Why Regional Human Rights Institutions Matter to Unborn Children[1]

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ABSTRACT: In recent decades the effort to protect and defend the right to life of unborn children has increasingly involved regional intergovernmental organizations, as member states have created or strengthened regional implementation institutions. As a result, the decisions of these institutions enjoy a very high degree of compliance in some regions and thus have real-world consequences. This article assesses the most important implementation institutions, their major decisions affecting unborn life, how their members are chosen, and how pro-life governments and non-governmental organizations can play a more effective role in trying to ensure that their work upholds the right to life of the unborn child. The regional bodies discussed here are not part of or subordinate to the United Nations, which has a quite different human rights system.

THROUGHOUT THE WORLD, battles are underway over legal protection for the unborn child. The contest is taking place in national legislatures, courts, government ministries, civil society, the media, and international organizations. Among the last-named, arguably the most important are the regional human rights commissions and courts. This article examines their legal authority, access rules, composition, and impact on the laws and practices of national states regarding the right to life of unborn children. The pace of activity in these institutions has stepped up in recent years, in part owing to efforts by pro-abortion advocates to persuade them to strike down or weaken national pro-life laws. Because decisions by regional commissions and

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courts indeed have real-world consequences for human life, pro-life advocates also need to become more active participants in their work, including by seeking election to these bodies. The concluding section proposes ways to do these things.

The Context

We need to keep international organizations in perspective by recognizing that national states still make most of the rules about whose lives must be protected and whose may be ended. As territorial sovereigns, states retain primary lawmaking authority within their borders and still have a monopoly of enforcement power; regional international organizations and their staffs do not have their own standing police and military forces. At the same time, all states have freely accepted, through treaties, their accountability before the organized community of states for how well they protect human rights. Accountability can be accomplished in different ways and to different degrees. The strongest forms of accountability take place at the regional level through the institutions described in this article.[2]

States have granted considerable authority to regional human rights commissions and courts, although the extent of this authority varies from region to region. The commissioners and judges are elected by states, but once elected they act independently of their governments in Europe, the Americas, Africa, and the Arab League.[3] The rationale for granting such independence is to encourage impartiality by the commissioners and judges and to lessen any tendency simply to support the political interests of their own states. Particularly in the first two of the aforementioned regions, commissions and courts have used their authority to require states to pay compensation to individuals found to

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[2] This article does not cover the International Criminal Court (ICC), whose jurisdiction now includes most countries and which could be regarded as a human rights court because of its authority to prosecute and try individuals for genocide, war crimes, and crimes against humanity, which occur most commonly in situations of armed conflict. However, there is no global human rights court as such. The regional courts and commissions fill this role.

[3] The exception is the newly-established ASEAN commission, which is made up solely of government representatives.

be victims of human rights violations, and even to require them to amend national legislation or regulations to preclude future violations.

State compliance with regional decisions tends to be high; this docility can be explained in part by the widely-held view held that reliance on the rule of law is the best cure for arbitrariness, warlordism, and other contemporary evils.[4] The trend toward compliance is consistent with the broader effort to build a more stable, law-governed and peaceful world, but many observers worry that if carried too far this development could eventually wrest control of public affairs from citizens, a fear that also troubles critics of the European Union (EU), World Bank, International Monetary Fund, and World Trade Organization. Where human rights are concerned, it would be an exquisitely painful irony if the increasingly powerful regional human rights institutions themselves became the source of widespread violations of the right to life of unborn children. It has not yet happened, but pro-abortion forces are pushing vigorously in this direction, and pro-life governments and NGOs need to be more actively engaged with the regional organizations on a continuing basis.

Regional Organizations: Overview

To reiterate a point made above, the regional institutions are neither branches nor agents of the United Nations. They operate on the basis of their own legal authority, which is derived from founding documents ratified by the states in their respective regions.[5]

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[4] A separate development, similarly aiming at safeguarding human rights from government abuse, is the increasing acceptance of an international community-based responsibility to protect populations from mass killing by their own governments or when the state is unable to protect its people. World Summit Outcome Document (2005), A/RES/60/1.

[5] I have written elsewhere on the UN role concerning the right to life, for instance "Is International Law on the Side of the Unborn Child?" *National Catholic Bioethics Quarterly* 7/1 (2007), which includes limited discussion of regional bodies; also, Review of *Power and Principle: Human Rights Programming in International Organizations,* ed. Joel E. Oestreich (Washington DC: Georgetown Univ. Press, 2007), *National Catholic Bioethics Quarterly* 8/ 2 (2008).

There are four regional courts, two in Europe and one each in the Americas and Africa. There are six commissions, two in Africa and one each in the Americas, the Arab League, the Association of Southeast Asian Nations (ASEAN), and the Organization of Islamic Cooperation (OIC). They display substantial diversity in their founding documents, composition, structure, legal authority, access rules, compliance procedures, and relationships to their regional supervisory bodies.[6] The main focus herein will be on Europe, the Americas and Africa, whose institutions have developed over a longer period.

Since basic human rights are by definition essentially the same for all human beings, one might wonder why states do not conduct all human rights work within the UN system. But geographic proximity still counts for something in human relations, at times provoking conflict but in most cases giving rise to a natural sense of community. Thus states in geographic proximity tend to develop free trade areas and regional security arrangements and to demonstrate regional solidarity in global organizations and even in international crises, temporarily putting aside differences. Even at the UN, regional groups have always functioned, formally or informally, for election of officers, coordination of common positions on substantive as well as procedural issues, and lobbying of other regional groups.

Europe

Two regional courts, each created by a separate multilateral treaty, play significant roles. The European Court of Human Rights (ECHR), established under the European Convention on Human Rights (1950), and the European Court of Justice (ECJ), established under the series of treaties creating the European Union. The most important decisions taken by the ECHR affecting the rights of the unborn child are summa-

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[6] For a comprehensive account of the philosophical origins, drafting and negotiating history of the principal regional treaties, and a close analysis of their terms from a pro-life standpoint, see Rita Joseph, *Human Rights and the Unborn Child* (Leiden & Boston: Martinus Nijhoff, 2009), chs. 10 (Europe), 11 (the Americas), and 12 (Africa). Her book, which also analyzes the main United Nations documents, is the only full-length study I am aware of that covers the origins and development of both the universal and regional treaties from a pro-life perspective.

rized below. While the ECJ has hitherto concentrated on matters directly concerning European integration, its expanded powers under the Lisbon Treaty (2009) and the inclusion of the Charter of Fundamental Rights as an annex to the Treaty have raised questions about its competence to address human rights issues, along with concerns about how its work might overlap or conflict with that of the ECHR.

The Organization for Security and Cooperation in Europe (OSCE) has a human rights office and conducts a range of investigative and promotional activities on particular topics selected by the OSCE's intergovernmental policymaking bodies, but it has not addressed the rights of unborn children.

ECHR

Article 2 of the European Convention on Human Rights provides that "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," but it does not specifically address the application or non-application of this right to unborn children.

The ECHR consists of 47 judges, one from each member state of the Council of Europe, elected by the Parliamentary Assembly of the Council of Europe for a single nine-year term. (Each state nominates three candidates, from which the Assembly chooses one after reviewing their qualifications and interviewing them.) The Court normally hears cases in a chamber of three or seven judges, but in the most important cases, or on appeal from one of the smaller chambers, a Grand Chamber of 17 judges is convened. Any European citizen who believes a state has violated his or her rights under the Convention, or any recognized non-governmental organization on the applicant's behalf, may file a petition with the Court. The state accused in the complaint may appoint an *ad hoc* judge to the panel hearing the case, unless the state's regular judge is already a member of that panel. Until 1998 most cases were decided by the quasi-judicial European Commission on Human Rights, which gave individuals as well as states a right of petition. The Court only heard cases filed by states or referred by the Commission. In 1998 the Commission was abolished and the Court assumed its previous responsibilities.

In the first case concerning the unborn child, the Commission ruled in 1977 that a West German statute banning abortion after 12 weeks' gestation did not violate a right to privacy under Article 8 of the Convention.[7] In two subsequent cases, the Commission ruled against a husband in the UK (1980) and a domestic partner in Norway (1992) who had argued that Article 2 of the Convention safeguarded their unborn children from abortion. In both of these cases the Commission implied that the unborn child has some rights, but chose not to draw a bright line defining how far they extend. Instead, the Commission deferred to the national legislation, though it stated that a law needed to strike a "fair balance" between the interests and rights of mother and child.[8]

After it assumed responsibility for the Commission's work, the European Court of Human Rights applied the national primacy and "fair balance" concepts in *Boso v. Italy* (2002) and *Vo v. France* (2004).[9] In an interesting case not directly concerning abortion, *Odievre v. France* (2003), the Grand Chamber decision included the following comment on the unborn child: "There is also a general interest at stake as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions....The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system."[10]

The most important case is that of *A, B, and C v. Ireland* (decided December 16, 2010),[11] in which the petitioners asked the Court to find Ireland's pro-life Constitutional article and related legislation to be in violation of several rights guaranteed in the Convention. By a vote of

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[7] *Bruggemann and Scheuten v. Federal Republic of Germany, App. No. 6959/75,* 10 European Commission on Human rights *Decisions and Reports,* 100 (1977).

[8] *Paton v. United Kingdom,* App. No. 8416/78, 3 Eur. H.R. Reports 408 (!980) and *R.H. v. Norway,* App. No. 17004/90, Eur. Comm. on Human Rights (1992).

[9] *Boso v. Italy,* ECHR No.50490/99, decided Sept. 5, 2002; *Vo v. France,* ECHR No. 53924/00, decided 2004.

[10] *Odievre v. France,* ECHR 42326/98, Reports 2003-III, paras. 44ff.

[11] *A, B, and C v. Ireland,* judgment No. 12686 (app. No. 25579/05), decided December 16, 2010

11-6 the Grand Chamber solidly reaffirmed the doctrine of national primacy by stating emphatically that "Ireland, like all other member states of the Council of Europe, has the sovereign right to determine its law on abortion in accordance with its own constitution and laws." The Court also decided that, because Ireland permitted freedom of travel and freedom of information about abortion providers abroad, its Constitution met the "fair balance" test.

Responding to a complaint by "C" that Irish law did not establish an adequate procedure to enable her to exercise her rights under existing Irish law, the Court declared unanimously that Ireland, like other Council member states, must apply its laws to achieve their purposes and on a nondiscriminatory basis. Because Ireland had not provided an adequate procedure for "C" to do this, the state must pay damages. This finding was consistent with the principle enunciated by the ECHR in *Tysiac v. Poland* (2007),[12] namely, that Polish law (which like Irish law restricts abortion but unlike Irish law provides certain exceptions) should have instituted a procedure giving the complainant timely access to an impartial appeal against the negative hospital decision in her case, and that the existing Polish appeal procedure was insufficient for this purpose.

The Court followed the same reasoning in the case of *R.R. v. Poland* (May 2011), in which it found that the state had not provided timely access to services (prenatal genetic testing) that are legal and that could have determined whether the unborn child's presumed disability qualified the mother for an abortion under Polish law. The Court awarded monetary damages to the applicant.[13] According to Gregor Puppinck of the European Center for Law and Justice, the ruling also had a pro-life aspect: the Court affirmed that the obligation to provide access to legal medical services falls upon the state, not upon individual health professionals. Puppinck argues that this amounts to a strong

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[12] *Tysiac v. Poland,* ECHR judgment 6999, March 20, 2007.(app. No. 5410/03)

[13] *R.R. v. Poland,* judgment No. 13114, May 26, 2011 (app. No. 27617/04).

affirmation of the rights of practitioners to refuse to participate in matters that violate their conscience.[14]

The Court, however, took a slightly different tack regarding conscience rights in *P & S v. Poland,* (November 1, 2012). The case concerned a minor who had been raped and whose parents sought an abortion, which is permitted under Polish law in these circumstances. Doctors in two hospitals refused to perform the abortion, citing grounds of conscience. The Court did not find fault with the physicians' exercise of their conscience rights, but it declared that *States were obliged to organize their health system in a way that the exercise of that right did not prevent patients from obtaining access to services to which they were entitled by law.* That is, the Court continued, Polish law "obliged the doctor to refer the patient to another physician carrying out the same service. However, it had not been shown that those requirements had been complied with in P.'s case."[15] The Court awarded damages to the girl and her parents.

Most recently, in the case of *Anita Kruzmane v. Latvia*, a mother (Kruzmane) complained that she had not been able to abort her Down's syndrome daughter. She claimed that her doctor had breached an obligation to prescribe a screening test for Down's, that this omission had caused her to give birth to the daughter, and that she had thereby suffered a violation of her right to respect for private life, which she said included the right to decide to have an abortion. The Court found no violation of the Convention and refused to award damages.[16]

In summary, on the core issue of whether a state can enact legislation to ban, restrict or permit abortion, the Court's decision in the Ireland case clearly and firmly established that each of the 47 member states of the Council of Europe can do any of these things as an act of sovereign right. The Court will hear cases alleging the denial of rights

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[14] Reported at www.lifenews.com/2011/03/02. Also see Parliamentary Assembly of the Council of Europe Resolution 1763 (October 7, 2010), narrowly adopted after sharp debate, affirming the rights of healthcare practitioners and institutions to decline to participate in abortions and other practices that violate their conscience.

[15] ECHR, application no. 57375/08.

[16] ECHR, application no. 33011/08, decided June 2014.

recognized in national law, such as complaints alleging denial of procedural rights contained in a law, assuming the usual criteria of admissibility are met.

The Committee of Ministers, the highest political body in the Council of Europe, monitors implementation of Court decisions through quarterly meetings of ministers or (usually) deputy ministers, who review reports from the Court on compliance and related communications from states.

ECJ

The European Court of Justice comprises 28 judges elected by common accord of EU governments; in practice, each member state nominates a single judge, who is then elected by consensus. Presumably governments could object to a nominee, but this writer is not aware of such a case. Therefore, if pro-lifers want to influence an election, they need to contact the nominating authorities in their own country. Terms are for six years, renewable.

The Court has authority to interpret the Treaty of Lisbon (entered into force December 2009), which incorporates as an annex the Charter of Fundamental Rights of the European Union.[17] While the Charter is silent on abortion and the rights of unborn children, the Court's power to interpret the Treaty is limited only by the guiding principles in its text, such as subsidiarity and specific conferral of competences, which would appear to be obstacles to the Court's striking down national laws on abortion. Members of the European Parliament have on occasion cited these principles in opposing pro-abortion resolutions at the Parliament. National parliaments have the right under the Treaty to complain that the Court has not given adequate weight to subsidiarity or conferral in a particular ruling, but the Court ultimately decides whether to uphold the complaint.

The drafters of the Lisbon Treaty did not resolve the obvious problem that the ECHR and the ECJ might come to different conclu-

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[17] Poland, Ireland, the Czech Republic, and the UK opted out of the Charter of Fundamental Rights.

sions about a specific human rights issue.[18] As already noted, the ECHR has determined that whether or not, and to what degree, abortion should be legal is a matter for national legislative determination. Discussions between the EU and the Council of Europe led to negotiation of a draft agreement in April 2013 on EU accession to the Convention. In December 2014, however, the ECJ rejected the proposed agreement and found that several of its provisions would violate the status and rights of the EU. As of March 2015 it was not clear how the Council of Europe, EU bodies, and Member States would proceed. If a new text acceptable to all parties can be developed, final approval would require an affirmative vote by the main European Union and Council of Europe institutions, including the two Courts, and ratification by all 47 Council of Europe Member States. Pro-life NGOs would do well to follow the ongoing discussions closely and to participate as circumstances permit.

ECJ findings and decisions are not subject to appeal and have direct effect; that is, they apply to citizens as well as states and do not require national implementing legislation or national judicial action.[19] In 1964 the ECJ asserted the supremacy of European law over national law and of its decisions over those of national courts.[20] ECJ supremacy, however, is not unchallenged. On June 30, 2009 the German Constitutional Court held that the initial implementing legislation of the Lisbon Treaty was incompatible with the German Basic Law (Constitution), because it did not accord the German parliament sufficient rights to participate in European lawmaking and treaty amendment procedures.[21] As Frank Schorkopf wrote in the *American Journal of International Law*, the Court "would view the EU as an association of sovereign states to which the principle of conferral of competences applies...[but] rejected the concept of a European federal state," insisting that "the

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[18] Elizabeth F. Defeis, "Human Rights and the EU: Who Decides? Possible Conflicts between the European Court of Justice and the European Court of Human Rights," *19 Dickinson International Law Journal,* p 301-330.

[19] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.* Case 26-62, 5 February 1963.

[20] *Flaminio Costa v ENEL* [1964] ECR 585 (6/64).

[21] Frank Schorkopf, in "International Decisions," *American Journal of International Law* 104: 259-65.

primary source of legitimization of the...[EU]... must be national polities."[22] The Court went further, defining certain rights concerning what it called "the political formation of economic, cultural and social circumstances of life,"[23] with which European integration must not significantly interfere, including basic liberties, family and education policies, and freedom of religion and ideology.[24] This decision required the German Government and Parliament, which had been driving energetically toward ever-closer union, to take steps to ensure that certain basic rights would be safe from Union encroachment. Although the Court did not mention abortion, its list of areas reserved for national authority could easily accommodate Germany's law on the subject, which, despite elements of permissiveness, in principle recognizes the humanity of unborn children and provides limited substantive and procedural protections for them. The German Constitutional Court has upheld these protections.

In June 2011 the Czech Parliament decided not to adopt draft legislation that would have provided abortions to citizens of other EU nations. Parliament was responding to protests by Czech pro-life and pro-family groups, and in light of a legal opinion submitted by the Alliance Defense Fund pointing out that the EU institutions acknowledged that they have no authority over national legislation on abortion.[25] The Alliance memorandum included the following statement by the President-in-Office of the Council of the European Union in response to a question by a member of the European Parliament concerning abortion:

> The Council has never discussed this, because it does not fall within its competence. The European Union treaties have not bestowed on the Community or the Union the competence whereby the Union could regulate on abortions. The Member States thus have the competence to regulate on this and ensure compliance in their territory with the laws that they pass. The EU cannot

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[22] Ibid., 261.

[23] Para. 249 of the Court's decision, quoted at ibid., 262.

[24] Paras. 256-60 of the Court's decision, cited at ibid., 263. The German Parliament thereafter enacted a revised implementation law, details of which are not relevant here.

[25] Alliance Defense Fund memo cited at LifeNews.com/2011/06/06.

interfere in unsatisfactory states of affairs due to differences in the legislation of Member States when it comes to areas that are not within its competence.[26]

A few months later, responding to another question that raised the same issue of legal competence to legislate on abortion, the Council reiterated the view that the matter legally falls under the competence of the individual states.[27]

Although the Treaty of Lisbon and the Treaty on the Functioning of the European Union entered into force after the foregoing statements, nothing in these documents authorizes the EU lawmaking bodies (Commission, Parliament, and Council) to legislate on abortion, and so far they have declined to do so. EU states are also members of the Council of Europe and parties to the European Convention, and it seems improbable that they would seek to attack a landmark ECHR ruling such as the *Ireland* decision through EU legislation. Additionally, the principles of subsidiarity and "conferral of competences" mentioned above would come into play. Still, there is reason to pay attention.

In October 2011 the ECJ ruled that "a process which involves removal of a stem cell from a human embryo at the blastocyst stage, entailing the destruction of that embryo, cannot be patented." The Court said its ruling upheld an existing European directive on biotechnology patents "intended to exclude any possibility of patentability where respect for human dignity could thereby be affected." The Court defined a human embryo as "a human ovum, as soon as fertilized if that fertilization is such as to commence the process of development of a human being, or a non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted, or a non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis." [28] Because the ruling prohibits

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[26] www.europarl.europa.eu, Debates, Response to question No. 11 (H0983/06), Wednesday, December 13, 2006. The Council of the European Union is a ministerial-level EU legislative and policymaking body, often confused with the Council of Europe or with the "European Council" (of heads of state and government, which has no legislative functions).

[27] www.europarl.europa.eu. Written reply of March 19, 2007 to written question E/4955/2006.

[28] *Oliver Bruestle v. Greenpeace*, Case 34/10, judgment of October 18,

patenting, it will likely be a strong disincentive to investment in embryo-destructive research. In a related development, on November 3, 2011 the Grand Chamber of the ECHR upheld by 13-4 Austria's ban on in-vitro fertilization (IVF) with donated sperm or eggs. [29]

Recent developments at the democratically elected European Parliament include a July 2012 resolution condemning forced abortions,[30] the November 2012 election of Tonio Borg as EU Health Commissioner by a vote of 386-281despite his candidacy being attacked because of his pro-life convictions and the pro-life laws of his country (Malta),[31] and overwhelming approval (567-37) of an October 2013 resolution endorsing a report condemning gendercide.[32] On October 22 and December 10, 2013, Parliament narrowly rejected draft resolutions endorsing a right to abortion.[33] However, on March 10, 2015 it adopted a non-legislative and non-binding resolution endorsing a committee report that called for expanding legal abortion and abortion access in the EU, but in the same resolution the Parliament reaffirmed the sovereign right of member states to legislate on abortion. The inclusion of the latter provision persuaded enough European Peoples Party (Christian Democratic) MEPs to vote for the resolution to ensure its passage. Two days later the Parliament adopted a separate nonbinding resolution based on another committee report urging the EU and member states to support legal abortion on a worldwide basis; to gain votes for this text, the drafters inserted, inconsistently, a condemnation of sex-selective abortion as "violence against women and girls" and urged the EU Council to take action against the practice.[34]

2011; quotations from Reuters.com/article/2011/10/18-us-embryo-court-idUSTRE79H19229111018, accessed 11/10/2011.

[29] *S.H. and Others v. Austria* (application 57813/00).

[30] www.lifenews.com, July 5, 2012.

[31] Ibid., November 13, 2012.

[32] Id., October 10, 2013

[33] PNCIUS.org/newsletter November 2013 and December 2013.

[34] PNCIUS.org, March 10 and 12, 2015.

Advisory Bodies

The EU Fundamental Rights Agency, while it has no legislative or regulatory authority, seeks to influence public and official attitudes through research, public information activities, and networking. It is supervised by a multinational management board selected by EU member states and EU institutions, and is assisted by an appointed Scientific Committee.[35] Within the Council of Europe, the Commissioner for Human Rights carries out functions that go beyond those of the EU agency. The Council's website describes the mandate of the Commissioner in these terms:

> The Commissioner's work...focuses on encouraging reform measures.... Being a non-judicial institution, the Commissioner's Office cannot act upon individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals.[36]

Despite the claim that the office is "non-judicial," the Commissioner can take part in the proceedings of the ECHR by invitation or on the Commissioner's own initiative, and in person as well as by written testimony.[37] The Commissioner can also make "assessment" visits to a member state and make recommendations to the government "to help redress shortcomings," including making recommendations to change laws and official practices. The position thus has a mandate for activism, and could be influential in persuading national states to adapt their legislation and regulations. Although the two European human rights agencies have no executive, legislative, or judicial authority over member states or their citizens, their substantial staffs and budgets add to their potential influence.

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[35] For an outline of the Agency's mission and functions and a summary of recent activities, see Olivier de Schutter, "The EU Fundamental Human Rights Agency: Genesis and Potential" in *New Institutions for Human Rights Protection*, ed. Kevin Boyle (Oxford UK: Oxford Univ. Press, 2009), pp. 93-126. Also, http://fra.europa.eu/fraWebsite/about.

[36] www.coe.int/t/commissioner/Activities/mandate.

[37] www.coe.int/t/commissioner/Activities/3Pintervention.

The COE Parliamentary Assembly, an advisory body comprised of national parliamentarians, on October 3, 2011 adopted a resolution "condemn[ing] the practice of prenatal sex selection" and calling on states to "introduce legislation with a view to prohibiting sex selection in the context of assisted reproduction technologies and legal abortion, except when it is justified to avoid a serious hereditary disease." While the exception is regrettable, the resolution as a whole is a welcome step forward. Besides urging legislation, it also encourages national ethics bodies to "elaborate guidelines for medical staff, discouraging prenatal sex selection by whatever method," with the same exception. The measure was supported across party and national lines, and passed 81-3, with 3 abstentions.[38]

The Americas

Two Inter-American institutions, both part of the OAS system, oversee observance of human rights in the region: the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights (hereinafter the Inter-American Court). Their roles are specified in two distinct documents.

(1) The *American Declaration of the Rights and Duties of Man*. Adopted by the OAS General Assembly in 1948, it does not mention a specific right to legal protection for unborn children, nor does it recognize a right to abortion. Article I, however, uses inclusive language in declaring that "Every human being has the right to life, liberty, and the security of his person."

(2) The *American Convention on Human Rights* (1969). It entered into force in 1978, and of the 35 OAS member states, 25 had acceded to the Convention as of March 2015. It contains the following relevant provisions:

Article 1. Obligation to Respect Rights

For the purposes of this Convention, "person" means every human being.

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

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[38] PACE Resolution 1829 (2011).

Article 4. Right to Life

> Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
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> Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

IACHR – The Commission

The IACHR is charged with overseeing implementation of both of the foregoing documents, but for non-parties to the Convention it applies only the Declaration. The Commission has seven members elected by the OAS General Assembly for a four-year term, renewable once. They serve independently, and a Commissioner may not take part in a case involving his or her own country. The Commission monitors human rights situations, sometimes visits, and can make recommendations for improvement. It also adjudicates petitions from states, individuals, and NGOs that allege that the rights of specific individuals have been abridged under the Declaration or under the Convention (in the case of states parties to the latter).

Inter-American Court

The only bodies that can refer cases to the Inter-American Court, which was established under the Convention, are the Commission or a State Party to the Convention. Individuals and NGOs thus have access to the Court only through the Commission. Article 41 of the Convention allows non-victims to file petitions with the Commission against a state party, but a victim must be identified in the petition. (By contrast, in the ECHR an actual victim must file the petition.[39]) The Court consists of seven judges elected by the OAS General Assembly for six-year terms, renewable once. Unlike the rule in the Commission, a judge need not recuse himself from a case involving his home country. The Court's judgments are binding on states. It can also render advisory opinions at the request of the Commission, another OAS agency, or any OAS member state.

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[39] Dinah Shelton, *Regional Protection of Human Rights, vol. 1* (Oxford: Oxford University Press, 2005), 599-605.

Cases

The Commission has decided two cases involving the unborn child. In 1981 it rejected a complaint brought by two Americans against the U.S. Government who had asserted that the legalization of abortion by the U.S. Supreme Court in 1973, and a subsequent application of that decision in a Massachusetts case, violated the American Declaration of Human Rights. The petitioners argued that the Convention should be read as spelling out more precisely the provisions of the Declaration, and that therefore Article 1 of the Declaration should be understood as applying from the moment of conception. The Commission, however, ruled by majority vote that since the U.S. was not a party to the Convention at the time the petition was filed and since the Convention itself had not even entered into force at the time the alleged violations occurred, it could not apply the Convention in the case.[40]

In its decision the Commission noted, however, that in preparing its draft of the future Convention in 1968 the Commission had itself included the phrase "in general, from the moment of conception" and that the San Jose Diplomatic Conference had incorporated this formulation by majority vote in the Convention the following year. The Commission had earlier rejected the unqualified phrase "from the moment of conception" because it wanted to accommodate the domestic legislation of states that permitted abortion "*inter alia*, to save the mother's life, and in case of rape."[41] Therefore it is clear that both the Commission and the San Jose Conference saw a need to include protection for the unborn child, although they did not define precisely the length of time in pregnancy during which protection was to be afforded; the reason for including the qualifying phrase "in general"

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[40] IACHR Resolution No. 23/81, Case 2141. The decision was adopted 5-2, with the two dissenting Commissioners filing detailed legal, scientific, and medical arguments that the Declaration could and should be interpreted as protecting the unborn. A third Commissioner wrote that, while he agreed with the majority that the Convention was not applicable to the U.S. because it was not a party thereto, he "completely shares the judgment" of the dissenters that "human life begins at the very moment of conception and ought to warrant complete protection from that moment, both in domestic law as well as international law." www.cidh.org/annualrep/80.81eng/USA2141.htm.

[41] Ibid., paragraph 25.

seems to have been intended as a formula that would allow some flexibility for narrow exceptions on substantive grounds such as the two just mentioned. The legislative history also indicates that the words "*inter alia*" were not to be understood broadly.[42]

The second case is that of Paulina del Carmen Ramirez Jacinto, in which the Government of Mexico and the Commission reached a friendly settlement providing for monetary and other compensation to the petitioner, who had been raped as a minor but denied her right under Mexican law (as a rape victim) to obtain an abortion. The denial had occurred because Mexico had not enacted regulations that would have enabled the petitioner to exercise this right. Under the terms of the settlement, Mexico was required to, and did, change its federal regulations to remedy this omission, and the State of Baja California changed its law on the matter.[43]

Although not related to a specific case, on December 1, 2006 the Commission responded to Nicaragua's recently-enacted total abortion ban by issuing an unprecedented statement declaring that the Nicaraguan government's repeal of article 165 of the Penal Code "endanger[s] the protection of women's human rights." The statement emphasized the need for therapeutic abortion to ensure women's rights to "li[fe] as well as their physical and psychological integrity."[44] The statement did not itself purport to require Nicaragua or any other country to change its law, but its message of disapproval could be read as an invitation to submit cases challenging the scope of the ban.

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[42] In its 1981 review of the Declaration, the Commission said that in 1948 eleven countries plus Puerto Rico allowed abortion to save the mother's life, and six in cases of rape. Only four states permitted abortion for reasons other than these: Peru (to save the mother's health), Cuba (to prevent transmission of a contagious disease), Nicaragua and Uruguay ("to protect the honor of an honest woman"), and Uruguay (economic reasons, if done in the first three months). *Id.,* paragraphs 18 (b), subparas. (e) and (f).

[43] www.cidh.org/annualrep/2007/eng.mexico/161.02.eng.htm (Report 21/07, Petition 161-02).

[44] Cited in Jocelyn E. Getgen, "Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban," *Scholarship@Cornell Law: A Digital Repository,* Winter 2008, pp. 155-56. www.scholarship.law.cornell.edu.

The Inter-American Court has decided two cases with implications for unborn life. On November 28, 2012 the Court ruled that Costa Rica's ban on *in vitro* fertilization violated the Convention because, it said, the Convention's protection of the life of the unborn child begins at implantation rather than fertilization.[45]

On May 30, 2013, in a case (Beatriz) referred to it by the Commission, concerning an anencephalic unborn child, the Court issued provisional measures ordering El Salvador to take all necessary measures to safeguard the mother's "rights to life, personal integrity, and health, as provided in Articles 4 and 5" [of the Convention] after the Supreme Court of El Salvador had denied a request to terminate the pregnancy. The Salvadoran Health Minister thereupon approved a Caesarean section in order to deliver the then 27-week old baby, who died shortly afterward. The Health Ministry therefore announced that no abortion occurred.

Compliance

A cursory survey of IACHR decisions over the past several years shows a high rate of compliance. This is probably due to the Commission's preference for and skill in obtaining "friendly settlements," in which the respondent state takes substantial measures to accept IACHR recommendations for compensation to victims. Willingness to comply is reinforced by a landmark Court ruling stating that parties to the Convention are as a rule obliged to adopt IACHR recommendations in individual cases.[46] In cases of non-compliance that are not resolved through direct contact with the state concerned, the Commission can publish the facts, inform the OAS General Assembly, and/or refer the case to the Court. Court judgments are binding, and the Court can order reparations and "measures to guarantee non-repetition" of the violation. In case of non-compliance or excessively delayed compliance, the Court can enlist the assistance of the OAS General Assembly.

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[45] *Murillo et al. v. Costa Rica.* Lifenews.com December 27, 2012. Also see analysis by Carlos Polo in Population Research Institute report January 21, 2013 asserting that the Court exceeded its authority.

[46] Dinah Shelton, *Remedies in International Human Rights Law*, 2nd edition (Oxford UK: Oxford Univ. Press, 2005), pp. 380-88.

General Activities

The IACHR has held public hearings on the general subject of abortion. In 2007, during its 130th Regular Session, the Commission held a wide-ranging discussion at the request of the pro-abortion Center for Reproductive Rights, the Center for Justice and International Law (CEJIL), and Human Rights Watch, but the report of the meeting does not indicate participation by any pro-life organization.[47] Similarly, a hearing on the Reproductive Rights of Women held during the IACHR's 141st session featured reports by organizations in 12 countries in the region, apparently not including pro-life organizations.[48] It is not clear from the published record why only pro-abortion organizations participated. According to Article 64 of the Commission's Rules of Procedure, interested groups may take part in hearings on general matters and country situations if they submit a request fifty days in advance and if the Commission agrees. It is also possible for NGOs to submit information relevant to country studies being prepared by the Commission, including studies prepared in connection with an onsite Commission visit.

Africa

Three institutions currently have continent-wide responsibility for human rights: the African Commission on Human and People's Rights (hereinafter African Commission), the African Committee on the Rights and Welfare of the Child (African Committee), and the African Court of Human and Peoples' Rights (ACHPR). The last-named is in the process of merging with the African Court of Justice, pursuant to a decision by the African Union Assembly (AU Assembly) in July 2008. The Protocol for the merged court, which is to be known as the African Court of Justice and Human Rights (ACJHR), had not been ratified by the required fifteen states as of March 2015. Sub-regional courts have also come into being: the Economic Community of West African States (ECOWAS) Community Court of Justice, the South African Development Community (SADC) Tribunal, and the East African Court of Justice. They are not discussed herein because the author not found

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[47] Press Release 54/0l, available at cidh.org.

[48] Annex to Press Release on 141st Session, available at cidh.org.

evidence that they have involved themselves in matters affecting the right to life of the unborn child.

The African Commission on Human and Peoples' Rights

The African Commission consists of eleven members elected by the AU Assembly (Heads of State and Government) for six-year perpetually renewable terms. The Commission studies and makes recommendations to governments on human rights conditions, organizes conferences, seminars, and similar meetings, encourages national and local human rights institutions in the region, asks governments for reports on compliance with Commission recommendations, and suggests to governments principles on which to base domestic legislation.

The Commission also has a role in interpreting its founding document, the African Charter on Human and Peoples' Rights, a role it currently shares with the ACHPR and will continue to share with that court's successor once the court merger takes place. This interpretive role includes the Maputo Protocol discussed below. The African Commission is also one of the bodies specifically authorized to bring cases before the present and future Court. NGOs have direct access to the Commission, though not to the Court; they can obtain official observer status, with the right to submit agenda items, present petitions on behalf of individual complainants, address the Commission, place interns on the staff, support rapporteurs and missions, organize workshops, and even draft normative resolutions and protocols.[49]

In February 2015, the Commission unanimously endorsed recommendations that Member States that have ratified the Maputo Protocol change their laws to incorporate its pro-abortion provision (Article 14 (2) (c), and to broaden practical access to abortion. The Commission further recommended that non-ratifying states also change their laws restricting abortion.[50] The Commission's recommendations are not binding, but they provide a new tool for pro-abortion NGOs to try to influence national governments, courts and legislatures. Moreover,

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[49] Dinah Shelton, *Regional Protection of Human Rights*, vol. 1, p. 545.

[50] African Commission General Comment No. 2, reported in *Parliamentary Network on Critical Issues for Critical Issues (PNCI) Newsletter* 9/2 (February 20, 2015).

the Commission is one of the entities specifically authorized to bring cases to the ACHPR, which would escalate the situation and call for a major effort by pro-life governments to defend their national pro-life laws.

Regional courts do have authority to order a government to do things to bring their laws into conformity with international treaties that they have accepted, and governnents are generally reluctant to defy a court order. Several African states are protected by the reservations they attached to their ratification of the Protocol, but most did not take this step. States Parties to the Protocol that have pro-life national laws will need to prepare for possible judicial action, but they can also consider initiatives in the political bodies of the African Union. Treaty revision could be one avenue, though this would take considerable time and effort. Other possible initiatives include pro-life resolutions at AU political-level meetings including the Assembly and establishment of a special rapporteur on the dignity of the unborn child. Also, there is a disconnect between the abortion article of the Maputo Protocol and the pro-child provisions of the African Charter on the Rights and Welfare of the Child, which is also a binding treaty.

The African Committee on the Rights and Welfare of the Child

The Committee consists of eleven members, elected for five years by the AU Assembly from among states parties to the African Charter on the Rights and Welfare of the Child (Children's Charter). The Charter had been ratified, as of March 2015, by 47 states. Unlike the other African institutions discussed here, the members' terms are not renewable. Other than the UN Committee on the Rights of the Child, this is the only treaty-based committee charged specifically with protecting children's rights. Its mandate is thus of particular pro-life interest.

As spelled out in the Children's Charter, the Committee's job is to conduct studies, make recommendations to governments, formulate "and [lay] down principles and rules," cooperate with other organizations, "monitor implementation and ensure protection of the rights enshrined in this Charter," "interpret the Charter at the request of" a member state or AU organ or certain other recognized bodies, and other tasks as may

be assigned by the AU or – interestingly – the UN.[51] The Committee can receive and consider "communications" (petitions) from individuals or from NGOs recognized by the AU or UN alleging violations of the Charter, but states cannot file complaints.[52] The Committee may "resort to any appropriate method of investigating" the matter described in the petition, and must report its findings biennially to the AU Assembly and then publish the report. States Parties to the Charter are required to make this report widely available.[53]

States Parties are also required to submit periodic reports on their implementation of the Charter (Article 43); the Committee reviews these in a multi-stage procedure involving repeated contacts with the state concerned to request additional information, culminating in publication of the Committee's concluding observations. NGOs can take part in the preparation of their state's report, if the state agrees, and may also participate informally in the stages of the Committee's review of state reports leading up to their submission to the AU Assembly. They can also submit alternative (shadow) reports to the Committee, as long as their views differ from those already contained in the state's own report. If a state declines to submit a report at all, after repeated requests the Committee can choose to review the NGO report as a substitute.[54] In this situation, the state is of course at higher risk of an unfavorable report.

The Children's Charter incorporates, by inclusive reference, language from the UN Convention on the Rights of the Child supporting the rights of the child before as well as after birth; the Committee's work thus merits serious attention by pro-life NGOs. Its secretariat is based within the main African Union secretariat in Addis Ababa, Ethiopia.

In November 2013, the Committee issued General Comment No. 1 on the Rights of Children of Incarcerated and Imprisoned Parents and

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[51] Article 42, www.africa-union.org/Official_documents/Treaties.

[52] Ibid., Article 44.

[53] Ibid., Article 45. "Any appropriate method" is understood by the Committee as including in-country visits with the consent of the respondent state.

[54] www.en.wikipedia.org/wiki/Afican_Charter_on_the_Rights_and_Welfare_of_the_Child, last visited March 5, 2015. This entry contains an excellent summary of the role of NGOs (called CSOs in the entry) in the preparation of reports and other functions of the Committee.

Primary Caregivers, in connection with Article 30 of the African Charter on the Rights and Welfare of the Child. This document that refers in several passages specifically to the children of pregnant women ("imprisoned mothers" or "incarcerated mothers"). It clearly recognizes the right of an unborn child to be born by describing requirements for the authorities to provide adequate and safe facilities and services for childbirth.[55]

African Court of Human and Peoples' Rights (ACHPR)

The ACHPR consists of eleven judges, elected by the AU Assembly for six-year terms, renewable once, from lists proposed by states party to the Court Protocol. [56] The Court can consider actions brought under any international human rights instrument to which the State(s) concerned are parties, not only African instruments. Moreover, the Court can apply as sources of law any relevant human rights instrument, universal or regional, ratified by the State(s) concerned. This represents a much broader spectrum than that available to the European and Inter-American Courts. The Court may also deal with "matters of interpretation arising from the application or implementation" of the Court Protocol, a function that, as stated above, it shares with the African Commission.

Article 5 designates who can bring a case to the ACHPR: the African Commission on Human and Peoples' Rights; the State Party which has lodged a complaint to the Commission; the State Party against which the complaint has been lodged at the Commission; the State Party whose citizen is a victim of a human rights violation; and African intergovernmental organizations. Additionally, when a State Party has an interest in a case, it may submit a request to the Court to be permitted to join in the proceedings.

As for NGOs and individuals, Article 5(3) of the Court Protocol provides that the ACHPR may entitle relevant NGOs with observer

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[55] The full Comment is available on the Committee website (http://acerwc.org/the-committees-work/general-comments).

[56] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Oau/leg/afchpr/prot (III), adopted June –1998, entered into force 2004.

status with the African Commission and also individuals to institute cases directly before it, but only in accordance with Article 34(6) of the same document. The latter Article narrows this entitlement by specifying that states *may* make declarations accepting the competence of the Court to receive cases under Article 5(3), but that the Court may *not* receive any petition involving a State Party that has *not* made such a declaration. As of March 2015, 26 states had ratified the Court Protocol, but only Burkina Faso, Malawi, Tanzania, Ghana, Rwanda, Ivory Coast, and Mali had made the declaration accepting individual and NGO access.

The Court's workload has increased substantially starting in 2011. Before that it had issued only one judgment, but as of March 2015 it had resolved 24 cases and had nine pending, plus four requests for advisory opinions. While the ACHPR has not considered any cases involving the rights of the unborn, it has had to contend with several sustained attempts by individuals and NGOs to persuade the Court to overturn or set aside the established limitations on access to the Court. The Court has rejected them all, but African and international pro-abortion international NGOs continue to campaign to gain direct access to the Court. As it seems unlikely that the African Union would cave in to this pressure on a hemispheric basis, the campaign also includes efforts to press national governments to file the necessary declaration to open the door for NGOs and individuals to bring cases against their own countries. As noted, the number of countries making the declaration is still small.

The (Future) African Court of Justice and Human Rights (ACJHR)

The new Court, whose founding Protocol was adopted by the African Union (AU) on July 1, 2008, is charged with being the principal judicial organ of the Union. As of March 2015, the Protocol was not in force, not having received the required fifteen states. According to the Protocol, the ACJHR will consist of two sections, each with eight judges elected by a two-thirds majority of the AU member states for six-year terms, renewable once. A judge may not take part in a case involving the state of his or her nationality. The sections will meet separately – one to decide human rights cases and the other to deal with all the rest – but either section may refer a matter to the full court for decision. The Court has broad authority to interpret and apply, among the States Parties to

an agreement, not only the African human rights treaties but, as with the current ACHPR, also "any...relevant human rights instrument ratified by the States concerned."[57] The new Court will also be able to order reparations (Article 28 (h)) and compensation (Article 45).

Judgments of the new Court will be binding on the States Parties, and if a state fails to execute a judgment, the Court may refer the matter to the AU Assembly, which may impose sanctions on that state (Article 46). The Court may invite a state, AU organ, or individual to testify or submit written observations in a case (Article 49). It may also issue advisory opinions, but only on the request of an AU organ (Article 53); States Parties and certain intergovernmental organizations may either ask or be asked to testify orally or in writing on the subject of a particular advisory opinion request. (Article 54)

Access

Articles 29 and 30 of the Protocol establishing the new Court designate who will have standing to bring a human rights case to the Court: State Parties to the Protocol; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs; and African National Human Rights Institutions. As with the ACHPR, both individuals and African Union-accredited NGOs will be allowed to bring a case directly to the new Court, but only when it concerns a state that has made a declaration accepting the competence of the Court to receive cases from these sources. This provision is intended to prevent the Court from being swamped by massive and often duplicative applications, as happened in the European system before the Council of Europe adopted vigorous measures to address the rapid accumulation of a backlog of over 100,000 petitions.

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[57] Protocol on the African Court of Justice and People's Rights, Article 28.

What the African Regional Instruments Say About the Right to Life

(1) The "African Charter on Human and Peoples' Rights" (1981, entered into force 1986) says nothing directly about abortion or the rights of the unborn but uses inclusive language in key provisions:

> Article 4. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
>
> Article 18. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

The reference to "the rights of...the child" in Article 18 would necessarily include the 1959 UN Declaration on the Rights of the Child, which recognizes the child's need for "appropriate legal protection, before as well as after birth."[58] This formulation is reaffirmed in the Preamble to the 1989 UN Convention on the Rights of the Child.

(2) "The African Charter on the Rights and Welfare of the Child**"** (1990, entered into force 1999)[59] refers in its Preamble to the "principles of the rights and welfare of the child" contained in the UN Convention on the Rights of the Child,[60] and affirms in Article 1 that "Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State." Article 2 further adopts the definition of "child" in the UN Convention: "every human being below the age of 18 years."

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[58] General Assembly resolution 1386 (XIV), November 20, 1959, third preambular paragraph.

[59] OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov.29, 1999. As of May 2013, 47 of the 54 African Union member states had acceded to the Charter.

[60] "REAFFIRMING ADHERENCE to the principles of the rights and welfare of the child contained in the declarations, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Governments Declaration on the Rights and Welfare of the African Child."

The following provisions should therefore be read in the light of the Preamble and Articles 1 and 2:

Article 5.
1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection, and development of the child.

Article 30.
1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
(e) ensure that a death sentence shall not be imposed on such mothers.

(3) "The Protocol on the Rights of Women in Africa" (2003, entered into force in 2005). Known as the "Maputo Protocol," this document is the sole exception among multilateral treaties to the pattern of expressing an explicit or implied preference for life. This exception appears in only a single sentence, one intended to provide a basis for killing unborn children, in complete contradiction to all other relevant provisions of African and universal treaty law: Article 14, Para. 2(c) provides that

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 fetus.

This provision is vulnerable on several grounds when analyzed in the context of the Protocol itself and of other international conventions to which African states are parties. Abortion or equivalent terms are not included among the rights "to health of women, including sexual and reproductive health" in Paragraph 1 of the same Article, nor are they mentioned anywhere else in the treaty. The term "reproductive rights" is nowhere defined in the Protocol or other African documents.

The phrase "where the continued pregnancy endangers the mental and physical health of the mother" presents a further difficulty. The general obligation of a state to protect the health of everyone in its jurisdiction is not founded on an undefined "reproductive right," as 14(2) (c) would have it understood. Moreover, many countries and

several of the United States have found that laws permitting abortion for "mental health" quickly deteriorate in practice into abortion-on-demand, with the vast majority of abortions being performed under this heading with no attempt to record the specific medical grounds for the procedure in the given case.

Paragraph 14 (2) (c) also seeks to impose on ratifying states an obligation that conflicts with other provisions of international law to which the same African states are party, such as the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. As shown earlier, these other agreements state clearly and directly that *every* child has an inherent right to life and that the state is obliged to protect this right. As noted, both documents define a child as "every human being below the age of eighteen years" and recognize that the child needs appropriate legal protection before as well as after birth.

In one respect, the Maputo Protocol does, however, conform with the African Charter on the Rights and Welfare of the Child and with the International Covenant on Civil and Political Rights, in that it prohibits the execution of pregnant women. The Protocol thus demonstrates the drafters' understanding that the unborn child has a right to life that is independent of the mother's rights and that this right requires and merits official protection.[61]

Further, the Protocol calls upon states to "establish and strengthen existing pre-natal and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding." If the unmentioned baby were not already living and physically present before birth, the woman would not have use for specifically "pre-natal" services.[62] There are many legal and logical reasons, therefore, why the abortion paragraph should not be applied, and why it should be deleted by agreement among African states as soon as this becomes feasible.

A state can protect its domestic law on the unborn by entering a reservation upon ratifying the Women's Protocol. While a reservation

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[61] Article 4, paragraph 2 (j) of the African Charter on the Rights and Welfare of the Child. Article 6 (5) of the Covenant.

[62] Many international agreements impose obligations on states to promote health care and nutrition for all women, pregnant or not.

is the strongest step, even states that do not file a reservation can still protect their unborn children to some extent by declining to make the declaration authorizing NGOs and individuals to bring cases directly to the African Court. Note in this regard that the pro-abortion Center for Reproductive Rights has urged that abortion "advocates...pressure governments to ratify the Maputo Protocol...and to make declarations accepting the jurisdiction of the African Court over cases brought by individuals and NGOs."[63]

Unlike the Children's Charter, the Maputo Protocol does not create a separate implementation mechanism. Instead, it is to be implemented by the African Commission. This is another reason why pro-life states and NGOs should participate more actively in the Commission's work, since it is one of the bodies specifically authorized to bring cases before the current and future African Court. Thus a pro-life majority on the Commission would keep the Commission from being turned into an instrument for pro-abortion advocacy, including referrals to the Court of radical challenges to pro-life national laws.

League of Arab States

The Arab Charter on Human Rights was adopted by the League of Arab States in May 2004, and entered into force on March 15, 2008. Three of its provisions are relevant here:

Article 5: "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."

Article 7: "The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases the best interests of the infant shall be the primary consideration."

Article 43 coordinates the Arab Charter with other legal instruments:

Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set

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[63] Center for Reproductive Rights, *Briefing Paper – The Protocol on the Rights of Women in Africa (*June 2005), p. 18. www.reproductiverights.org.

forth in the international and regional human rights instruments which the states parties have adopted or ratified, including rights of women, the rights of the child and the rights of persons belonging to minorities.[64]

The Charter provides for an Arab Human Rights Committee of seven independent experts elected by States Parties for a four-year term, renewable once. The Committee is to review reports by States Parties on their implementation of the rights in the Charter, to request additional information if necessary, to share their conclusions with the state concerned, and to make recommendations. The Committee does not have authority to hear and adjudicate individual cases or to impose reparations or other sanctions on states it finds non-compliant with the Charter. However, its conclusions, recommendations, and annual report to the Council of the League are public documents, thereby creating an incentive for states to make an effort to comply. As of September 2013 the Committee had reviewed and published the reports by Jordan, Algeria, Bahrain, and Qatar and the Committee's conclusions and recommendations concerning the first three of these.

In September 2014, the Ministerial Council of the Arab League adopted a statute for an Arab Court of Human Rights. While this was intended as a major step forward, the decision was sharply criticized by a large number of human rights NGOs and lawyers' groups who complained that the statute had been drafted behind closed doors by experts in the Arab League Secretariat without any consultation with civil society or other non-governmental organizations. The protesting groups also criticized several substantive provisions of the text, and they have called for states to oppose ratification until the text is amended to meet their concerns.[65]

ASEAN

The ASEAN Intergovernmental Commission on Human Rights, established in mid-2009, does not operate from a regional charter or convention on human rights, but its "Terms of Reference," adopted at

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[64] www.umn1.edu/humanrs/instree/loas2005.html.

[65] Rebecca Lowe, " Bassiouni: New Court is a 'Potemkin Tribunal'", www.ibanet.org, visited November 28, 2014.

the July 2009 ASEAN Ministerial Meeting, provide a flavor of the political context within which it is to operate. The Commission is to

> 1.4. Promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural, and religious backgrounds, and taking into account the balance between rights and responsibilities.
>
> 1.5. Enhance regional cooperation with a view to complementing national and international efforts… and
>
> 1.6. Uphold international human rights standards as prescribed by the Universal Declaration…the Vienna Declaration and Programme…and …instruments to which ASEAN Member States are parties.[66]

The Commission may advise member states, encourage them to ratify international human rights instruments, and assist them in fulfilling treaty obligations. A confidential procedure for considering complaints was launched in 2012. As decisions must be reached by consensus, it seems unlikely that the procedure will produce dramatic results at least in the short term. This limited mandate, and the fact that Commission members are government appointees and representatives, strongly suggests that the Commission will continue to proceed cautiously. In 2010, the Commission began discussion of an ASEAN Human Rights Declaration, a process that culminated in adoption of a text at the ASEAN Summit in Phnom Penh in November 2012.[67] Unlike the Arab Human Rights Committee, the ASEAN Commission has no mandate to request or examine state reports or to ask for information on compliance with Commission recommendations.

The Organization of Islamic Cooperation (OIC)

Article Six of the Convention on the Rights of the Child in Islam (adopted in 2005) reads: "The child shall have the right to life from when he is a fetus in his/her mother's womb or in the case of his/her mother's death; abortion should be prohibited except under necessity warranted by the interests of the mother, the fetus, or both of them."

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[66] www.asil.org/ilib090724.cfm#r2.

[67] Text available at www.asean.org.

The OIC established this 18-member Independent Permanent Human Rights Commission in June 2011 as an advisory body of experts. The Commission had held five sessions as of June 2014, at which it issued recommendations and other public statements on human rights issues, including condemnation of the spring 2014 abduction of 200 Nigerian school girls by Boko Haram, and government discrimination against Muslim minorities in Myanmar, the Central African Republic, and elsewhere. The Commission has established contacts with the office of the UN High Commissioner for Human Rights and other human rights bodies and is feeling its way in terms of how it can be most effective. It has no judicial or quasi-judicial functions.[68]

What Pro-Life Advocates Can Do

It is clear from the foregoing discussions that NGOs can play important roles in the Inter-American and African Commissions on Human Rights, and in the African Committee on the Rights and Welfare of the Child. They can contribute to country reports, conduct and submit substantive research and studies, prepare petitions, and much more. These opportunities do not appear to be fully utilized by pro-life NGOs at the moment.

Among regional courts, NGOs have full access to the ECHR. While there is less scope for NGO activity in proceedings before the Inter-American Court, the ACHPR, and the ECJ, it would be a mistake for pro-lifers to ignore them. The composition of these courts changes over time, and the content and direction of their decisions could change as well, in a more pro-life or pro-abortion direction. As noted, in Africa seven parties to the Maputo Protocol have also authorized individual and NGO access to the ACHPR: Burkina Faso, Mali, Ghana, Malawi, Rwanda, Ivory Coast and Tanzania. Pro-abortion individuals or NGOs in any of these countries could, therefore, bring a case directly to the ACHPR alleging that the state is in violation of the abortion clause of the Maputo Protocol (Article 14 (2) (c)).

The Center for Reproductive rights has an office in Nairobi, and the NGO Equality Now has issued a how-to manual to use the Maputo

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[68] The Commission's website is www.oichumanrights.wordpress.com (last visited December 3, 2014).

Protocol to challenge national protective laws. These actions clearly indicate that pro-lifers in Africa need to prepare for more active engagement on the ground in within individual countries and in the African multilateral institutions. Perhaps one or more international pro-life NGOs should open permanent offices in key countries.

It matters a great deal who is chosen to sit on regional courts and commissions, most of which reach decisions by majority vote. This means that a far-reaching ruling affecting an entire continent could be decided by a single vote in a panel as small as thirteen (the ECJ Grand Chamber), eleven (Africa), or even seven (the Americas). As noted earlier, the independence of commissioners and judges from government instructions is premised on the belief that it will incline those elected to pursue an objective, impartial application of treaty provisions to specific cases, and some judges and commissioners undoubtedly strive for this ideal. Yet reading the actual language of their rulings and dissents reminds us that judges and commissioners are not computers dealing with mathematical or astronomical calculations but human beings dealing with human values. As humans they inevitably bring their own values to their deliberations, including their sense of what justice means or, perhaps, what they think it *should* mean in the cases before them.

For both the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), the number of judges equals the number of member states. Within the ECJ, each state nominates a single candidate, who is ordinarily elected by consensus along with all the other national nominees. For the ECHR, the Council of Europe Parliamentary Assembly (PACE) chooses each judge from three national nominees following a formal screening procedure that includes in-person interviews by a PACE committee. For both courts, then, NGO input into the process appears to be limited mainly to the nomination stage.

In the Americas and Africa, the number of judges and commissioners is much lower than the number of states, and informal lobbying can take place at both the nomination (i.e., national) and election (i.e., multilateral) stages. For the Inter-American Commission on Human Rights, each OAS member state may nominate up to three candidates, after which the OAS General Assembly conducts the election. For the Inter-American Court, States Parties to the Inter-American Convention

may nominate up to three candidates, and the election is by States Parties, also during an OAS General Assembly session.

For the African Commission, which has the important responsibility of overseeing implementation of the Maputo Protocol as well as the main Charter of Human and People's Rights, the eleven members are elected by the African Union Assembly from lists of candidates proposed by member states; each state can nominate up to two candidates. Invitations to submit nominations are sent to member states four months before an election. For the African Committee on the Rights and Welfare of the Child, the AU Secretariat invites nominations from member states six months in advance. Both of these elections present early opportunities for NGOs to suggest qualified candidates to their respective governments and express support for their nomination. Interim vacancies, to be filled by the state of nationality of the departing member, offer additional opportunities.

For the current African Court (ACHPR), States Parties to the Court Protocol can nominate up to three candidates, and (by contrast with the Inter-American system), the entire AU Assembly, not just States Parties to the Court Protocol, elects the Court. For the proposed new consolidated Court (ACJHR), States Parties to the Protocol can nominate up to two candidates, and may indicate whether they are candidates for the human rights section or the general international law section of the Court. The AU Executive Council and the Assembly are to conduct the actual election. Candidates for all of the regional courts must be judges or lawyers, but this is not a requirement for candidates for the Inter-American and African Commissions or for the African Committee on Children's Rights.

National Human Rights Institutions

While the legal status of NHRIs varies from country to country, in general they are in a position to influence national laws and policies and nominations to international courts and commissions; therefore, pro-life leaders should be encouraged to take part in their work. For election to courts and commissions, an NHRI is likely to support candidates who share the philosophy of its leaders. In Africa, they are also among the

organizations specifically authorized to bring cases to the African Court of Human and Peoples' Rights.[69]

Pro-life advocates should not overlook the professional staff members of commissions, courts, and NHRIs, as staff often have significant substantive input and influence in the decision-making processes of their organizations. This also holds for the two official European rights agencies. Simply submitting relevant and accurate information would be one positive way to contribute to their work, particularly because staffs tend to be small and often over-worked.

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[69] A recent and growing body of scholarship has focused on the domestic aspects of international human rights implementation. Examples include Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia PA: Univ. of Pennsylvania Press, 2007) and Julie Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions* (Stanford CA: Stanford Univ. Press, 2009).