights.”²⁷⁵ Accordingly, professor Marks recommends stringent standards for new rights, including enforceability and non-infringement of already existing rights.²⁷⁶

The proclamation by treaty monitoring bodies of a right to abortion, without a basis in international law and in contravention of

²⁷³ De Jesus, *supra* note 85, at 606.

²⁷⁴ JAKOB CORNIDES, NATURAL AND UN-NATURAL LAW 5 (2010), <https://c-fam.org/wp-content/uploads/Un-Natural-Law-FINAL.pdf>.

²⁷⁵ HANNUM, *supra* note 27, at 95-6.

²⁷⁶ *Id.*

states' domestic legislation, fails to meet Professor Marks' criteria. First, as argued in *supra* Section II.A, the assertion of a right to abortion could present significant enforcement challenges, such as requiring states to supply sufficient and accessible abortion practitioners and facilities despite funding limitations and potentially in violation of the states' domestic laws. Second, a proclamation of a right to abortion could also infringe established rights of freedom of thought, conscience, and religion, and potentially freedom of expression or opinion.²⁷⁷ Hopefully as states push back against the surreptitious effort to assert a right to abortion, the U.N. and pro-choice NGOs will consider addressing the issue in a forthright manner that honors state commitments to human rights treaties and preserves the value of the rights those instruments explicitly guarantee.

B. Loss of Human Rights Progress in Other Areas

The backdoor effort to create a right to abortion compromises progress in other areas of human rights by absorbing an inordinate amount of U.N. treaty body attention, as seen in the countless Committee communications that have focused on this issue.²⁷⁸ In addition, the dogged attempt to create a right to abortion has shifted discussions at U.N. conferences away from other human rights issues. This is precisely what occurred at the 1994 U.N. Conference on Population and Development in Cairo, "where an abortion rights initiative . . . pushed all other population and

²⁷⁷ See, e.g., text accompanying *supra* notes 101-03, 105-10 & 125. Professor Glendon has also cautioned against the haphazard creation of new human rights such as abortion, stating, "As memories fade about why it was necessary after World War II to affirm the existence of certain inalienable rights, the citizens of the world must be vigilant to prevent trivialization and dilution of those basic protections of human dignity." Glendon, What Happened at Beijing, *supra* note 87.

²⁷⁸ See Safe Abortion, *supra* note 51, at 99, nn.9-10 (citing a long list of U.N. treaty committee general comments and concluding observations that urge states to liberalize their domestic abortion laws); see also CRR, *Ireland Must Legalize Abortion*, *supra* note 2, at n.8 (listing numerous treaty monitoring body communications that "have specified that in order to ensure women's rights states should liberalize their abortion laws"); *supra* notes 100-01 and accompanying text (stating that the CEDAW Committee alone has criticized the abortion laws of over one hundred states parties).

development issues into the background.”²⁷⁹ Likewise, at a 2011 General Assembly meeting, numerous nations criticized the HRC Special Rapporteur on the Right to Health for ignoring his mandate by neglecting critical health issues, such as hunger and disease, and instead focusing his report on the “non-existent right to abortion.”²⁸⁰ The Special Rapporteur was also criticized for his “systematic attempts to reinterpret internationally agreed conventions and to disregard intergovernmental documents in which the right to health and its derived rights had been clearly defined. . . .”²⁸¹

Perhaps the most poignant illustration of the waste of international resources caused by the push for a right to abortion was the failure, for the first time in history, to adopt an outcome document at the 2015 U.N. Commission on Population and Development (UNCPD).²⁸² The UNCPD is an annual meeting at U.N. Headquarters to discuss progress toward fulfilling the goals of the 1994 International Conference on Population and Development in Cairo.²⁸³ The reason for the 2015 failure was that countries could not reach consensus on the right to abortion. On one side, there were “strong appeals to have sexual and reproductive health and rights embedded in the outcome document.”²⁸⁴ On the other side, states felt “harassed” and “discredited” by the U.N. Population Fund with respect to their national abortion legislation.²⁸⁵

²⁷⁹ Glendon, What Happened at Beijing, *supra* note 87.

²⁸⁰ Several Aspects of Sexual, Reproductive Health, *supra* note 21. The meeting summary noted opposition to the Rapporteur’s advocacy of a right to abortion by Egypt, Chile, Argentina, and Swaziland, and “others.”

²⁸¹ *Id.*

²⁸² Press Release, Economic and Social Council, Commission on Population and Development Unable to Agree upon Proposed Resolution, Reproductive Rights Among Points of Contention, POP/1041 (Apr. 17, 2015), <https://www.un.org/press/en/2015/pop1041.doc.htm> [hereinafter Points of Contention].

²⁸³ *Pro-Life and Family Member States Reject Outcome Document at UN Commission on Population and Development*, ADF INT’L (Apr. 21, 2015), <https://adfinternational.org/detailspages/press-release-details/pro-life-and-family-member-states-reject-outcome-document-at-un-commission-on-population-and-development>.

²⁸⁴ Points of Contention, *supra* note 281.

²⁸⁵ *Id.*

In 2017, the Commission again was unable to reach consensus on the outcome document, due in large part to disagreement about a right to abortion.²⁸⁶ Commission Chair Alya Ahmed Saif al-Thani described this as “a major failure.”²⁸⁷ On the pro-abortion rights side of the 2017 UNCPD, the Assistant Secretary-General for Policy Coordination in the Department of Social and Economic Affairs referenced the “‘unfinished business’ of the Cairo Agenda,” meaning the effort to “ensure sexual and reproductive health rights,” including abortion.²⁸⁸ Russia’s representative summed up the opposing side’s perspective that “pushing sexual and reproductive health rights as indivisible from human rights was nothing but an attempt to undermine international agreements on human rights.”²⁸⁹ He considered that “[s]uch formulations diluted basic human rights, which only discredited the Commission’s work [and] express[ed] opposition to use of the Commission as a ‘back door’ through which to force various human rights concepts that did not meet the broader consensus.”²⁹⁰

The effort to create a right to abortion also stymies human rights progress by discouraging states from ratifying human rights treaties to which they might agree but for the well-founded concern that U.N. bodies, and even other nations, would try to read a right to abortion into the treaty commitments. The United States, for example, has declined to ratify the Convention on the Rights of the Child in large part because of concerns that ratification will impact U.S. abortion laws²⁹¹ as well as raise federalism concerns.²⁹² Likewise,

²⁸⁶ Press Release, Economic and Social Council, Commission on Population and Development Fails to Adopt Outcome Document as Fiftieth Session Concludes, POP/1060 (Apr. 7, 2017), <https://www.un.org/press/en/2017/pop1060.doc.htm>.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Soo Jee Lee, *A Child’s Voice Vs. a Parent’s Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 700 (2017); see also Rutkow & Lozman, *supra* note 31, at 178.

²⁹² Rutkow & Lozman, *supra* note 31, at 177 (citing Susan Kilbourne, Student Research, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. FIGHTING POVERTY 327, 327 (1998)).

abortion concerns have at least partly influenced the United States' decision to not ratify the CEDAW and the ICESCR.²⁹³

C. Danger of Withdrawal or Schism

Given the strong resentment some states have toward efforts by U.N. treaty monitoring bodies, agencies, and special rapporteurs to interpret human rights treaties to include a right to abortion, some states may choose to withdraw from the treaties altogether.²⁹⁴ International law scholars have taken notice of this possibility. As Duke Professor Laurence Helfer has stated, “overlegalizing human rights can lead even liberal democracies to reconsider their commitment to international institutions that protect those rights.”²⁹⁵ Likewise, UCLA Law professor Randall Peerenboom has noticed that “fault lines have become readily apparent as the human rights movement has gained in power and attempted to enforce increasingly specific interpretations of rights.”²⁹⁶ Professor Peerenboom has further observed that “[t]he growing power of the international human rights movement has led to a backlash as countries have begun to feel the movement’s bite.”²⁹⁷ Should the resistant states’ resentment continue to grow, what is now a division with the potential to cause treaty withdrawals may, in the words of a European Commission official, reach the point of “schism in the world of legal thought [whereby] human rights would no longer be

²⁹³ *Id.* at 168. General concerns about treaty body overreach have also discouraged the U.S. from ratifying the CRPD. *See also* Candace Farmer, *Can the U.S. Use a Reservation to Alleviate Sovereignty Concerns Regarding the Convention on the Rights of Persons with Disabilities?* 43 GA. J. INT’L & COMP. L. 249, 257 (2014) (“The true root of [U.S.] apprehension [in ratifying the CRPD] is traced back to the uncertainty of the Expert Committee’s power restraints. . .”).

²⁹⁴ Pedone & Kloster, *supra* note 99, at 78.

²⁹⁵ Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1836 (2002).

²⁹⁶ Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 824 (2005).

²⁹⁷ *Id.*

universal.”²⁹⁸ The need for a better approach to abortion and the rights of the unborn could not be more evident.²⁹⁹

VI. THE NEED FOR CLARIFICATION: USING AN AMENDMENT OR
OPTIONAL PROTOCOLS TO RESOLVE THE CONFLICT BETWEEN
ABORTION AND PROTECTION OF THE UNBORN IN U.N. HUMAN
RIGHTS INSTRUMENTS

The backdoor attempt to create a right to abortion through inference has produced division and resentment in the international community, absorbed resources at the expense of other attention-worthy issues, and caused a host of other problems.³⁰⁰ Although the strategy has successfully pressured some states into changing their abortion laws,³⁰¹ other states continue to resist, and the acrimony seems to be mounting, as seen in the 2015 and 2017 UNCPD failures to reach consensus.³⁰² Given that pro-choice NGOs and treaty monitoring bodies do not appear to be backing down, perhaps the international community is ready to reaffirm the traditional and universally accepted way of creating international law: through contracts made by willing sovereign nations.³⁰³

²⁹⁸ Cornides, *supra* note 273, at 5.

²⁹⁹ Philip Alston’s 1984 article that accurately predicted the coordination of NGOs and treaty monitoring bodies to assert new human rights also provided advice: “a more orderly and considered procedure should be followed before the United Nations accords the highly prized status of a human right to any additional claims.” Alston, *Conjuring Up New Human Rights*, *supra* note 186, at 614.

³⁰⁰ See *supra* Part V.

³⁰¹ See generally Zorzi, *supra* note 15 (discussing the liberalization of abortion laws in Nepal, Belgium, Ethiopia, Chad, Columbia, Argentina, Peru, and potentially Chile).

³⁰² See *supra* Section V.B.

³⁰³ Some states, anticipating efforts to interpret human rights treaty commitments to include a right to abortion, filed reservations, understandings, and declarations (RUDs) that clarified their national position on abortion and the rights of unborn human beings. See, e.g., Finegan, *supra* note 79, at n.142 (describing declarations to the CRC by Argentina, Guatemala, and Ecuador that extend the Convention’s protections to unborn human beings, as well as reservations by China, France, Tunisia, and the U.K., that preempt restrictions on national abortion laws). Because states may only file RUDs at the time of ratification or accession, states that did not see the backdoor effort coming missed their opportunity to

If states parties to the relevant U.N. human rights treaties could definitively settle the matter of abortion and the rights of the unborn, then the international community could move forward and turn their attention to issues that have been neglected for the preoccupation with abortion. States would likely reach consensus at the UNCPD once again, and the vast flow of resources that the U.N., states, and NGOs have spent to push for an international right to abortion could be redirected to issues such as disease, hunger, and education. In addition, nations, such as the United States, would likely be more open to ratifying U.N. human rights treaties once the debate and uncertainty regarding abortion and the rights of the unborn are finally put to rest. With the adoption of treaty committee ethics guidelines and mandate clarification, the U.N. treaty compliance system could regain integrity and therefore become more effective in fulfilling its original purpose of helping nations meet their treaty obligations.³⁰⁴

There are two options for legislatively settling the issue of abortion and rights of the unborn under the existing human rights treaties: amendment and the adoption of optional protocols. Well-resourced nations with the strongest positions on abortion and rights of the unborn are perhaps the most likely candidates for leading efforts to alter treaty agreements through amendments or additional protocols, as they are less vulnerable to international pressure.

A. Amendment to Existing Human Rights Treaties

Through an amendment, U.N. human rights treaties could explicitly clarify that abortion and the rights of the unborn are left to each individual state or establish some basic parameters for these issues. The relevant U.N. treaties for abortion and rights of the

clarify their position on abortion and rights of the unborn within the treaty system. VCLT, *supra* note 82, art. 23(2). However, even states that did successfully file RUDs have received significant pressure from treaty monitoring bodies who, unhappy with the states' abortion-limiting statements, have declared such RUDs to violate the "object and purpose" of the treaty and therefore, under the VCLT, to be invalid and of no effect. Pedone & Kloster, *supra* note 99, at n.16.

³⁰⁴ See Pedone & Kloster, *supra* note 99, at 80-82 (proposing treaty body reform).

unborn are the ICCPR, ICESCR, CRC, CAT, CRPD, and CEDAW. The first five of these six instruments describe the amendment procedure with some detail. The CEDAW does not refer to “amendments” per se, but does give a very brief description of the process for “revisions,” stating that any state party may, at any time, submit to the U.N. Secretary General a written request for revision to the CEDAW.³⁰⁵ Upon receipt of a revision request, the CEDAW simply states that the U.N. General Assembly “shall decide upon the steps, if any, to be taken in respect of such a request.”³⁰⁶

The more detailed amendment procedure for the other five relevant treaties is essentially the same for each instrument.³⁰⁷ Any state party to the treaty may file an amendment request with the U.N. Secretary General.³⁰⁸ The Secretary General then communicates the proposed amendment to each state party and requests notification of whether the state party agrees to a conference for the purpose of discussing and voting on the proposed amendment.³⁰⁹ If one-third of the states parties agree to the conference, the Secretary General will convene the meeting under the auspices of the United Nations.³¹⁰ Should a majority of the states that are present vote in favor of the amendment, it will go to the General Assembly for a vote.³¹¹ The amendment enters into force upon approval by the General Assembly and acceptance by two-thirds of the states parties to the

³⁰⁵ CEDAW, *supra* note 96, art. 26(1).

³⁰⁶ *Id.* art. 26.2. In practice, the revision process for the CEDAW has been similar to that of the other human rights treaties. Michael Bowman, *Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform*, 7 HUMAN RTS. L. REV. 225, n.53 (2007).

³⁰⁷ See ICCPR, *supra* note 44, art. 51; ICESCR, *supra* note 41, art. 29; CRC, *supra* note 45, art. 50; CAT, *supra* note 129, art. 29; G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 47 (Jan. 24, 2007) [hereinafter CRPD].

³⁰⁸ See, e.g., ICCPR, *supra* note 44, art. 51(1).

³⁰⁹ See *id.*

³¹⁰ *Id.*

³¹¹ *Id.*

treaty.³¹² The amendment binds only the states parties that have accepted it.³¹³

One of the risks of seeking an amendment that leaves matters of abortion and rights of the unborn completely in the discretion of each state party is that states could use the amendment to justify extreme behavior at either end of the abortion debate. For example, some states may choose not to balance the mother's right to life against that of her unborn child where life-saving treatment for the mother involves the foreseen but undesired loss of her child.³¹⁴ On the other end of the spectrum, without some restrictions, states could allow for particularly brutal scenarios such as late-term abortion³¹⁵ or practices that shock the conscience, such as conception solely for the purpose of aborting and selling the child for fetal tissue research, as was proposed in the Harvard Journal of Law and Gender.³¹⁶

To guard against these undesirable extremes, an amendment to the relevant human rights treaties could set forth basic limitations

³¹² See, e.g., *id.* art. 51(2).

³¹³ See, e.g., *id.* art. 51(3). The CRPD provides for a slightly different rule with respect to the binding nature of amendments made to Articles 34, 38, 39 and 40. The CRPD Conference of States Parties can agree by consensus to have amendments to these four articles apply to all States parties, provided the amendments otherwise satisfy the procedural requirements. CRPD, *supra* note 306, art. 47(3).

³¹⁴ See *supra* notes 63-65 and accompanying text.

³¹⁵ Seven nations, including the United States, currently permit elective abortion after twenty weeks. Robert King, *Graham: U.S. Must Exit 'Club' of Countries Allowing Late-Term Abortion*, WASH. EXAMINER (Mar. 15, 2016, 11:31 AM), <http://www.washingtonexaminer.com/graham-us-must-exit-club-of-countries-allowing-late-term-abortion/article/2585839>.

³¹⁶ See V. Noah Gimbel, *Fetal Tissue Research & Abortion: Conscriptio, Commodification, and the Future of Choice*, 40 HARV. J.L. & GENDER 229, 239 (2017). The author states:

In a fetal tissue free market, conceiving to abort for the purpose of "donation" would be recognized as a valuable form of women's biolabor. Like prostitution to the feminist decriminalization camp, women's ability to profit off of their sexual and reproductive capacities would carry the liberatory promise of enhanced economic independence and even better reproductive healthcare. *If the fetus . . . is just an extension of the woman's body, selling it is no different than selling sex.* *Id.* at 277.

with respect to abortion and rights of the unborn. Given that only a few countries prohibit abortion where the procedure is determined to be necessary to save the mother's life, it is likely that the General Assembly and two-thirds of the states parties to the ICCPR, ICESCR, CRC, CAT, CRPD, and CEDAW³¹⁷ would agree to an amendment that permitted the more restrictive parameter of life-saving treatment for the mother that involved the foreseeable but unintentional death of the unborn child.³¹⁸ Likewise, at the other end of the spectrum, as of 2014 only four states allow abortion on demand after the twenty-fourth week of pregnancy.³¹⁹ Accordingly, it is likely that the General Assembly and two-thirds of the states parties to the relevant U.N. human rights treaties would agree to prohibit abortion on demand after the twenty-fourth week of pregnancy.

B. Adoption of Optional Protocols

As an alternative to treaty amendments, states parties to the ICCPR, ICESCR, CRC, CAT, CRPD, and CEDAW could explicitly set forth their position on abortion and rights of the unborn in two optional protocols. An optional protocol is a treaty by its own right, and only the states parties to the original treaty who also ratify or accede to the protocol are bound by it.³²⁰ One protocol could explicitly set forth a woman's right to abortion and relevant limitations, and a second protocol could set forth the rights of the

³¹⁷ Unlike the ICCPR, ICESCR, CRC, CAT, and CRPD, the amendment process for the CEDAW is unclear. *See supra* notes 304-05 and accompanying text.

³¹⁸ *See* CENTER FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS 2014 (2014), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap2014.PDF> (indicating that, as of 2014, only the abortion prohibition laws of Chile, El Salvador, Malta, and Nicaragua, did not have an exception where necessary to save the mother's life).

³¹⁹ *Id.* According to the Center for Reproductive Rights, as of 2014, only Canada, North Korea, Singapore, and Vietnam allow for abortion "for any reason" past the 24th week of pregnancy. *Id.* China also allows for abortion after the 24th week of pregnancy for any reason but sex selection. *Id.*

³²⁰ *See Convention on the Elimination of All Forms of Discrimination Against Women, What Is an Optional Protocol?*, U.N. ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm> (last visited Feb. 20, 2018).

unborn as they relate to specific provisions of the treaty. While it would be contradictory to have opposing protocols to the same treaty, the preambular language of the protocols would include the rationale for the protocols.

Thus far, optional protocols have been a more common procedure than amendments for modifying U.N. human rights treaties, and only protocols have been used to make substantive changes to treaty commitments.³²¹ Three protocols have given states parties the option to modify substantive provisions of human rights treaties: the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty;³²² the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;³²³ and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.³²⁴

As with amendments, the use of optional protocols to clarify rights pertaining to abortion and unborn human beings risks creating undesirable interpretations at both ends of the abortion debate. However extreme interpretations could be preempted through carefully chosen textual language. Optional protocols on abortion and rights of the unborn also risk contributing to human rights

³²¹ See *Amendments to the Treaties*, BAYEFSKY, <http://www.bayefsky.com/tree.php/area/amend> (last visited Feb. 20, 2018) (listing three U.N. human rights treaty amendments); *The Core International Human Rights Instruments and Their Monitoring Bodies*, OHCHR, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Feb. 20, 2018) (listing nine protocols, three of which substantively change treaty commitments). There have been two treaty amendments and a third that is not yet in effect; all three pertain to treaty committee matters (emoluments, number of treaty committee members, and committee meeting time).

³²² G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, (Dec. 15, 1989).

³²³ G.A. Res. 54/263, annex, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, (May 25, 2000).

³²⁴ G.A. Res. 54/263, annex, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (May 25, 2000).

dilution, as argued in Section V.A; however, this risk is higher in a protocol creating a new right to abortion than in a protocol that extends already-existing rights to the unborn. In any case, these risks are arguably outbalanced by the manifold benefits of finally closing the backdoor effort to create a right to abortion. As an additional consideration, both protocols should provide a withdrawal clause to give states liberty to alter their international commitments if states change their domestic policy on these controversial issues.

VII. CONCLUSION

Given the great divide among states regarding abortion and the rights of the unborn, as well as the numerous harms that the backdoor effort to assert a right to abortion has caused, international law's best option is to legally clarify these issues. This could be done through an amendment recognizing, with limits, that abortion and the rights of the unborn are decidedly left to each sovereign state, or more likely, through optional protocols to the relevant human rights treaties. This would promote state sovereignty and U.N. treaty monitoring body integrity, preserve the value of explicitly provided-for human rights, and lessen the likelihood of treaty withdrawal or a schism in which human rights are no longer considered universal. In addition, clarification on abortion and rights of the unborn would allow the international community to turn its attention and resources to global issues that have been overshadowed by the abortion debate. Hopefully a collective desire to move forward on these challenging issues will prevail at the 2018 UNCPD.