International Law and the Right to Abortion

By Piero A. Tozzi, J.D.

International Law Group Organizations

Legal Studies Series • Number One

A Program of Catholic Family & Human Rights Institute

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Preface

Do treaty obligations exist that require governments to liberalize their laws on abortion? An increasing chorus of pro-abortion legal scholars, lawyers and other advocates answer yes. So far, only a few national judges have agreed with this proposition, but we expect many more to fall sway to these purely ideological and legally specious arguments.

While these advocates do not assert that any United Nations (UN) treaty explicitly mentions a right to abortion, they nevertheless claim such treaty obligations exist because of the non-binding comments, conclusions and treaty reinterpretations made by various UN treaty-monitoring bodies. These arguments are part of a coordinated legal attack not only on the unborn child but also on a genuine understanding of human rights, on national sovereignty, and international relations.

The following paper answers and effectively dismantles these claims. This paper will help legal scholars, parliamentarians and others who come under pressure from those making these profoundly harmful claims.

This paper is the first in a two part series on the question of international law and abortion. The second part will explore the question of whether there are treaty obligations to protect the unborn child from abortion. There is a small but growing chorus of pro-life legal scholars and advocates making similar but opposite claims that governments who have ratified various UN treaties are obligated under those treaties to protect the unborn child from abortion.

Yours sincerely,

Austin Ruse
President
Catholic Family & Human Rights Institute

Introduction

> "*There is no generally accepted right to abortion in international human rights law.*" Amnesty International, "Women, Violence and Health," Feb. 18, 2005.[1]

> "*[R]epealing the legal reforms of the…Federal District Penal Code [liberalizing access to abortion] will, in fact, result in violations of Mexico's international human rights obligations.*" Amnesty International, Brief submitted to the Supreme Court of Mexico, March 2008.[2]

In recent years, abortion advocates have sought to advance the idea that a "right" to abortion, based in international human rights law, exists, and that sovereign nations should therefore amend their laws to permit the exercise of this right. Asserting that this right exists before various fora — United Nations treaty compliance committees, national constitutional courts and national legislatures — abortion advocates have met with both success and setback.

Most UN treaty compliance committees now not only subscribe to the notion that access to abortion is an integral part of the modern human rights paradigm, but actively participate in advancing it. The record in constitutional courts, however, has been mixed, while a number of

1 Statement by Amnesty International on whether a "right to abortion" exists in international law made prior to Amnesty's 2007 decision to abandon neutrality on the abortion issue. *Available at* http://www.amnesty.org/en/library/asset/ACT77/001/2005/en/dom-ACT770012005en.html.

2 "Postura de Amnistia Internacional sobre la Accion de Inconstitucionalidad 146/2007, y su Acumulada 147/2007, ante la Suprema Corte de Justicia de la Nacion," ¶ 4. Statement by Amnesty International following its 2007 decision to advocate for abortion rights, contradicting its previously-held appraisal on whether a "right to abortion" exists in international law.

national and local legislatures, principally in the Americas, have rejected the contention that they are obliged to recognize any such right, instead strengthening protection of unborn life in domestic legislation.

Assuming, however, that such a right — and a corresponding obligation on the part of states to uphold such a right — exists, from where is it derived? As it is purportedly grounded in international human rights law, what source or sources give it authority?

The argument that access to abortion is a human right is elaborated upon perhaps most systematically in a 2008 article that appeared in the Human Rights Law Review authored by Christina Zampas and Jamie M. Gher, two attorneys affiliated with the New York-based public interest law firm the Center for Reproductive Rights.[3]

The font of such rights is imprecise, and the authors do admit that for the most part it cannot be found in binding treaty law — the single exception being one regional treaty, the African Union Convention on Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, known as the "Maputo Protocol." According to the authors, the Maputo Protocol is "the only legally binding human rights instrument that explicitly addresses abortion as a human right."

Rather, the right to abortion is one that exists by implication, inferred from a number of international instruments as articulated in the interpretations of treaties made by UN treaty compliance committee members. First and foremost, it can be inferred from the right to life and health found in numerous treaties — the necessary assumption being that lack of access to abortion threatens women's lives and health. "In addition to the right to life and health," according to Zampas and Gher, "women's right to abortion is bolstered by the broad constellation of human rights that support it, such as the rights to privacy, liberty, physical integrity and non-discrimination. In fact, it is the evolution of human rights interpretations and applications, stemmed by increased sophistication, women's empowerment and changing times, which have given force to women's human right to abortion."

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3 Christina Zampas & Jamie M. Gher, "Abortion as a Human Right – International and Regional Standards," 8 Hum. Rts. L. Rev. 249, 252 (2008).

The movement toward a global recognition of abortion as a human right "gained momentum," according to the authors, at the International Conference on Population and Development held in Cairo in 1994, and the Fourth World UN Conference on Women held in Beijing the following year. Though Zampas and Gher concede that the outcome documents produced at both conferences are "non-binding," they nevertheless "touch on women's right to abortion, and thus provide additional support for the notion that women's reproductive rights are human rights." The Cairo document, for example, though "it does not explicitly call for legalization of abortion worldwide," confirms that "where abortion is legal, the procedure should be accessible and safe." International "consensus documents" such as those produced at Cairo and Beijing, "are persuasive and indicative of the world community's growing support for reproductive rights, and are often used to support legislative and policy reform, as well as interpretations of national and international law."

Beyond such instruments are the "interpretations and jurisprudence" of treaty compliance committees — the "General Comments" and "Concluding Observations" — that purport to instruct nations that have acceded to various UN treaties to liberalize abortion laws to bring them into compliance with standards dictated by such bodies. According to the authors, although such committees "are not judicial bodies and their Concluding Observations are not legally binding, the increasingly comprehensive quality of the Concluding Observations on the subject of reproductive rights has enormous potential to influence national laws and policies. When taken together and analyzed, the Committees' General Comments and Concluding Observations may be considered a type of jurisprudence or collective work guiding the development and application of human rights both at the national level and the international level."

But is the argument — though repeated often and with conviction — that a right to abortion exists based on evolving or emerging norms a compelling basis for concluding that sovereign nations must change their laws protecting the unborn and allow abortion?

The article that follows — "International Law and the Right to Abortion" — examines the basis for claiming that a right to abortion exists in international law and concludes that the claim is without legal foundation, and states may therefore legislate in defense of pre-natal life.

This article is the first in a series of legal studies to be published by the International Organizations Law Group, the public interest law arm of the Catholic Family and Human Rights Institute, or C-FAM.

I: Respect for the Principle of Sovereignty, Set Forth in the UN Charter, Means that Countries are Free to Protect Unborn Life

The sovereignty of member states is the organizational principle upon which the UN, as set forth in the founding Charter of the United Nations ("UN Charter"), is premised: "The Organization is based on the principle of the sovereign equality of all its members."[4] Respect for the principle of sovereignty not only should ensure that the territorial integrity of states be respected, but also that the cultural norms and traditions of a self-governing people will be protected from imperialistic encroachment by outsiders who seek to impose alien values.

Sovereignty thus is a broader concept than simply the juridical personality of a "Westphalian" nation state. While it encompasses the legitimate expression of the (sovereign) nation-state actor on the world stage, it also represents the will of a (sovereign) people to whom the ruler is accountable and whose human dignity and rights are grounded in an objective, natural moral order that is universally binding upon (or, sovereign over) all.

II: No Right to Abortion Exists in Either Treaty Law or Customary International Law

Sovereign nations may, however, freely choose to circumscribe their sovereignty by binding themselves to certain obligations under international law. Where states do not willingly surrender such authority to international regimes, they are generally free to govern themselves internally as they so choose — again a principle recognized in the UN

4 *See* UN Charter art. 2(1).

Charter, which states that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[5]

Principally, a nation is bound by international law to the extent that either the terms of treaties it freely entered into and ratified so bind it, or a nation has accepted certain norms that have evolved into "customary" ones.[6] No right to abortion exists under either treaty law or customary international law.

Treaty Law

When a sovereign state has given its *free consent* to the contractual terms of a treaty it negotiated in good faith and upon due ratification, the agreement entered into becomes binding upon it. This principle is known as *pacta sunt servanda*.[7]

According to well-established norms of treaty interpretation, the text of the treaty is where one should first look to determine its meaning. Per the Vienna Convention on the Law of Treaties, "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."[8] In other words, textual language and the intent behind the choice of words are of paramount importance.

No global UN treaty contains the word "abortion," nor can a "right" to abortion be inferred from the "ordinary meaning" of the words of any such treaty.[9] Indeed, when treaties like the International Covenant

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5 UN Charter art. 2(7).

6 Restatement (Third) of the Foreign Relations Law of the United States § 102(1)(a) (1987).

7 Black's Law Dictionary 1109 (6th ed. 1990)("Agreements (and stipulations) of the parties (to a contract) must be observed.").

8 Vienna Convention, art. 31(1) (emphasis added).

9 There is one hard law *regional* treaty that mentions abortion, the African Union Convention on the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, known as the "Maputo Protocol." See Maputo Protocol art. 14(2)(c)("States Parties shall take all appropriate measures to: . . . protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."). As of May 2007, over half the countries

on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and the Convention on the Rights of the Child ("CRC") were negotiated, many nations had legislation outlawing abortion and they intended to leave those laws unaffected. Laws in many countries continued to protect the unborn or criminalize abortion long after the treaties at issue were ratified, and until recently, no one dared suggest that countries had somehow agreed (unbeknownst to their negotiators when the treaties were crafted and unbeknownst to the policy makers who ratified the documents) to alter core domestic legislation.

Moreover, the principle human rights treaties and the Universal Declaration of Human Rights ("UDHR") — which is not a treaty and therefore not binding, but nonetheless is an important statement of aspirational principle — contain "right to life" provisions that can (and should) be interpreted as protecting unborn life.

These include the following:

1. ICCPR art. 6.1: "[E]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[10]

2. ICCPR art. 6.5: "Sentence 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*."

3. CRC art. 6: "[E]very child has the inherent right to life.... States Parties shall ensure…the survival and development of the child."[11]

4. UDHR art. 3: "Everyone has the right to life."[12]

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that signed the Protocol had not ratified it, with some, like Uganda and Kenya, refusing to do so at least in part on the grounds that its abortion clause conflicted with domestic legislation.

10 ICCPR, art. 6(1).

11 CRC art. 6 (1) & (2).

12 UDHR art. 3.

Applying the interpretive principles set forth in the Vienna Convention, these provisions may be read consistent with protecting unborn life, but not with a right to abortion — an interpretation some abortion advocates actually offer.[13]

For example, the ICCPR protects the right to life of "every human being," which does not exclude the unborn. Furthermore, though the ICCPR acknowledges the right of countries where the death penalty remains on the books to impose capital punishment upon adult men and women who merit it, executing pregnant women is proscribed. As all other adult women may be subject to the death penalty, this clause must be read as recognizing the value of life in the mother's womb, giving the unborn a status independent from that of the mother.

A plain reading of the language in the CRC also favors protection of unborn life. CRC article 1 defines a child as "every human being below the age of eighteen years." It thus defines a ceiling, but not a floor, as to who is a child — in other words, it pointedly does *not* say that the status of "child" attaches at the time of birth. *Moreover, the CRC explicitly recognizes the child before birth as a rights-bearing person entitled to special need and juridical protection.* The Preamble quotes the Declaration on the Rights of the Child and recognizes 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.*"[14]

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13 Center for Reproductive Rights, Safe and Legal Abortion is a Woman's Human Right (Briefing Paper) (Aug. 2004) at Table 1, *available at* http://www.reproductiverights.org/pdf/pub_bp_safeandlegal.pdf and International Planned Parenthood Federation, Access to Safe Abortion: A Tool for Assessing Legal and Other Obstacles at 15 (June 2008), *available at* http://www.ippf.org/NR/rdonlyres/6649ED84-2EA1-4C88-8A86-CA19BBB19463/0/AbortionLawToolkit.pdf.

14 CRC Preamble (emphasis added). Though the preamble is not binding per se, it provides interpretive context. The Vienna Convention states the rule of interpretation that, "The context…shall comprise…the text, including its preamble and annexes." Vienna Convention art. 31(2).

Customary International Law

Customary international law refers to "a general and consistent practice of states followed by them from a sense of legal obligation."[15] Such a belief by states that certain practices are legally binding upon them is known as *opinio juris*, or *opinio juris et necessitatis*.[16] A sovereign state may further object to being bound by a customary rule by consistently maintaining it is not so bound: "That a rule of customary international law is not binding on any state indicating its dissent during the development of the rule … is an accepted application of the traditional principle that international law essentially depends on consent of states.[17]

While the formation of customary international law is not as precise as what results from the process of negotiating, signing and ratifying treaties — and for that reason, claims that something constitutes an "obligation" imposed by customary international law should be viewed with caution — certain acts clearly violate customary international law norms. These include violation of "safe conducts," infringements of the rights of ambassadors, and piracy on the high seas.[18]

With respect to abortion, there simply is no customary norm, nor is there any "general and consistent practice of states." While groups like the pro-abortion Center for Reproductive Rights (CRR) attempt to show that there is a trend toward liberalization,[19] cataloguing where nations fall according to laws ranging from liberal to restrictive,[20]any such "trend" does

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15 Restatement (Third) § 102(2).

16 Lee A. Casey and David B. Rivkin, Jr., "International Law and the Nation-State at the U.N.: A Guide for U.S. Policymakers," Heritage Foundation Backgrounder at 7 (Aug. 18, 2006).

17 *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See also Jeremy Rabkin, The Case for Sovereignty (AEI 2004)(customary international law is akin to the "law of nations," a term of art during the time of time of the drafting of the U.S. Constitution).

18 *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See also Jeremy Rabkin, The Case for Sovereignty (AEI 2004)(customary international law is akin to the "law of nations," a term of art during the time of time of the drafting of the U.S. Constitution).

19 *See*, e.g., Reed Boland and Laura Katzive, Developments in Laws on Induced Abortion: 1998-2007, 34 International Family Planning Perspectives 110 (Sept. 2008). Laura Katzive is the Deputy Director of CRR's International Legal Program. See http://reproductiverights.org/en/profile/laura-katzive.

20 *See* http://reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf.

not create obligations under customary international law. Conceptually, such a show-of-hands tallying of the nations of the world is misguided, as it is really a survey of the domestic laws of various nations, and does not demonstrate "a general and consistent practice of states followed by them from a sense of legal obligation."

But even under CRR's own calculus, no "general and consistent" practice can be shown. Per CRR, as of 2008, 68 countries around the world either prohibit abortion outright or allow it only to save a mother's life, and another 35 countries only allow it to preserve the physical health of the mother.[21] Other nations have varying degrees of limitation on the practice, with only 56 of the world's 196 nations falling into the category that CRR deems to allow abortion "without restriction as to reason." Moreover, promoters of global abortion tend to overlook countervailing trends showing that countries are rejecting the culture of abortion in favor of protecting life in the womb, such as the Dominican Republic's adoption of a constitution that explicitly protects life "from conception until death"[22] or the United States (U.S.) Congress' ban on partial birth abortion, which has been upheld by the U.S. Supreme Court.[23]

III: Attempts to Fabricate a "Right to Abortion" Where None Exists

In the mid-1990s, at the both the 1994 International Conference on Population and Development in Cairo and in the Fourth World Conference on Women that took place the following year in Beijing, there was an attempt by representatives from nations of the global North to claim that a right to abortion existed, and to have such a claimed right incorporated into the outcome documents for both conferences. This attempt was defeated by a concerted effort by a global coalition of countries, including many from Latin America and the Islamic world.

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21 *See* http://reproductiverights.org/sites/crr.civicactions.net/files/pub_fac_abortionlaws2008.pdf.

22 *See* Piero A. Tozzi and Paola Ocejo, UNICEF Calls for Legal Abortion in Dominican Republic, C-FAM Friday Fax, Apr. 23, 2009, *available at* http://www.c-fam.org/publications/id.1118/pub_detail.asp.

23 *See Gonzales v. Carhart*, 550 U.S. 124 (2007).

What the Cairo and Beijing Documents Say About Abortion

As a result of this effort, neither of the outcome documents from Cairo or Beijing — the Cairo Programme of Action ("ICPD Programme of Action") and the Beijing Platform of Action of 1995 ("Beijing Platform") — contain a "right" to abortion. Indeed, even if they did, neither is a treaty, so such a claimed "right" would not be binding in international law; as things stand, neither document creates any new rights.[24]

On abortion, the Cairo document states that "Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning."[25] While the ICPD Programme of Action does state that "where abortion is not against the law, such abortion should be safe," it (importantly) affirms that "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."[26]

As Mary Ann Glendon has pointed out, rather than treating abortion as a "right" that should be cherished and protected, like freedom of speech or freedom of religion, the Cairo outcome document says that government should seek to "reduce the recourse to abortion," "eliminate the need for abortion" and strive to help women "avoid repeat abortions."[27] Presumably, if abortion were a "right" like freedom of speech, the drafters of the Cairo outcome document would not be calling on governments to "reduce" and "eliminate" it.[28]

The Beijing document repeats the same language from Cairo concerning abortion, including the statement that any changes in a country's abortion law "can only be determined at the national or local level according to the national legislative process."[29]

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24 *See*, e.g., ICPD Programme of Action ¶ 1.15.

25 ICPD Programme of Action ¶ 7.24.

26 ICPD Programme of Action ¶ 8.25.

27 ICPD Programme of Action ¶ 8.25.

28 Mary Ann Glendon, "What Happened at Beijing," *First Things* (Jan. 1996) ("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.").

29 Beijing Platform ¶ 106(k).

This latter is an important acknowledgment of the principle of sovereignty as proclaimed in the UN Charter — "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" — and serves to belie any claim to the contrary made by proponents of abortion.[30]

The Attempt to Create "Rights by Stealth" Using UN Treaty Compliance Committees

Despite the language in both outcome documents, there was subsequently an attempt by abortion advocates to claim (1) that the ICPD Programme of Action and the Beijing Platform signified an emerging consensus among nations that a right to terminate unborn life in the womb existed, and (2) that the outcome documents from both conferences should be elevated to a higher status than warranted under international law.

How this came about is detailed in an article by Catholic Family & Human Rights Institute scholars Douglas Sylva and Susan Yoshihara entitled "Rights by Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion."[31]

In brief, what happened following the failure to advance recognition of a "right" to abortion at Cairo and Beijing is that certain UN agencies — namely the United Nations Population Fund (UNFPA), the Office of the High Commissioner for Human Rights and UN Division for the Advancement of Women — convened a gathering called the "Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Sexual and Reproductive Health and Rights" in December 1996 in the village of Glen Cove on Long Island, New York. They were joined by various "stakeholders," including pro-abortion civil society non-governmental organizations (NGOs) and UN "special rapporteurs."[32]

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30 UN Charter art. 2(7).

31 Douglas Sylva & Susan Yoshihara, "Rights by Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion" 7 Nat. Cath. Bioethics Quart. 97 (2007), reprinted as C-FAM White Paper No. 8 (2007), *available at* http://www.c-fam.org/docLib/20080425_Number_8_Rights_By_Stealth.pdf.

32 *Id.* at 99-100.

The stated purpose of this meeting was to establish "the legal accountability of Governments for neglecting or violating rights to reproductive and sexual health," *i.e.*, abortion, according to the report issued under the Roundtable's auspices ("Roundtable Report"). Such rights, according to the Roundtable participants, are embedded in already-recognized human rights: "A human rights approach is premised on the view that reproductive and sexual health rights are integral to recognized human rights — in particular, to life, liberty and personal security, and the highest attainable standards of health."[33]

As set forth above, however, no right to abortion exists in international human rights law. How then to find a right to abortion where binding treaties are silent as to abortion and there exists no customary norm?

The answer to that was breathtaking in its audacity, and infuriating in its contempt for the sovereign rights of states as guardians of the cultural norms and traditions of self-governing people. The existing UN human rights treaties would simply be reinterpreted to include a right to abortion where such treaties were silent to abortion.[34]

Moreover, the Cairo and Beijing documents were to be reinterpreted not only as actually formalizing a right to abortion, but also elevated into a binding norm: "the United Nations conference documents [from Cairo and Beijing] had identified new dimensions for the interpretation and implementation of the human rights treaties, particularly by clarifying the interrelationship between human rights and women's rights and their pertinence to reproductive and sexual health."[35]

The means by which this would be done would be through UN treaty monitoring bodies charged with overseeing implementation of the treaties. The major international human rights treaties include provisions for "treaty monitoring bodies," also known as "compliance committees." By becoming parties to the treaty, States agree to submit periodic reports on their compliance, receive recommendations on improvements, and allow the committee to monitor their overall progress. States do *not*, however, in any way agree to allow committee members to rewrite their domestic legislation.

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33 *Id.* at 100 (citing Roundtable Report at 6).

34 *See id.* at 104 (citing Roundtable Report at 4).

35 *See id.* (citing Roundtable Report at 6).

Compliance Committees, Pro-abortion NGOs and the Assault Upon the Unborn and Sovereignty

What has developed, however, is that by participating in the treaty compliance review process, sovereign nations find themselves pressed on their domestic legislation and even constitutional provisions protecting unborn life. Certain compliance committees have proven especially keen on pushing an abortion agenda, namely, (1) the Human Rights Committee ("HRC"), which was formed under the ICCPR, (2) the Committee on Economic, Social and Cultural Rights ("CESCR"), charged with reviewing implementation of ICESCR, and (3) the committee tasked with observing implementation of CEDAW ("CEDAW Committee"). In so doing, these committees overstep their mandates, thereby needlessly calling into question the legitimacy of the treaty body system.

Example of countries that have come under pressure from UN compliance committees include the following:

- Chile, whose constitution protects life before birth,[36] has come under pressure from several committees in recent years. In 2004, CESCR in its concluding observations directed that Chile "revise its legislation and decriminalize abortion in cases of therapeutic abortions and when the pregnancy is the result of rape or incest."[37] Two years later, the CEDAW Committee conveyed its concern "that abortion under all circumstances is a punishable offence under Chilean law" and demanded that the country "take concrete measures to enhance women's access to health care, in particular to sexual and reproductive health services."[38] Chile again came under pressure in 2007, this time from the HRC, which labeled Chile's abortion laws "unduly restrictive" and directed that Chile "should amend its abortion laws."[39]

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36 Constitución Política de la República de Chile art. 19(1)("La ley protege la vida del que está por nacer.").

37 CESCR 33rd session; UN document E/C.12/1/Add.105; review on 18-19 & 26 November 2004 at ¶ 53.

38 CEDAW Committee Report (Chile), ¶¶ 19-20 (2006).

39 HRC 89th session; UN document CCPR/C/CHL/CO/5; review on 14-15 & 26 March 2007 at ¶ 8.

- In 2006, CESCR targeted El Salvador, whose constitution protects life from the moment of conception,[40] noting "with concern that . . . abortion is illegal in all circumstances" and urging the country "to reform its abortion legislation and to consider exceptions to the general prohibition of abortion, in cases of therapeutic abortion and pregnancy resulting from rape or incest."[41]

- In 2004, the HRC took aim at the right of conscience — a right recognized, incidentally, by the Universal Declaration of Human Rights[42] *and* the ICCPR[43] — when it expressed its "deep concern about restrictive abortion laws in Poland . . . the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on *the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions*." The HRC went on to state that Poland should "liberalize its legislation and practice on abortion" and "provide further information on *the use of the conscientious objection clause by doctors*."[44]

Beyond being subject to hectoring during periodic reviews before the various compliance committees, countries protective of unborn life that have signed on to "optional protocols" that exist for several of the treaties can find themselves entwined in an adjudicative process, albeit one that is neither binding nor heard before judges, but rather by compliance committee members. This happened in the matter *Karen Noelia Llontoy Huamán v. Peru*, brought by the pro-abortion legal advocacy NGO CRR against the sovereign government of Peru.[45]

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40 Constitución Política de la República de El Salvador de 1983, tit. I, art. 1 ("Asimismo reconoce como persona humana a todo ser humano desde el instante de la concepción.").

41 CESCR 37th session; UN document E/C.12/SLV/CO/2; review on 8-9 & 21 November 2006 at ¶¶ 25 & 44.

42 UDHR art. 18 (proclaiming freedom of conscience).

43 ICCPR art. 18.1.

44 HRC 82nd session; UN doc. CCPR/CO/82/POL/Rev.1; review on 27-28 October & 4 November 2004 at ¶ 8 (emphasis added).

45 *Karen Noelia Llontoy Huamán v. Peru*, Comm. No. 1153/2003, Oct. 24, 2005, U.N. document CCPR/C/85/D/1153/2003 (dated 22 November 2005), available at http://www1.umn.edu/humanrts/undocs/1153-2003.html. For an excellent analysis of the proceeding,

Though the HRC did not purport to direct Peru to change its laws defending life, but rather faulted the country for not providing effective access to abortion where the Committee deemed it to be legal under existing Peruvian law, that distinction is questionable. Abortion is generally criminalized in Peru, though permissible in cases where the pregnancy truly endangers the life or health of the mother. It is *not* permitted in cases where the reason for the abortion is the disability of the unborn child. *Huamán v. Peru* involved a mother and her baby diagnosed *in utero* as suffering from anencephaly. One attending physician recommended abortion, but the government hospital declined, as the pregnancy was advanced and did not meet the criteria for abortion under Peruvian law. The mother's life was not threatened by the pregnancy, and she gave birth to and subsequently breast-fed her child, who lived for four days before expiring naturally.[46]

The proceeding illustrates the mutually reinforcing role between radical NGOs and compliance committees. It was brought by CRR and other pro-abortion NGOs to advance an agenda, using a sympathetic compliance committee, which concluded that rights were violated under a treaty — the ICCPR — that does not mention abortion.

In addition to activity before UN compliance committees, abortion advocates have also brought cases in targeted countries, arguing that compliance with international human rights legal standards requires states to liberalize their laws on abortion. Such advocacy helped convince the constitutional court of Colombia in 2006 to partially liberalize that nation's restrictions on abortion, relying in part on statements made by the compliance committees like the CEDAW Committee to hold that modification of the country's penal law was required.[47] Though there may be reasons based on domestic law for a court to reach such a decision, insofar as international human rights law is concerned, there is nothing that would compel a country's court to so rule based on international treaty or customary law obligations.

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see Robert John Araujo, S.J., Conscience, Totalitarianism, and the Positivist Mind, 77 Mississippi L. J. 571 (2008).

46 Comm. No. 1153/2003, Oct. 24, 2005, U.N. document CCPR/C/85/D/1153/2003 (dated 22 November 2005), *available at* http://www1.umn.edu/humanrts/undocs/1153-2003.html.

47 *See* Tribunal Constitucional de Colombia, Sentencia C-355/2006, *available at* http://ss1.webkreator.com.mx/4_2/000/000/00c/0f0/Sentencia%20C-355-06.doc.

IV: Reasserting Sovereignty: The Right of States to Defend Human Life Before Birth and the Restoration of International Rule of Law

What can be done by countries that find themselves pressured to amend their legislative or constitutional provisions protecting human life in the womb based on fallacious international human rights law arguments? They can and should simply and unapologetically assert their sovereign right to enact such provisions as an expression of the will of their sovereign people. This can be restated in various fora, including before UN compliance committees.

There are a number of examples of countries doing precisely that. In 2007, Pakistan found itself questioned by the CEDAW Committee for its laws generally protective of the unborn. The country's representative simply told the committee that Pakistanis consider abortion to be the equivalent of "murder" once a fetus is conceived, and that therefore the questions were out of bounds.[48] When the CEDAW Committee scolded Honduras for its laws against abortion, saying its law prohibiting all abortions is "a crime," members of the Honduran delegation replied that Article 67 of that country's constitution gives the same rights to unborn and born children.[49]

Likewise, when a nation's supreme or constitutional court is presented with arguments based purportedly in international law, it should resolve issues in a manner consistent with its own constitution, according such arguments with the proper respect due them under the relevant domestic constitutional standards. This was done recently, for example, by the United States Supreme Court in the case *Medellín v. Texas*,[50] which affirmed the right of a sovereign nation (in this case, the United States) to govern affairs in accordance with its domestic constitution. The Mexican Supreme Court's recent decision upholding Mexico City's abortion law was similarly a limited one consistent with Mexico's constitution and federalist governmental structure.[51] It rejected the broad "transnationalist" reasoning

48 *See* Samantha Singson, "Pakistan Tells Pro-Abortion UN Committee that 'Abortion is Murder,'" Friday Fax, May 31, 2007, *available at* http://www.c-fam.org/publications/id.516/pub_detail.asp.

49 Samantha Singson, Friday Fax, C-FAM, Vol. 10, No. 33, August 2, 2007.

50 552 U.S. __, 129 S. Ct. 360 (No. 06-984), (Mar. 25, 2008).

51 Acción de Inconstitutionalidad 146/2007 y Su Accomulada 147/2007.

evident in the 2006 Colombian case and advanced by CRR and its allies in amicus briefs, holding narrowly that while there is no constitutional obligation to criminalize abortion, there is no broad constitutional right to the procedure as would require all states and jurisdictions in Mexico to liberalize their laws.[52]

Moreover, when nations stand up for sovereignty in defense of the unborn against the improper claims made by UN compliance committees, UN agencies and radical NGOs, the rule of law and the legitimacy of international regimes is ultimately enhanced. Conversely, when sovereign countries accede to the unwarranted claims made by international non-state actors in excess of their mandates or what the law requires, rule of law and respect for international regimes is undermined.

If compliance committees persist in exceeding their authority, nations might consider "unsigning" or "deratifying" conventions as an exercise of their sovereign power.[53] This would be an unusual but not unprecedented step — the United States withdrew its signature from the Rome Statute establishing the International Criminal Court during the Bush Administration. While one would hope such a step would be unnecessary with respect to the major UN treaties — none of which either explicitly or implicitly reference abortion — countries may need to consider such an option if treaty compliance committees insist on reinterpreting treaties beyond their wording and intended scope, seeking to hold nations accountable to fabricated "standards" that they never agreed to.

Oftentimes, such disrespect for the sovereign rights of nations translates into a form of cultural imperialism, with alien values of Western elites (which may not be shared necessarily by the citizens of Western countries) imposed upon reluctant nations. Writing outside the abortion context, the perceptive Swiss diplomat Josef Bucher made the following observation:

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52 *See id.*; Piero A. Tozzi, "Mexican Supreme Court Issues Final, Limited Ruling on Abortion," Friday Fax, Mar. 5, 2009, *available at* http://www.c-fam.org/publications/id.1039/pub_detail.asp.

53 Certain treaties contain clauses that allow for states parties to formally "denounce" or withdraw from a treaty, *see, e.g.*, CRC art. 52, and the Vienna Convention contains a procedure for denunciation where a treaty does not explicitly provide for it. See Vienna Convention art. 56. As a general principle, the legal doctrine of *rebus sic stantibus, or clausula rebus sic stantibus*, allows for a nation to suspend or terminate a treaty due to a fundamental change in circumstances. See Athanassios Vamvoukos, Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude (1985).

> In some cases, Western countries are allowing legal rights to become part of an ideology, by striving for the harmonization of their content which is unnecessary for the functioning of a global order. The export of values under the cover of harmonization may actually disrupt peaceful globalization, when it is not perceived as equally legitimate in all cultures and societies. . . .
>
> On close examination, however, it becomes clear that it is not the different cultures or religions, but the ideologies, which exploit the values politically[,] that clash. Often these collisions occur between fundamentalist philosophies, which raises the difficult question of the extent to which human rights policy, as a secular ideology, has become susceptible to fundamentalist tendencies.[54]

Similarly, the Permanent Observer of the Holy See to the United Nations recently elaborated on how *ultra vires* actions by compliance committees antagonistic to the principle of sovereignty ultimately weaken effective international legal regimes and the rule of law in an address before the Sixth Committee, which is the UN General Assembly's primary forum for consideration of legal questions. The Holy See noted that one area where the UN can enhance rule of law is in the "making of international treaties and conventions," which can strengthen international norms governing state conduct. However, in implementing such norms, the Holy See stressed how important it is that "United Nations' agencies and monitoring bodies respect the intent and desire of States. A treaty body system which moves away from the original intent of the parties and expands its mandates beyond the power given by States, risks undermining its own credibility and legitimacy and can discourage States from joining conventions."[55]

Such concerns are perhaps most pronounced in the area of abortion, a sensitive social topic which impassions people on all sides of the issue. Given that no "right" to abortion exists in international human rights

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54 Josef Bucher, "A Holistic Approach to Promoting International Law," Human Rights & Human Welfare, Working Paper no. 29, at 10, *available at* http://www.du.edu/gsis/hrhw/working/2008/49-bucher-2008.pdf.

55 Statement by H.E. Archbishop Celestino Migliore, Apostolic Nuncio, Permanent Observer of the Holy See, 63rd Session of the United Nations General Assembly, Before the Sixth Committee on Item 79: The Rule of Law at the National and International Levels (Oct. 14, 2008), *available at* http://www.holyseemission.org/13Oct2008.html.

law, attempts to fabricate such a "right" and impose it upon reluctant, sovereign nations using a treaty body system unhinged from the actual text of international treaties result in undermining respect for true human rights — a consequence that will impoverish all concerned.

List of Acronyms

CEDAW ..... Convention on the Elimination of All Forms of Discrimination Against Women
CESCR ..... Committee on Economic, Social and Cultural Rights
CFC ..... Catholics for Choice
CRR ..... Center for Reproductive Rights
HRC ..... Human Rights Committee
ICCPR ..... International Covenant on Civil and Political Rights
ICESCR ..... International Covenant on Economic, Social and Cultural Rights
NGO ..... Non-governmental Organization
UDHR ..... Universal Declaration of Human Rights
UN ..... United Nations
UNFPA ..... United Nations Population Fund
US ..... United States

Biography

Piero A. Tozzi is a Senior Fellow of the Catholic Family and Human Rights Institute (C-FAM). He ran C-FAM's New York office for two years while serving as the organization's Executive Vice President and General Counsel. He also established the International Organizations Law Group as C-FAM's public interest law arm, submitting amicus briefs and shadow reports on a proper understanding of international law in fora such as the Mexican Supreme Court and the Inter-American Commission on Human Rights. A speaker of Mandarin Chinese, he has authored articles on Chinese law and politics as well as written and lectured extensively on constitutional law, religious liberties, conscience rights, and international law.

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