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## THE SAN JOSE ARTICLES AND AN INTERNATIONAL RIGHT TO ABORTION

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### INTRODUCTION

Abortion advocates are on a mission to establish an “international” right to abortion using “soft norms” under customary international law. Their ultimate goal is to weave throughout the various sources of customary international law, language implying an international consensus that abortion is a necessary component of fundamental health that must be provided by States to their citizens. If national bodies, including courts, accept the notion that an international customary law right to abortion exists, those bodies could impose it upon their citizens.

To understand the dilemma, let us imagine the reversal of *Roe v. Wade*<sup>1</sup> from the perspective of a person who has faithfully participated in the March for Life<sup>2</sup> in Washington D.C. each year in protest of *Roe*. In one day the U.S. Supreme Court announces it is reversing *Roe* and holds that a right to abortion cannot be derived from the words of the Constitution.<sup>3</sup> It does not take much imagination to understand the joy this news would bring to the faithful marcher, whose decades-long protest has apparently borne fruit. But then, imagine the devastation the marcher would feel if the Supreme Court were to announce that, despite the reversal of *Roe*, a right to abortion nonetheless exists in the United States because abortion has been established as a human right under customary international law. Such an established right is the prize for which abortion advocates are working—a failsafe backstop for the day when the Supreme Court finally reverses *Roe*.

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> See MARCH FOR LIFE, <http://marchforlife.org>.

<sup>3</sup> Neither under a “liberty” or “privacy” interpretation, U.S. Const. amend. XIV, § 1.

Nonetheless, since, as demonstrated below, the foundational human rights documents do not recognize a right to abortion, the burden of proof lies upon abortion advocates to prove that an unwritten right to abortion has come into existence. It is a burden they cannot carry.

#### I. THE ORIGINAL HUMAN-RIGHTS DOCUMENT: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

In 1948, the United Nations General Assembly adopted the “Universal Declaration of Human Rights” (hereafter, the “UDHR”).<sup>4</sup> The setting for the creation of the UDHR—considered by many to be the original human rights document—was the aftermath of World War II, the devastation of which followed too closely on the heels of the destruction wrought by the First World War. The “massive violations of human dignity” represented by those two wars spurred the formation of the United Nations, the purpose of which was to “establish and maintain collective security” in the post-World War II era and to declare that the “community of nations” would never again allow such “massive violations of human dignity.”<sup>5</sup>

The preamble to the UDHR references the horrors of the Nazi regime and those of the Imperialist Japanese—“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”<sup>6</sup>— as a preface to the notion that “human rights should be protected by the rule of law.”<sup>7</sup> The UDHR declares that freedom, justice, and peace in the world rely on the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>8</sup>

Article 3 of the UDHR succinctly affirms the value of human life: “everyone has the right to life, liberty and security of person.”<sup>9</sup>

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<sup>4</sup> *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217A(III), UN Doc. A/810, (1948) [hereafter, UDHR] (available at <http://www.un.org/en/documents/udhr>).

<sup>5</sup> Mary Ann Glendon, *A World Made New*, xv-xvi, (New York, Random House, 2001).

<sup>6</sup> UDHR, *supra* note 4, pmb1, para. 2.

<sup>7</sup> *Id.* at para. 3.

<sup>8</sup> *Id.* at para. 1.

<sup>9</sup> UDHR, *supra* note 4, art. 3.

## II. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (hereafter, the “ICCPR”) is a treaty intended to implement into law the rights recognized in the UDHR.<sup>10</sup> A “declaration” like the UDHR has no binding legal effect; it is not “law.”<sup>11</sup> Conventions like the ICCPR, however, as treaties, bind those nations that ratify them.<sup>12</sup>

Echoing the UDHR, Article 6 of the ICCPR clearly affirms a legally-protected right to life: “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.”<sup>13</sup>

## III. TWO SOURCES OF PUBLIC INTERNATIONAL LAW: TREATY AND CUSTOM

The ICCPR represents one of the best known examples of one source of public international law—the treaty, which is a written agreement between nations. As a written document, nations can read a treaty and decide whether or not to be bound by its terms; then they can either ratify the treaty or try to renegotiate its terms.

By contrast, the second source of public international law, “custom,” is unwritten. Customary international law represents a “custom” among nations, or stated otherwise, a way of behaving or interacting by nations that, over time, becomes a pattern that all nations follow.<sup>14</sup> Because this source of law is not found in a written and subsequently ratified agreement, it must be discerned by a court from evidentiary materials.

There are two schools of thought on how customary international law develops: the traditional view and the modern view. The traditional view requires (1) unanimity among the nations, (2) the existence of the practice over a long period of time, and (3) a high standard of evidence. The commentary of jurists and others has been recognized as evidence of “customary” international law.\* As the Supreme Court stated in its opinion in the case *Sosa v. Alvarez-Machain*:

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<sup>10</sup> International Covenant On Civil And Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter, ICCPR] (November 17, 2014), <http://www.2.ohchr.org/English/law/ccpr.htm>.

<sup>11</sup> Compare U.N. Charter art. 10, with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, reporters’ note 2 (1987).

<sup>12</sup> See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

<sup>13</sup> ICCPR, *supra* note 10, art. 6 (1).

<sup>14</sup> William Saunders, Understanding International Law: The ABC’S of An International Right to Abortion, 84 Human Life Rev. (2010).

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the **customs and usages of civilized nations**; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, **not for the speculations** of their authors concerning what the law ought to be, *but for the trustworthy evidence of what the law really is.*<sup>15</sup>

However, there is a “modern” view of customary international law, relied upon by abortion advocates. I call this the “bold” position. The bold position does not require the existence of the practice over a long period of time. In fact, it asserts that customary international law can be found from a single UN meeting, since all the nations are (theoretically at least) present (more about this below).<sup>16</sup>

#### IV. CUSTOMARY INTERNATIONAL LAW AND THE EFFORT TO ESTABLISH AN INTERNATIONAL HUMAN RIGHT TO ABORTION

Abortion advocates are committed to establishing a right to abortion in international law. Since a treaty expressly guaranteeing a right to abortion is unlikely to ever be universally agreed to, and since the foundational documents by their express terms respect the right to life (and make no mention of a “right” to abortion), it is the second source of international law that provides an opportunity for abortion advocates to attempt to craft this “international right to abortion.” They do so by relying upon the “bold position” on customary international law.

A key tactic of abortion advocates is to weave throughout various human rights documents the notion that a right to abortion exists as a necessary component of what they term “reproductive health services.” (This will be explained in more detail under the section on “conference statements” below.) By inserting language that might be understood to imply a right to abortion into various UN documents, the abortion advocates create “sources” that they claim provide evidence of such a

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<sup>15</sup> *Id.* (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

<sup>16</sup> Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harvard Law Rev.* 815-76 (1997).

right in customary international law. Abortion advocates are attempting to create “soft norms” that eventually “harden” into binding law. (I will return to this point below.)

## V. SOURCES THAT ABORTION ADVOCATES CLAIM SUPPORT A RIGHT TO ABORTION

### A. *Rapporteur’s Reports*

Paul Hunt, who was a “special rapporteur” to the UN on the right to health, wrote the following in a 2008 report, titled *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights*:

#### Duties of Immediate Effect: Core Obligations

Also, a State has a core obligation to ensure a minimum “basket” of health-related services and facilities, including essential food to ensure freedom from hunger, basic sanitation and adequate water, essential medicines, immunization against the community’s major infectious diseases, and sexual and reproductive health services including information, family planning, prenatal and postnatal services, and emergency obstetric care.<sup>17</sup>

The inclusion of “sexual and reproductive health services”—alongside food, water, and basic sanitation—among the minimum “basket” of health-related services that States are “obligated” to provide to their citizens, provides, under the bold position, “evidence” that can later be cited by pro-abortion advocates of an existing international right to abortion. (However, as we will see below, “reproductive health services” does not include a general right to abortion.)

### B. *Committee Comments*

United Nations committee recommendations are a second example of a “preferred source” relied upon by abortion advocates to provide evidence of customary international law. Each UN human rights treaty

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<sup>17</sup> Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc. No. A/HRC/7/11 ¶ 52 (2008) available at [http://www.who.int/medicines/areas/human\\_rights/A\\_HRC\\_7\\_11.pdf](http://www.who.int/medicines/areas/human_rights/A_HRC_7_11.pdf).

contains provisions for the election of a committee, which is empowered solely to receive reports from signatory states and make advisory recommendations to them. Although by the terms of the treaty such recommendations are not “binding interpretations” (*i.e.*, they are not like judicial decisions), they provide an opportunity for abortion advocates (through pro-abortion members of such committees) to make pro-abortion assertions in those recommendations, which will later be cited as supporting an international right to abortion. This poses a real risk to the pro-life position because, increasingly, UN committee reports are cited by jurists, government officials, and activists *as if they were statements of international law* in order to pressure governments to change pro-life laws and policies.

The UN advisory committee for the Convention on the Elimination of All Forms of Discrimination Against Women (hereafter, “CEDAW”) provides an example. In a report on Croatia, CEDAW published the following: “The refusal, by some hospitals [in Croatia], to provide abortions on the basis of conscientious objection of doctors [constitutes] an infringement of women’s reproductive rights . . . .”<sup>18</sup> In other words, women have a right to abortions and doctors must provide them. The notion that women’s reproductive rights trump doctors’ rights of conscience is a “bold” statement indeed, considering the fact that the foundational human rights documents—the UDHR and the ICCPR—explicitly provide for the right to life of all human beings,<sup>19</sup> and, provide for the protection of rights of conscience.<sup>20</sup>

### C. Conference Statements

At every UN meeting conference statements are negotiated. Following the meeting, these statements, also known as “outcome documents,” are issued as a “report” of the meeting results. This is a third vehicle used by abortion advocates to buttress the claim a right to abortion exists.

At such a meeting, all the nations are represented (theoretically, at least, that is, every member nation of the UN has the right to be there). Therefore, agreement to the outcome document may be said to create (or, to illustrate) consensus on a point of international law. In other words,

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<sup>18</sup> Report of the United Nations Committee on the Elimination of Discrimination Against Women, G.A. Res. 54/38, ¶ 109, 21<sup>st</sup> Sess., U.N. Doc. A/54/38/Rev.1, Jan. 1, 1999).

<sup>19</sup> UDHR, *supra* note 4 at art. 3; See ICCPR *supra* note 10 at art. 6-1.

<sup>20</sup> UDHR, *supra* note 4 at art. 18; See ICCPR, *supra* note 10 at art. 18.

abortion advocates claim that agreement to language in an outcome document from a single international meeting creates a consensus that, under the bold position, counts as evidence of customary international law.<sup>21</sup>

The International Conference on Population and Development (ICPD), convened by the United Nations in Cairo, Egypt, in 1994, provided abortion advocates just such an opportunity.<sup>22</sup> At this conference abortion advocates hoped to win express recognition of a right to abortion.<sup>23</sup> However, they failed.

While the statement recognized that abortion does take place in some countries, it did not endorse a “right” to abortion generally. We can see this from a close examination of the document.

In paragraph 13, it said basic “reproductive health” includes, *inter alia*, “abortion” but only “as specified in paragraph 8.25.”<sup>24</sup> Paragraph 8.25 in turn says (1) abortion should never be promoted as a method of family planning, (2) the legality of abortion is a matter of national (local) law, and (3) if abortion is legal in a nation, it should be safe:

In no case should abortion be promoted as a method family planning... 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.<sup>25</sup>

The Cairo elaborates upon the meaning of “reproductive health”:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the

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<sup>21</sup> Bradley and Goldsmith, *supra* note 17.

<sup>22</sup> George Weigel, *What Really Happened at Cairo*, First Things, Feb. 1995, available at <http://www.firstthings.com/article/1995/02/002-what-really-happened-at-cairo>.

<sup>23</sup> *Id.* ¶ 8.25.

<sup>24</sup> Programme of Action of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13, ¶ 13.14 (1994), *See*, Ch. 8 ¶ 8.25, <http://www.un-documents.net/ac171-13.htm>.

<sup>25</sup> *Id.* ¶ 8.25.

capability to reproduce and the freedom to decide if, when and how often to do so.

Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable **methods of family planning** of their choice, as well as other methods of their choice for regulation of fertility **which are not against the law**, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. *In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems.* It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases.<sup>26</sup> (emphasis added)

In sum, while there is a “right of men and women” to reproductive health care and services, that extends only to methods that are “not against the law.”

Thus, as we can see from paragraphs 13.14, 8.25, and 7.2, while “reproductive health” includes “family planning,” it does not include abortion unless a country has legalized it (and even then, it is never to be “promoted”). In short, the Cairo statement does not recognize a general “human right” to abortion, either alone or as part of a right to “reproductive health” or to “family planning” services.

Furthermore, a number of countries made “reservations” to the document.<sup>27</sup> In these reservations, they expressly refuted any suggestion that a right to abortion was implied in the Cairo language. The reservations served instead to re-confirm the pro-life principles first stated in the UDHR and the ICCPR.<sup>28</sup> An example of the express

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<sup>26</sup> *Id.* ¶ 7.2.

<sup>27</sup> These reservations are documented in part 2, chapter 1 of Programme of Action of the International Conference on Population and Development.

<sup>28</sup> ICCPR, *supra* note 10; See UDHR *supra* note 4.

reservations made by the United States and eight Latin American countries, refuting any implied right to abortion in the Cairo language, follows. Nicaragua's reservation stated:

The Government of Nicaragua, pursuant to its Constitution and its laws, and as a signatory of the American Convention on Human Rights, confirms that every person has a right to life, this being a fundamental and inalienable right, and that this right begins from the very moment of conception. We accept the concepts of 'family planning,' 'sexual health,' 'reproductive health,' 'reproductive rights,' and 'sexual rights' expressing an explicit reservation on these terms and any others when they include 'abortion' or 'termination of pregnancy' as a component. Abortion and termination of pregnancy *can under no circumstances* be regarded as a method of regulating fertility or a means of population control.<sup>29</sup>

The reaction by these nations only emphasizes the point that there was no unanimity or even consensus, at the time of the Cairo conference in 1994, that language such as "reproductive health services" was synonymous with abortion. And it must be remembered that, without unanimity, under the modern view as well as the traditional view, there is no customary international law. These national reservations when combined with the actual words in the outcome document demonstrate conclusively that Cairo does not recognize an international right to abortion—either expressly or implicitly.

## VI. SOFT NORMS

Not to be dissuaded, abortion advocates argued that the repetition of language such as "reproductive health" from the Cairo statement and other sources, over a period of time, could establish an international customary law right to abortion.

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<sup>29</sup> *Id.* See A/CONF.171/13 Report of the ICPD, available at <http://www.unfpa.org/public/cache/offonnce/home/sitemap/icpd/International-Conference-on-Population-and-Development/ICPD-Programme;jsessionid=A2AAFAFE60A2673AA2B45997998ABECD.jahia02>).

For example, a memo from one group, "Summary of Strategic Planning," dated 2003, and placed into the Congressional Record by Congressman Chris Smith (R-N.J.)<sup>30</sup> stated—

The ILP's overarching goal is to ensure that governments worldwide guarantee reproductive rights out of an understanding that they are legally bound to do so."

We see two principal requisites for achieving this goal:

**(1) Strengthening international reproductive rights norms.**

Norms refer to legal standards. The strongest existing international legal norms relevant to reproductive rights are found in multilateral human rights treaties. Based on *our* view of what reproductive rights should mean for humankind, the existing human rights treaties are not perfect. For example, at least four substantive areas of reproductive rights illustrate the limits of international reproductive rights norms in protecting women:

- (a) **abortion;**
- (b) adolescents access to reproductive health care;
- (c) HIV/AIDS; and
- (d) child marriage.

One strategic goal could be to work for the adoption of a new multilateral treaty (or addendum to an existing treaty) protecting reproductive rights. **The other principal option is to develop 'soft norms' or jurisprudence (decisions or interpretations) to guide states' compliance** with binding norms.

Supplementing these binding 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 inter-

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<sup>30</sup> 149 Cong. Rec. E2534, E2535 (2003) (emphasis added).

governmental political bodies, agreed conclusions in international conferences and reports of special rapporteurs.<sup>31</sup>

Thus, since existing treaties did not provide a right to abortion, the strategy was to develop such a right to abortion through soft norms into “hard” customary international law. Since, as we have seen, there was no right in 1948 (UDHR), or 1966 (ICCPR), or 1994 (Cairo), it would have been necessary to prove that it had developed since Cairo. In fact, following the election of pro-life president, George W. Bush, one “abortion-rights” group tried to win judicial approval of this theory in the 2001 case *CLRP v. Bush*.<sup>32</sup> Though the case was dismissed for technical reasons, their complaint defines their notion of customary international law:

Customary international law is embodied, *inter alia*, in treaties (even if not ratified by the United States), the writings of international law jurists, and documents produced by United Nations international conferences. The *Restatement Third of the Foreign Relations Law of the United States* (American Law Institute 1987) defines customary international law as resulting “from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>33</sup>

In other words, from the point of view of abortion advocates, soft norms could “ripen” into binding obligations, even for nations that never expressly agreed to them.

## VII. RESISTANCE TO THE “SOFT-NORM” MOVEMENT

Pro-life delegates to the UN have pushed back against this “soft norms” strategy. Remember that it is clear no right to abortion was recognized prior to Cairo. Rather, as mentioned before, abortion

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<sup>31</sup> 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. These “soft” norms are discussed above in the section, “sources that abortion advocates claim support a right to abortion”

<sup>32</sup> *The Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002).

<sup>33</sup> *The Ctr. for Reprod. Law & Policy v. Bush*, 2001 WL 36082935 (S.D.N.Y.) (2001) First Amended Complaint at 80 (emphasis added).

advocates assert that the repetition of “reproductive health” language taken from the Cairo statement in special rapporteur’s reports, comments from UN treaty-monitoring bodies, UN conference outcome statements, and other “soft” sources has created a right to abortion. Thus, if pro-life delegates could simply establish that the repetition of this language was *not* understood by the nations to be an endorsement of a right to abortion, they would have rebutted that argument decisively. This was, in fact, achieved at the UN Special Session on Children held in June 2001.

As the final statement was being negotiated, some delegates confessed that certain language about “reproductive health” was understood by them to include a right to abortion. This was unacceptable to other nations -

[T]he U.S. delegate asked Andras Vamos-Goldman [an official Canadian delegate at the Child Summit held at UN headquarters in New York] . . . what was meant by the phrase “equal access to services . . . including sexual and reproductive health care,” to which the delegate replied, “of course—and I hate to use the word—but in ‘services’ is included abortion.” Those countries that do not consider abortion to be a female child’s ‘right’ reacted quickly, and a number of countries that had previously supported the inclusion of the language “agree[d] to its deletion.”<sup>34</sup>

In other words, once a delegate admitted that he was using language intended to imply a right to abortion, that language was rejected. “Reproductive health” was not understood to include a general right to abortion. This shows—conclusively in my view—that no right to abortion can have developed since Cairo by the route of customary international law.

In further refutation, the United States of America appended the following explanatory statement:

Concerning references in the document to UN conferences and summits and their five year reviews, the United States

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<sup>34</sup> 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, 91 (Winter, 2011) (Vamos-Goldman’s statement was widely reported at the time: see *LifeSiteNews.com*, *Life, Family and Culture News*, *Resources*, *Canada Shocks U.N. Delegates*, <http://www.lifesitenews.com/news/archive/ldn/2001/jun/01061401> (June 14, 2001)).

does not understand any endorsement of these conferences to be interpreted as promoting abortion.

The United States understands the terms “basic social services, such as education, nutrition, health care, including sexual and reproductive health,” “health care,” “quality health care services,” “reproductive health care,” “family planning,” “sexual health,” “reproductive health,” “safe motherhood,” in the documents to in no way include abortion or abortion-related services or the use of abortifacients.”<sup>35</sup>

#### VIII. REAFFIRMATION OF THE FOUNDATIONAL HUMAN RIGHTS DOCUMENTS’ PROTECTIONS FOR LIFE

The idea that “reproductive health” language somehow evolved since the Cairo conference to cover abortion was further rebutted in 2004 in the Doha Declaration. The Doha Declaration is an outcome document from a UN international conference held at Doha, Qatar, in November 2004, to celebrate the second International Year of the Family. A quote from the report on the conference states that one of the purposes of the conference was to “reaffirm international norms” related to family life.<sup>36</sup>

The following excerpt recites the principles of protection of all human life originating in the original human life documents:

#### **The Doha Declaration (2004)**

##### **Reaffirmation of Commitments to the Family**

We reaffirm international commitments to strengthen the family, in particular:

**We recognize the inherent dignity of the human person** and note that the child, by reason of his physical and mental immaturity, needs special safeguards and care **before as well as after birth**. Motherhood and childhood

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<sup>35</sup> “United States of America Explanation of Position,” 5/1/2001.

<sup>36</sup> Conference to Celebrate the Tenth Anniversary of the International Year of the Family, Doha, Qatar, Nov. 29-30, 2004, *Report on the Doha International Conference for the Family*, U.N. Doc. A/59/599 (Dec. 7, 2004).

are entitled to special care and assistance. **Everyone has the right to life, liberty and security of person.**<sup>37</sup>

By using the exact same language of the UDHR from 1948 and the ICCPR from 1966, the Doha Declaration reconfirms the international community's commitment as it was understood when those documents were first agreed to. Simply said, the declaration undergirds the notion that the original protections for life contained within the foundational human rights documents have stood the test of time and no consensus has evolved that there is a right to abortion.

In adopting the Doha Declaration, the 70 nations who gathered at Qatar reaffirmed the meaning of the language in the original human rights documents as it was when first adopted. And, as we have discussed, that language did not include abortion.

#### IX. ABORTION ADVOCATES LIMITED SUCCESS SINCE DOHA

Despite the conclusive evidence just reviewed from Doha and the UN Special Session on Children that there is no international consensus that a "right to abortion" has evolved in customary international law, the argument continues to be made to judges that an international human right to abortion exists.

##### A. Colombia

Colombia's Constitution explicitly protects life.<sup>38</sup> Yet, despite that fact, in a 2006 decision, the Colombian Corte Constitucional (Constitutional Court) ruled that under certain circumstances abortion could not be illegal.<sup>39</sup> This was a radical decision because the Constitutional Court relied partially upon soft norms in its opinion, which declared unconstitutional portions of Colombia's Criminal Code that criminalized

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<sup>37</sup> *Id.* at 15 ¶ 2.

<sup>38</sup> Constitución Política de Colombia [C.P.], 1991, art. 2, para. 2. ("The authorities of the Republic are established in order to protect all individuals residing in Colombia, in their life, honor, property, beliefs, and other rights and freedoms, and in order to ensure the fulfillment of the social duties of the State and individuals.")

<sup>39</sup> Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.) (Abortion not illegal when "mother's life or physical or mental health is at risk, when the preborn child has serious malformations indicating probable non-viability, or when the pregnancy is the result of rape, incest, unwanted artificial insemination, or unwanted implantation of a fertilized ovum.")

abortion.<sup>40</sup> The Court's ruling was based on its finding "that international human rights law could be applied in Colombia through the Court's incorporation of regional and international human rights law within its judicial review of the abortion legislation."<sup>41</sup> This decision represented the "first constitutional decision that provided an international human-rights framework to review the constitutionality of abortion under domestic law."<sup>42</sup>

### *B. Europe*

In Europe, the pro-abortion argument has been subtly different. There the effort has been to convince a court to hold that a fundamental legal document (a treaty) implies a right to abortion that trumps national laws (similar to *Roe*, where the Supreme Court interpreted our fundamental law—the Constitution—to imply a right to abortion, trumping state laws to the contrary). While abortion advocates have been frustrated on this point, courts have interpreted the requirements of the fundamental law in a way that advances abortion and undermines pro-life cultural preferences.

The European Court of Human Rights (hereafter, the "ECHR") is the human rights court of the Council of Europe.\* The ECHR interprets the European Convention on Human Rights (hereafter, "the Convention"), a treaty ratified in 1950.<sup>43</sup> The Council of Europe consists of 47 member countries, whose policies are affected by ECHR decisions. An opinion by the ECHR that recognized abortion as a right—even though officially affecting policy only for those countries—would be cited by abortion advocates as evidence that an international right to abortion exists.<sup>44</sup> As explained below, recent cases from the ECHR illustrate further success of abortion advocates in turning soft norms into hard law.

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<sup>40</sup> Saunders, *supra* note 25, at n. 6.

<sup>41</sup> Veronica Undurraga & Rebecca J. Cook, Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006, in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, 216, 220 (Susan H. Williams ed. 2009).

<sup>42</sup> *Id.* at 241.

<sup>43</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter Convention], available at <http://conventions.coe.int/treaty/en/Treaties/html/005.htm>.

<sup>44</sup> See discussion above.

### 1. *Tysiac v. Poland*<sup>45</sup>

In 2007 the ECHR decided *Tysiac v. Poland*, a case in which a woman was denied a health exception for an abortion.<sup>46</sup> In its ruling, the ECHR found that Poland violated Article 8 of the Convention, which guarantees a right to privacy,<sup>47</sup> by not effectively allowing an abortion for the health exception to the plaintiff.<sup>48</sup> But the main import of this case is the ECHR's finding that Poland, which is a pro-life country that only allows for abortions in certain limited circumstances, did not institute procedures that would allow abortions under the exceptions provided for in law. "Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it."<sup>49</sup>

### 2. *A, B, and C v. Ireland*<sup>50</sup>

Ireland's Constitution guarantees the right to life: "The State *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.**"<sup>51</sup> Yet, abortion advocates insisted that European, non-Irish "consensus" can trump Ireland's express constitutional protections for life. In *ABC* the ECHR applied the principle from *Tysiac* to Article 40.3.3, thus weakening Ireland's constitutional protections for life.

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<sup>45</sup> *Tysiac v. Poland*, App No. 4510/03, 2007-I Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79812>.

<sup>46</sup> *Id.* ¶ 119 (patient suffered from severe myopia from 1977).

<sup>47</sup> Convention, *supra* note 42, § I, art. 8 ("Privacy 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

<sup>48</sup> *Tysiac*, *supra* note 45 ¶ 104. ("In this context, the Court observes that the applicable Polish law, the 1993 Act, while prohibiting abortion, provides for certain exceptions. ... abortion is lawful where pregnancy poses a threat to the woman's life or health, as certified by two medical certificates, irrespective of the stage reached in pregnancy.").

<sup>49</sup> *Id.* ¶ 116.

<sup>50</sup> *A, B and C v. Ireland*, App. No. 25579/05 Eur. Ct. H.R. (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332>.

<sup>51</sup> Constitution of Ireland, art. 40.3.3, *in operation as from Dec. 29, 1937*, available at <http://www.irishstatutebook.ie/en/constitution/> (emphasis added)

The ECHR decided *A, B, and C v. Ireland* in December 2010. The plaintiffs were three anonymous women—referred to as “A,” “B,” and “C”—each of whom claimed that Ireland’s prohibition on abortion required her to travel abroad to obtain one, which violated her Convention rights.<sup>52</sup> The plaintiffs asked the ECHR to find a right to abortion in the Convention, even though the language of the Convention does not mention abortion—in fact, Article 2 of the Convention explicitly guarantees a right to life: “Everyone’s right to life shall be protected by law.”<sup>53</sup> Nevertheless, the plaintiffs argued that the ECHR should interpret the treaty as providing such a right.<sup>54</sup> They found this “right” by reading two Articles of the Convention together to imply it: Article 3, which prohibits torture and inhuman and degrading treatment,<sup>55</sup> and Article 8, which guarantees a right to privacy protected from interference, with certain exceptions including where national security and public safety are implicated.<sup>56</sup>

The *ABC* plaintiffs further argued that because the laws of a majority of European countries favor abortion, this “consensus” should be binding on Ireland as well.

A strong international consensus can demonstrate that a less burdensome alternative is available and preferred throughout the member States.... The State fails to address the fact that **Ireland’s abortion laws are completely incongruous with the European consensus and international standards on lawful abortion** to protect women’s health and well-being.<sup>57</sup>

The ECHR did not accept this argument. While it said that a consensus exists in Europe that abortion be allowed on the grounds of “health and well-being”, that consensus did not “decisively narrow the broad margin of appreciation [accorded to] the State”—meaning that

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<sup>52</sup> *A, B and C*, *supra* note 50 ¶ 139.

<sup>53</sup> Convention, *supra* note 42, § I, art. 2 (“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”).

<sup>54</sup> *A, B and C*, *supra* note 50 ¶ 139.

<sup>55</sup> Convention, *supra* note 42, § I, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

<sup>56</sup> Corte Constitucional, *supra* note 38.

<sup>57</sup> *A, B and C*, *supra* note 50 ¶ 90. (Applicants’ Reply to the Observations of Ireland on the Admissibility and Merits, Dec. 23, 2008) (emphasis added).

Ireland does not have to bow to any such consensus, but under the “margin of appreciation” can maintain more stringent abortion restrictions in law.<sup>58</sup>

The final outcome of the *ABC* case presents a “good news, bad news” scenario. As stated above, the ECHR disagreed with the plaintiffs and found no right to abortion in the Convention. And by reiterating its finding from *Vo v. France*<sup>59</sup> regarding the “margin of appreciation,” the ECHR maintained respect for Ireland’s sovereignty. Under the margin of appreciation, decisions on issues such as abortion are left up to the States.<sup>60</sup>

The bad news, however, is that the ECHR also advanced the idea from *Tysi c* that if a country has under any interpretation provided a right to abortion in its law (as Ireland had done in the *X* case<sup>61</sup>), it must effectively provide for that right.

[249] While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State . . . **once that decision is taken the legal framework devised for this purpose should be “shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.”**<sup>62</sup>

The ECHR in *ABC* thus interpreted Article 40.3.3 of Ireland’s Constitution to allow abortion when the “life” of the mother is at stake, as opposed to her health or well-being.<sup>63</sup>

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<sup>58</sup> *Id.* ¶ 236.

<sup>59</sup> *Vo v. France*, App. No. 53924/00, 2004-VIII Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887>.

<sup>60</sup> *Id.* ¶ 82 (“It follows that the issue of when the right to life begins comes within the margin or appreciation which the Court generally considers that States should enjoy in this sphere . . .”).

<sup>61</sup> See *Attorney General v. X*, [1992] I.L.R.M. 401 (Ir.) (The Supreme Court of Ireland ruled that “threat of suicide” by a girl seeking an abortion constituted “a real and substantial threat to the life of the pregnant woman or girl.” It thereby allowed abortion in such circumstances in Ireland under sec. 40.3.3 of the Irish Constitution. The lower court had interpreted 40.3.3 to protect the life of the unborn child).

<sup>62</sup> A, B and C, *supra* note 50 ¶ 249 (citing *S.H. and Others v. Austria*, App. No. 57813/00 ¶ 74 (2010)) (emphasis added).

<sup>63</sup> *Id.* ¶ 265. (Implementation of legislation to regulate the application of Article 40.3.3 would allow “pregnant women who establish that there is a real and substantial risk to their life to have an abortion in Ireland rather than traveling out of the jurisdiction”).

Plaintiff C had asserted her pregnancy constituted a potential risk to her life.<sup>64</sup> She (echoing *Tysiāc*) also claimed that “she required a regulatory framework by which any risk to her life and her entitlement to a lawful abortion in Ireland could be established.”<sup>65</sup> Since Ireland had not passed any legislation to implement such a “regulatory framework”, the ECHR found that Ireland violated Article 8<sup>66</sup> of the Convention.<sup>67</sup> The *Tysiāc* principle required Ireland to put in place measures to inform women of a right to abortion under Irish law—this holding reinvigorated abortion as a political subject in Ireland and caused an uproar in the country as to how to comply.<sup>68</sup>

### 3. R.R. v. Poland<sup>69</sup>

The *Tysiāc* principle was further applied by the Court to undermine pro-life views in the case *R.R. v. Poland*, decided by the ECHR in 2011.<sup>70</sup> In *R.R.* the plaintiff alleged that the conscientious objections of medical staff denied her the right to choose an abortion that might have been allowed under Poland’s “health” exception if results of genetic tests had been obtained in a timely manner.<sup>71</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 130.

<sup>66</sup> *Id.* ¶ 103. (“... All governments ... 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. ... 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 ...”)

<sup>67</sup> *Id.* ¶ 267-68 (“[A]uthorities failed to comply with their positive obligation to secure to [Plaintiff “C”] effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which [Plaintiff “C”] could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.”)

<sup>68</sup> Mary Minihan, *Expert group on abortion to report by July*, *The Irish Times*, Mar. 16, 2012, available at <http://www.irishtimes.com/newspaper/ireland/2012/0316/1224313395195.html> (March 16, 2012). Ireland’s Ambassador to the UN confirms the expert group tasked with making recommendations on implementing an ECHR ruling on abortion will report to the Government by July. Ireland’s rejection of 6 recommendations by UN member States on “reproductive rights” was decried by an Irish Family Planning Association member as “astonishing” for a state that expresses respect for human rights; while a spokesperson for the Society for Protection of Unborn Children pointed out that the UDHR and Irish Constitution both recognize and protect the right to life.

<sup>69</sup> *R.R. v. Poland*, 53 Eur. Ct. H. R. 31, ¶ 166 (2011).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* ¶ 43.

Following a prenatal ultrasound, the plaintiff had been informed that the fetus might have some genetic abnormality, possibly Turner syndrome.<sup>72</sup>

Turner syndrome . . . is a genetic condition in which a female does not have the usual pair of two X chromosomes. Girls who have this condition usually are shorter than average and infertile due to early loss of ovarian function. Other health problems that may occur with TS include kidney and heart abnormalities, high blood pressure, obesity, diabetes mellitus, cataract, thyroid problems, and arthritis. Girls with TS usually have normal intelligence, but some may experience learning difficulties.<sup>73</sup>

The plaintiff ultimately gave birth to a baby girl affected with Turner syndrome. In her civil suit, the plaintiff claimed that she was unable to obtain genetic testing in time to qualify for the health exception for abortion, due to “unreasonable procrastination” by the doctors dealing with her case and that they “failed to provide her with reliable and timely information about the fetus’ condition [and] . . . failed to establish the fetus’ condition in time for her to make an informed decision as to whether or not to terminate the pregnancy.”<sup>74</sup>

The Supreme Court of Poland ruled against the medical professional defendants and found that the plaintiff’s rights had been violated under the same two Convention articles involved in *A, B, and C v. Ireland*: Article 3, Inhuman or Degrading Treatment<sup>75</sup> and Article 8, Right to Respect for Private and Family Life.<sup>76</sup> In reviewing this decision, the ECHR stated that whether the abnormality would have entitled the plaintiff to an abortion was not at issue; rather, what was at issue was the legal obligation to provide prenatal genetic testing “within the time-limit for abortion to remain a lawful option for her.”<sup>77</sup> Referring to its aforementioned finding in *Tysic*—if a right to abortion has been provided for in law, the State must make it available *in fact*. The State has a “positive

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<sup>72</sup> *Id.* ¶¶ 9, 33.

<sup>73</sup> *Id.* ¶ 16 n.3.

<sup>74</sup> *Id.* ¶ 43.

<sup>75</sup> *Id.* ¶¶ 161-62; see *Tysic*, *supra* note 45, ¶ 119.

<sup>76</sup> *Id.* ¶ 214; see *Corte Constitucional* *supra* note 38.

<sup>77</sup> *Id.* ¶¶ 202-04.

obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion.”<sup>78</sup> In other words, Poland had not effectively instituted procedures to allow the plaintiff access to genetic testing in time to get an abortion, thus affirming that her Conventions rights were violated under Articles 3 and 8.<sup>79</sup> When one reflects that the woman met resistance from a decidedly pro-life medical culture, one sees that *in practice* this decision undermines the conscience rights of that pro-life medical culture.

#### 4. Conscientious Objection—Another Obstacle to Establishing an International Right to Abortion

The *R.R.* decision allows a woman’s right to an abortion to trump the rights of health professionals to refuse certain services on grounds of conscience:

[S]tates are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.<sup>80</sup>

The plaintiff in *R.R.* had argued that the violations of Articles 3 and 8 of the Convention (as found by the ECHR) resulted in part from “the unregulated and chaotic practice of conscientious objection under Polish law . . . .”<sup>81</sup> Echoing this argument, a Special Rapporteur submitted comments to the Court stating:

The consensus among UN Treaty Monitoring Bodies and international health organizations was that the **right of a health care provider to conscientiously object** to the

<sup>78</sup> *Id.* ¶ 200.

<sup>79</sup> *Id.* ¶¶ 108-09. See also *European Court Issues Landmark Decision Against Poland, Says Women Entitled to Prenatal Genetic Testing*, CTR. FOR REPROD. RIGHTS (May 26, 2011),

<http://reproductiverights.org/en/press-room/european-court-issues-landmark-decision-against-poland-says-women-entitled-to-prenatal-ge>. (delighted at the outcome of *R.R. v. Poland*, the CRR exulted in a press release. “For the first time in its history, the European Court of Human Rights specifically found that an abortion-related violation amounted to inhuman and degrading treatment.”).

<sup>80</sup> *R.R. v. Poland*, *supra* note 69 ¶ 206.

<sup>81</sup> *Id.* ¶ 94.

provision of certain health care services *must be carefully regulated* so that it did not effectively deny a woman the right to obtain such services which were guaranteed by the law, in this case pursuant to Article 8 of the European Convention.<sup>82</sup>

Article 9 of the Convention guarantees freedom of conscience, as well as of thought and of religion, subject only to limitations necessary to protect “public order, health or morals or . . . the rights and freedoms of others.”<sup>83</sup> The Convention is the treaty—the binding law—which provides for rights of conscience; however, these rights are under attack.<sup>84</sup>

The call for limitation of conscience rights was again put forward by Special Rapporteur, Christine McCafferty, in a report to the Parliamentary Assembly of the Council of Europe (PACE) on Conscientious Objection.<sup>85</sup> The report acknowledged the right of conscientious objection, but recommended that member states adopt rigorous limitations on that right, including obliging individuals and institutions to provide abortions in cases of emergency.<sup>86</sup> “Emergency” in the draft resolution is defined to include danger to the patient’s life *or health*.<sup>87</sup> A healthcare provider would also be obligated under the draft resolution to provide “the desired treatment” when there is no equivalent practitioner within a reasonable distance to which the patient can be referred.<sup>88</sup> If PACE had adopted the McCafferty Report’s recommendations, anti-life forces would be able to badger governments

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<sup>82</sup> *Id.* ¶ 128 (Third party submission of “Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the office of the United Nations High Commissioner for Human Rights.”).

<sup>83</sup> Convention: § 1, art. 9: “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

<sup>84</sup> *R.R. v. Poland*, *supra* note 69 ¶¶ 94, 128 (2011).

<sup>85</sup> Eur. Consult. Ass., Report: Social, Health and Family Affairs Committee, Women’s access to lawful medical care: the problem of unregulated use of conscientious objection, Rapporteur: Ms Christine McCafferty, United Kingdom, Socialist Group, Doc. No. 12347 (July 20, 2010), <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12506&Language=EN>.

<sup>86</sup> *Id.* §§ A. 4.1.3, C. 29, 40, 56.

<sup>87</sup> *Id.* § A. 4.1.3.

<sup>88</sup> *Id.*

to restrict conscience rights based on the argument that such a vote represented a 'European consensus.'

Fortunately, PACE rejected much of the McCafferty Report's recommendations and instead adopted a resolution recognizing the right to conscientious objection by both individuals and institutions, which stated that conscientious objection is "adequately regulated" in the "vast majority of council of Europe member states."<sup>89</sup>

#### X. WHY THIS MATTERS IN THE UNITED STATES

Supreme Court opinions in cases such as *Lawrence v. Texas*<sup>90</sup> and *Roper v. Simmons*<sup>91</sup> indicate the Court's willingness to rely upon European viewpoints and trends in European court decisions to decide the constitutionality of disputed moral issues such as abortion.

In reviewing the constitutionality of a Texas statute that criminalized same-sex sodomy, the *Lawrence* Court found the liberty interest of the Due Process Clause of the 14th Amendment provided homosexuals a right to engage in sexual conduct in the privacy of the home.<sup>92</sup> The Court found the statute unconstitutional, and overruled its prior decision in *Bowers v. Hardwick*<sup>93</sup>. For our purposes, what is noteworthy about the decision is that, writing for the Court, Justice Antony Kennedy relied on the fact that the ECHR had rejected the reasoning and holding of *Bowers* and that "other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."<sup>94</sup>

In *Roper v. Simmons*, Justice Kennedy again relied extensively on the viewpoints and laws of numerous countries to justify the conclusion that the 8<sup>th</sup> and 14<sup>th</sup> amendments forbid imposition of the death penalty on offenders who committed their crimes before turning 18.<sup>95</sup> In his opinion, Justice Kennedy opined that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death

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<sup>89</sup> Eur. Consult. Ass., *Resolution, The right to conscientious objection in lawful medical care*, Doc. No. 1763 para. 3 (2010), <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/eres1763.htm>.

<sup>90</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>91</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>92</sup> *Lawrence*, 539 U.S. at 558.

<sup>93</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>94</sup> *Lawrence*, 539 U.S. at 560.

<sup>95</sup> *Roper*, 543 U.S. at 551.

penalty”<sup>96</sup> and “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”<sup>97</sup>

Viewing international customs (or judicial decisions of European courts interpreting documents other than the U.S. Constitution) as *informing* U.S. Supreme Court decisions is a short step from viewing such customs as *binding* on those decisions under customary international law. Should the Court ever overturn *Roe*, the establishment of an international right to abortion under customary law would provide abortion advocates the fail safe back-stop they seek to protect a right to an abortion in the U.S.

#### XI. THE SAN JOSE ARTICLES

In March 2011, a group of pro-life Government, academic, legal and civil society representatives met in Costa Rica. The result of that meeting was The San Jose Articles. The San Jose Articles provide support for pro-life nations against growing pressure to abandon pro-life policies in order to be “in compliance” with international legal “obligations.”<sup>98</sup> The purpose of the San Jose Articles is to provide “expert testimony” that there is *no international human right to abortion on demand*, because there is *no unanimity in the international community* on this issue.<sup>99</sup> This expert testimony is the result of the efforts of a group of experts: law professors, philosophers, Parliamentarians, Ambassadors, human rights lawyers, and UN General Assembly delegates—who prepared these articles to demonstrate how human rights instruments protect the unborn child—contrary to the voices urging the opposite conclusion.<sup>100</sup>

The San Jose Articles reaffirm a number of important concepts. One is that life begins at conception and that conception creates a “human being,” entitled from that point on to protection of his or her inalienable human rights. Second, these rights are explicitly protected in the UDHR and the ICCPR—the fundamental human rights documents—and, third,

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<sup>96</sup> *Id.* at 578.

<sup>97</sup> *Id.*

<sup>98</sup> United Nations, *Press Conference on Launch of ‘San Jose Articles’* (Oct. 6, 2011), [http://www.un.org/press/en/2011/111006\\_Holy\\_See.doc.htm](http://www.un.org/press/en/2011/111006_Holy_See.doc.htm).

<sup>99</sup> *Why the San Jose Articles? Abortion and the Unborn Child in International Law*, San Jose Articles, [http://www.sanjosearticles.com/?page\\_id=47](http://www.sanjosearticles.com/?page_id=47) (last visited Feb. 23, 2012).

<sup>100</sup> *Id.*

no abortion right has been established in customary international law in the intervening years; nor, fourth, has any UN Treaty established such a right. Fifth, any UN treaty monitoring body that purports to find such a right is, thus, acting contrary to its mandate and outside its authority. Thus, governments should not bow to pressure to change their laws based, but should continue to adhere to the protection for life as affirmed in the fundamental human rights documents.

*The San Jose Articles*

Article 1. As a matter of scientific fact a new human life begins at conception.

Article 2. Each human life is a continuum that begins at conception and advances in stages until death. Science gives different names to these stages, including zygote, blastocyst, embryo, fetus, infant, child, adolescent and adult. This does not change the scientific consensus that at all points of development each individual is a living member of the human species.

Article 3. From conception each unborn child is by nature a human being.

Article 4. All human beings, as members of the human family, are entitled to recognition of their inherent dignity and to protection of their inalienable human rights. This is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international instruments.

Article 5. There exists no right to abortion under international law, either by way of treaty obligation or under customary international law. No United Nations treaty can accurately be cited as establishing or recognizing a right to abortion.

Article 6. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) and other treaty monitoring bodies have directed governments to change their laws on abortion. These

bodies have explicitly or implicitly interpreted the treaties to which they are subject as including a right to abortion.

Treaty monitoring bodies have no authority, either under the treaties that created them or under general international law, to interpret these treaties in ways that create new state obligations or that alter the substance of the treaties.

Accordingly, any such body that interprets a treaty to include a right to abortion acts beyond its authority and contrary to its mandate. Such *ultra vires* acts do not create any legal obligations for states parties to the treaty, nor should states accept them as contributing to the formation of new customary international law.

Article 7. Assertions by international agencies or non-governmental actors that abortion is a human right are false and should be rejected.

There is no international legal obligation to provide access to abortion based on any ground, including but not limited to health, privacy or sexual autonomy, or non-discrimination.

Article 8. Under basic principles of treaty interpretation in international law, consistent with the obligations of good faith and *pacta sunt servanda*, and in the exercise of their responsibility to defend the lives of their people, states may and should invoke treaty provisions guaranteeing the right to life as encompassing a state responsibility to protect the unborn child from abortion.

Article 9. Governments and members of society should ensure that national laws and policies protect the human right to life from conception. They should also reject and condemn pressure to adopt laws that legalize or depenalize abortion.

Treaty monitoring bodies, United Nations agencies and officers, regional and national courts, and others should desist from implicit or explicit assertions of a right to abortion based upon international law.

When such false assertions are made, or pressures exerted, member states should demand accountability from the United Nations system.

Providers of development aid should not promote or fund abortions. They should not make aid conditional on a recipient's acceptance of abortion.

International maternal and child health care funding and programs should ensure a healthy outcome of pregnancy for both mother and child and should help mothers welcome new life in all circumstances.<sup>101</sup>

## CONCLUSION

Not surprisingly, release of the San Jose Articles has unleashed criticism from abortion advocates. In an AlterNet internet article, one author goes so far as to admit that current human rights agreements do not contain a right to abortion. "The [San Jose] articles point out that there is technically no 'right to abortion' in any current global human rights agreement. And they're right. But this is beside the point."<sup>102</sup> Presumably she is referring to the absence of a right under a treaty, for she goes on to claim that "States' failures to ensure access to . . . abortion violates human rights established in international law . . . including the right to . . . reproductive health."<sup>103</sup>

The author justifies her position by referring to "precedence" established over decades by "reproductive rights advocates" for the "right to health" which "establishes precedence for access to safe and legal abortion."<sup>104</sup> However, as we saw in our analysis of the Cairo statement, abortion is not part of a right to reproductive health.

Perhaps the author is, in effect, claiming a right to abortion under due to the development of customary international law. However, scattered "precedent" does not international law make. As discussed extensively in this paper, there are requirements that must be met to establish customary international law, and these have not been met.

The San Jose Articles provide a solid counter to the notion that a right to abortion has been established in customary international law. Efforts by abortion advocates to insinuate abortion into international law must be exposed and opposed. The rights of sovereign nations must be upheld

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<sup>101</sup> *Id.*

<sup>102</sup> Jessica Mack, What Are the "San Jose Articles?" Don't Be Fooled by the Conservative Global Elites' Latest Ploy to Attack Science, Women, and the United Nations, (Oct. 25, 2011) <http://www.alternet.org/reproductivejustice/152868>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

to determine their own law on this other issue. Courts should respect “traditional” international law and not succumb to efforts to supplant the traditional understanding of international law with the “bold” position, nor use soft norms to cement abortion rights into law.