The San Jose Articles and an International Right to Abortion[*]

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

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

To put this in practical terms, imagine someone who has faithfully marched for life on the anniversary of *Roe v. Wade*.[1] Imagine the U.S. Supreme Court some day announcing that it is reversing *Roe*, holding that a right to abortion cannot be derived from the words of the Constitution. Imagine the joy of the faithful marcher, whose decades-long protest has borne fruit. And then

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).

imagine the devastation that he would feel if, the next day, the Supreme Court were to announce that, despite the reversal of *Roe*, a right to abortion exists in America because abortion has been established as a human right under customary international law. That is the prize for which abortion advocates are working – a failsafe back-stop for the day when the Supreme Court finally reverses *Roe*.

Since the foundational human rights documents do not recognize a right to abortion, however, the burden of proof lies upon abortion advocates to demonstrate that an unwritten right to abortion has come to exist. It is a burden they cannot carry.

The Original Human-Rights Document

In 1948, the United Nations General Assembly adopted the "Universal Declaration of Human Rights" (hereafter, the "UDHR").[2] The setting for the creation of the UDHR – considered by many to be the original human rights document – was the aftermath of World War II, the devastation of which followed far too closely on the heels of the destruction wrought by the First World War. The "massive violations of human dignity" represented by those two wars spurred the formation of the United Nations, the purpose of which was to "establish and maintain collective security" in the post-World War II era and to declare that the "community of nations" would never again allow such "massive violations of human dignity."[3]

The preamble to the UDHR makes reference to the horrors of the Nazi regime and that of the Imperialist Japanese – "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind"[4] – as a preface to the notion that "human rights should be protected by the rule of law."[5] The UDHR declares that freedom, justice and peace in the world rely on the "recognition of the inherent dignity and of the

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

[3] Mary Ann Glendon, *A World Made New* (New York NY: Random House, 2001), pp. xv-xvi.

[4] UDHR, preamble, para. 2.

[5] Ibid. at para. 3.

equal and inalienable rights of all members of the human family."[6] Article 3 of the UDHR succinctly affirms the value of human life: "everyone has the right to life, liberty and security of person."[7]

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (hereafter, the "ICCPR") is a treaty intended to implement into law the rights recognized in the UDHR.[8] A "declaration" like the UDHR has no binding legal effect; it is not "law." Conventions like the ICCPR, however, as treaties, bind those nations that ratify them.

Echoing the UDHR, Article 6 of the ICCPR clearly affirms a legally-protected right to life: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[9]

Two Sources of Public International Law: Treaty and Custom

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

By contrast, the second source of public international law, "custom," is unwritten. Customary international law represents a "custom" among nations, a way of behaving or interacting by nations that, over time, becomes a pattern that all nations follow.[10] Because this source of law is not found in a written and subsequently ratified agreement, it must be discerned by a court from evidentiary materials.

There are two schools of thought on how customary international law

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[6] Ibid. at para. 1.

[7] Ibid. at art. 3.

[8] *International Covenant on Civil and Political Rights*, December 16, 1966, 999 U.N.T.S. 171 [hereafter, ICCPR] (accessible at http://www.2.ohchr.org/English/law/ccpr.htm).

[9] ICCPR: art. 6 (1).

[10] William Saunders, "The ABC's of an International Right to Abortion," *Human Life Review* (Summer 2010): 84.

develops: the traditional view and the modern view. The traditional view requires (1) unanimity among the nations, (2) the existence of the practice over a long period of time, and (3) a high standard of evidence. The commentary of jurists and others has been recognized as evidence of "customary" international law. In its opinion in the case *Sosa v. Alvarez-Machain*,[11] the Supreme Court stated its opinion:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be*, but for the trustworthy evidence of what the law really is.*[12]

However, there is a "modern" view of customary international law, relied upon by abortion advocates. I call this the "bold" position. The bold position does not require the existence of the practice over a long period of time. In fact, it asserts that customary international law can be found from a single UN meeting, since all the nations are (theoretically at least) present (more about this below).[13]

Customary International Law

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

A key tactic of abortion advocates is to weave throughout various human rights documents the notion that a right to abortion exists as a necessary

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[11] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

[12] Ibid., citing *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[13] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position* (1997): 840.

component of what they term "reproductive health services." (This will be explained in more detail under the section on "conference statements" below.) By inserting language implying a right to abortion into various UN documents, the abortion advocates create "sources" that (they purport) provide evidence of such a right in customary international law. Abortion advocates are attempting to create "soft norms" that eventually "harden" into binding law. (I will return to this point below.)

Sources that the Left Claims Support a Right to Abortion

Included among abortion advocates' favored sources to cite as "evidence" of the development of customary international law are UN documents such as rapporteur's reports, committee comments, and conference statements.

1. Rapporteur's Reports

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

> Duties of Immediate Effect: Core Obligations
>
> Also, a State has a core obligation to ensure a minimum "basket" of health-related services and facilities, including essential food to ensure freedom from hunger, basic sanitation and adequate water, essential medicines, immunization against the community's major infectious diseases, and sexual and reproductive health services including information, family planning, prenatal and postnatal services, and emergency obstetric care.[14]

By including "sexual and reproductive health services" – alongside food, water, and basic sanitation – among the minimum "basket" of health-related services that States are "obligated" to provide to their citizens, Hunt is attempting to embed a reference to an abortion right in a United Nations document. Insertion of this language into the special rapporteur's report thus, under the bold position, provides "evidence" that can later be cited by pro-abortion advocates of an existing international right to abortion.

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[14] *Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN Doc. No. A/HRC/7/11 (2008).

2. Committee Comments

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

The UN advisory committee for the Convention on the Elimination of All Forms of Discrimination Against Women (hereafter, "CEDAW") provides an example. In a report on Croatia, CEDAW published the following: "The refusal, by some hospitals [in Croatia], to provide abortions on the basis of conscientious objection of doctors [constitutes] an infringement of women's reproductive rights...."[15] In other words, women have a right to abortions and doctors must provide them. The notion that women's reproductive rights trump doctors' rights of conscience is a "bold" statement indeed, considering the fact that the original human rights documents – the UDHR and the ICCPR – explicitly provide for the right to life of all human beings, and, implicitly at least under the notion of "liberty," provide for the protection of rights of conscience.

3. Conference Statements

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

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[15] *Report of the United Nations Committee on the Elimination of Discrimination Against Women,* G. A. Res. 54/38, para. 109, 21st Sess., U.N. Doc. A/54/38/Rev.1 (Jan 1, 1999).

nations are represented (theoretically, at least, that is, every member nation of the UN has the right to be there). Therefore, agreement to the outcome document may be said to create (or, to illustrate) consensus on a point of international law. In other words, abortion advocates claim that agreement to language in an outcome document from a single international meeting creates a consensus that, under the bold position, counts as evidence of customary international law.[16]

The International Conference on Population and Development (ICPD), convened by the United Nations in Cairo, Egypt, in 1994, provided abortion advocates just such an opportunity. At this conference abortion advocates hoped to win express recognition of a right to abortion. However, they failed. The statement issued from this conference said nothing about abortion; rather, it said:

> 7.2. Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.

Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility that are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. *In line with the above definition of reproductive health*, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases.[17]

Furthermore, a number of countries made "reservations" to the document.

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[16] Supra n. 13.

[17] *Programme of Action of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (1994).

In these reservations, they expressly refuted any suggestion that a right to abortion was implied in the Cairo language. The reservations served instead to re-confirm the pro-life principles first stated in the UDHR and the ICCPR.[18] An example of the express reservations made by the United States and eight Latin American countries, refuting any implied right to abortion in the Cairo language, follows. Nicaragua's reservation stated:

> The Government of Nicaragua, persuant to its Constitution and its laws, and as a signatory of the American Convention on Human Rights, confirms that every person has a right to life, this being a fundamental and inalienable right, and that this right begins from the very moment of conception. We accept the concepts of 'family planning,' 'sexual health,' 'reproductive health,' 'reproductive rights,' and 'sexual rights' expressing an explicit reservation on these terms and any others when they include 'abortion' or 'termination of pregnancy' as a component. Abortion and termination of pregnancy *can under no circumstances* be regarded as a method of regulating fertility or a means of population control.[19]

The reaction by these nations shows there was no unanimity that, at the time of the Cairo conference in 1994, language such as "reproductive health services" was synonymous with abortion. And it must be remembered that, without unanimity, under the modern view as well as the traditional view, there is no customary international law. The reservations when combined with the actual words in the outcome document show that Cairo does not state an international right to abortion – neither expressly, nor implicitly.

Soft Norms

Not to be dissuaded, abortion advocates argued that the repetition of language such as "reproductive health" from the Cairo statement and other sources that do not mention abortion over a period of time established an international customary law right to abortion. Let me refer you to a document from a leading pro-abortion lawyer's group.

An internal memo from the Center for Reproductive Rights[20] ("CRR"),

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[18] Saunders, supra n. 10, at n. 19.

[19] Ibid. (See A/CONF.171/13 Report of the ICPD, available at www.un.org/poin/icpd/conference/offeng/poa.html).

[20] The Center for Reproductive Rights (CRR) was originally known as the Center for Reproductive Law and Policy (CLRP).

"Summary of Strategic Planning" dated 2003, and placed into the Congressional Record by Congressman Chris Smith (R-N.J.)[21] stated:

> The ILP's overarching goal is to ensure that governments worldwide guarantee reproductive rights out of an understanding that they are legally bound to do so." We see two principal requisites for achieving this goal: (1) Strengthening international reproductive rights norms. Norms refer to legal standards. The strongest existing international legal norms relevant to reproductive rights are found in multilateral human rights treaties. Based on *our* view of what reproductive rights should mean for humankind, the existing human rights treaties are not perfect. For example, at least four substantive areas of reproductive rights illustrate the limits of international reproductive rights norms in protecting women: (a) abortion; (b) adolescents access to reproductive health care; (c) HIV/AIDS; and (d) child marriage.
>
> One strategic goal could be to work for the adoption of a new multilateral treaty (or addendum to an existing treaty) protecting reproductive rights. The other principal option is to develop 'soft norms' or jurisprudence (decisions or interpretations) to guide states' compliance with binding norms.
>
> (2) Supplementing these binding treaty-based standards and often contributing to the development of future hard norms are a variety of 'soft norms.' These norms result from interpretations of human rights treaty committees, rulings of international tribunals, resolutions of inter-governmental political bodies, agreed conclusions in international conferences and reports of special rapporteurs. (Sources of soft norms include the European Court of Human Rights, the CEDAW Committee, provisions from the Platform for Action of the Beijing Fourth World Conference on Women, and reports from the Special Rapporteur on the Right to Health.) (emphasis added).[22]

Thus, the CRR, acknowledging that the treaties did not provide a right to abortion, hoped to develop such a right through soft norms into "hard" customary international law. Since, as we have seen, there was no right in 1948 (UDHR), or 1966 (ICCPR), or 1994 (Cairo), they had to prove that it had developed since then. Fearing the consequences to this strategy posed by the election of a pro-life president in the U.S., George W. Bush, the CRR tried to win judicial approval of their theory in the 2001 case *CLRP v. Bush*.[23] Though the case was dismissed for technical reasons, their complaint defines their notion of "customary international law":

> 80. Customary international law is embodied, *inter alia*, in treaties (even if not ratified

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[21] 149 *Congressional Record* E2534, E2535 (2003) (emphasis added).
[22] Ibid.
[23] *The Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2002).

by the United States), the writings of international law jurists, and documents produced by United Nations international conferences. The *Restatement Third of the Foreign Relations Law of the United States* (American Law Institute 1987) defines customary international law as resulting "from a general and consistent practice of states followed by them from a *sense of legal obligation*.[24]

In other words, from the point of view of abortion advocates, utilizing the bold view, customary international law – discerned from a variety of sources – exists so long as it can be said that states follow the principles contained within these sources from a sense of legal obligation.

Resistance to the "Soft-Norm" Movement

Pro-life delegates to the UN have pushed back against this "soft norms" strategy. Remember that no one would assert that a right to abortion was recognized prior to Cairo. Rather, as mentioned before, abortion advocates assert that the repetition of reproductive health language from Cairo in special rapporteur's reports, comments from UN treaty-monitoring bodies, UN conference outcome statements, and other sources have created a right to abortion. Thus, if pro-life delegates could simply establish that the repetition of this language was *not* understood by the nations to be an endorsement of a right to abortion, they would have rebutted that argument decisively. This was, in fact, achieved at the UN Special Session on Children held in June 2001.

I served on this delegation. As we negotiated the Outcome Document, we were able to elicit the admission by other delegates that they were trying to smuggle in the idea of an international right to abortion under the "reproductive health" language:

> [T]he U.S. delegate asked Andras Vamos-Goldman [an official Canadian delegate at the Child Summit held at UN headquarters in New York] ...what was meant by the phrase "equal access to services...including sexual and reproductive health care," to which the delegate replied, "of course – and I hate to use the word – but in 'services' is included abortion." Those countries that do not consider abortion to be a female child's 'right' reacted quickly, and a number of countries that had previously supported the inclusion of the language "agree[d] to its deletion."[25]

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[24] First Amended Complaint of Petr. at 80, *The Center for Reproductive. Law & Policy v. Bush*, 2001 WL 36082935 (S.D.N.Y.) (2001) (emphasis added).

[25] William L. Saunders, "Neither By Treaty, Nor By Custom: Through the Doha Declaration, the World Rejects Claimed International Rights to Abortion and Same-Sex

In other words, once a delegate admitted that they intended to use language that implied a right to abortion, that language was rejected. It was rejected precisely because it allegedly meant "there is a right to abortion." This shows – conclusively in my view – that no right to abortion can have developed since Cairo by the route of customary international law (which requires unanimity). In further refutation, the United States of America appended the following explanatory statement:

> Concerning references in the document to UN conferences and summits and their five year reviews, the United States does not understand any endorsement of these conferences to be interpreted as promoting abortion.
>
> The United States understands the terms "basic social services, such as education, nutrition, health care, including sexual and reproductive health," "health care," "quality health care services," "reproductive health care," "family planning," "sexual health," "reproductive health," "safe motherhood," in the documents to in no way include abortion or abortion-related services or the use of abortifacients.[26]

Reaffirmation of the Protections for Life

The idea that "reproductive health" language somehow evolved since the Cairo conference to cover abortion was further rebutted in 2004 in the Doha Declaration. The Doha Declaration is an outcome document from a UN international conference held at Doha, Qatar, in November 2004, to celebrate the second International Year of the Family. A quote from the report on the conference states that one of the purposes of the conference was to "reaffirm international norms" related to family life.[27] The following excerpt recites the principles of protection of all human life originating in the original human life documents:

Marriage, Affirming Traditional Understandings of Human Rights," *Georgetown Journal of Law & Public Policy* 9 (Winter, 2011): 91. The Vamos-Goldman's statement was widely reported at the time: *see* LifeSiteNews.com, Life, Family and Culture News, Resources, *Canada Shocks U.N. Delegates*, http://www.lifesitenews.com/news/archive/ldn/2001/jun/01061401 (June 14, 2001).

[26] "United States of America Explanation of Position," 5/1/2001.

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

The Doha Declaration (2004): We reaffirm international commitments to strengthen the family, in particular: We recognize the inherent dignity of the human person and note that the child, by reason of his physical and mental immaturity, needs special safeguards and care before as well as after birth. Motherhood and childhood are entitled to special care and assistance. Everyone has the right to life, liberty and security of person.[28]

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

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

The Left's Limited Success since Doha

Despite the conclusive evidence just reviewed from Doha and the UN Special Session on Children that there is no international consensus that a "right to abortion" has evolved in customary international law, the Left marches on relentlessly in their quest to force recognition of such a right.

1. Colombia

Colombia's Constitution explicitly protects life.[29] Yet, despite that fact, in a 2006 decision, the Columbian Corte Constitucionale (Constitutional Court) ruled that under certain circumstances abortion could not be illegal.[30] This was

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[28] Ibid. at 15.

[29] Constitucion Political de Colombia [C.P.], 1991, art. 2, para. 2: "The authorities of the Republic are established in order to protect all individuals residing in Colombia, in their life, honor, property, beliefs, and other rights and freedoms, and in order to ensure the fulfillment of the social duties of the State and individuals."

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

a radical decision because the Court relied on soft norms in its opinion, which declared unconstitutional portions of Colombia's Criminal Code that criminalized abortion.[31] The Court's ruling was based on its finding "that international human rights law could be applied in Colombia through the Court's incorporation of regional and international human rights law within its judicial review of the abortion legislation."[32] This decision represented the "first constitutional decision that provided an international human-rights framework to review the constitutionality of abortion under domestic law."[33]

2. Europe

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

The European Court of Human Rights (hereafter, the "ECHR") is the human rights court of the Council of Europe. The ECHR interprets the European Convention on Human Rights (hereafter, "the Convention"), a treaty ratified in 1950.[34] The Council of Europe consists of 47 member countries, whose policies are affected by ECHR decisions. An opinion by the ECHR that recognized abortion as a right – even though officially affecting policy only for those countries – would be cited by abortion advocates as evidence that an

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[31] Saunders, supra n. 25, at n. 6.

[32] Veronica Undurraga & Rebecca J. Cook, "Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006" in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, ed. Susan H. Williams (New York NY: Cambridge Univ. Press, 2009), p. 220.

[33] Ibid. at 241.

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

international right to abortion exists.[35] Recent cases from the ECHR illustrate further success of abortion advocates in turning soft norms into hard law.

Tysiąc v. Poland.[36] In 2007 the ECHR decided *Tysiąc v. Poland,* a case in which a woman was denied a health exception for an abortion.[37] In its ruling, the Court found that Poland violated Article 8 of the Convention, which guarantees a right to privacy,[38] by not effectively allowing an abortion for the health exception to the plaintiff.[39] But the main import of this case is the Court's finding that Poland, which is a pro-life country that only allows for abortions in certain limited circumstances, did not institute procedures that would allow abortions under the exceptions provided for in law. "Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it."[40]

A, B, and C v. Ireland.[41] Ireland's Constitution guarantees the right to life: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."[42] Yet, abortion advocates insisted that European, non-Irish "consensus" can trump Ireland's express constitutional protections for life, no matter how explicit. In *ABC* the Court applied the principle from *Tysiąc* to Article 40.3.3, thus weakening Ireland's constitutional protections for life.

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[35] See CRR argument discussed earlier in this paper from their complaint in *CLRP v. Bush*.

[36] *Tysiąc v. Poland*, 5410/03 ECHR (2007).

[37] Ibid. at 119 (patient suffered from severe myopia from 1977).

[38] Convention: sec. I, art. 8. "Privacy 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[39] *Tysiąc*, 5410/03 ECHR at 104: "In this context, the Court observes that the applicable Polish law, the 1993 Act, while prohibiting abortion, provides for certain exceptions...abortion is lawful where pregnancy poses a threat to the woman's life or health, as certified by two medical certificates, irrespective of the stage reached in pregnancy."

[40] Ibid. at 116.

[41] *A, B and C v. Ireland*, 25579/05 Eur. Ct. H.R. (2010).

[42] Constitution of Ireland, 1937, Article 40.3.3.

The ECHR decided *A, B, and C v. Ireland* in December 2010. The plaintiffs were three anonymous women – referred to as "A," "B," and "C" – each of whom claimed that Ireland's prohibition on abortion required her to travel abroad to obtain one, which violated her Convention rights.[43] The plaintiffs asked the Court to find a right to abortion in the Convention. This despite the fact that the language of the Convention does not mention abortion – in fact, Article 2 of the Convention explicitly guarantees a right to life: "Everyone's right to life shall be protected by law."[44] Nevertheless, the plaintiffs argued that the Court should interpret the treaty as providing such a right. They found this "right" by reading two Articles of the Convention together to imply it: Article 3, which prohibits torture and inhuman and degrading treatment,[45] and Article 8, which guarantees a right to privacy protected from interference, with certain exceptions including where national security and public safety are implicated.[46] (This argument ignores the fact that even if the Convention could be found to imply such a right, Ireland could only be bound by that interpretation if it ratified the treaty knowing it was agreeing to a right to abortion. Since this is not true, Ireland is bound to no such understanding.)

Nevertheless, the *ABC* plaintiffs further argued that because the laws of a majority of European countries favor abortion, this "consensus" should be binding on Ireland as well:

> A strong international consensus can demonstrate that a less burdensome alternative is available and preferred throughout the member States…. The State fails to address the fact that Ireland's abortion laws are completely incongruous with the European consensus and international standards on lawful abortion to protect women's health and well-being.[47]

While the Court acknowledged that a consensus exists in Europe that abortion

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[43] *A, B, and C*, 25579/05 ECHR at 139.

[44] Convention: sec. I, art. 2: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[45] Convention: sec. I, art. 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[46] Supra n. 38.

[47] *A, B, and C,* 25579/05 ECHR (*Applicants' Reply to the Observations of Ireland on the Admissibility and Merits*, Dec. 23, 2008, at ¶ 90).

be allowed on the grounds of "health and well-being" (*in addition to* "life of the mother"), that consensus did not "decisively narrow[s] the broad margin of appreciation [accorded to] the State" – meaning that Ireland does not have to bow to any such consensus, but under the "margin of appreciation" can maintain more stringent abortion restrictions in law.[48]

The final outcome of the *ABC* case presents a "good news, bad news" scenario. As stated above, fortunately the Court disagreed with the plaintiffs and found no right to abortion in the Convention. And by reiterating its finding from *Vo v. France*[49] of the "margin of appreciation," the Court maintained respect for Ireland's sovereignty.[50] Under the margin of appreciation, decisions on issues such as abortion are left up to the States.[51]

The bad news, however, is that the Court also advanced the idea from *Tysiąc* that if a country has under any interpretation provided a right to abortion in its law,[52] it must effectively provide for that right:

> [249] While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State..., once that decision is taken the legal framework devised for this purpose should be "shaped in a

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[48] *A, B, and C*, 25579/05 ECHR at 236.

[49] *Vo v. France*, 53924/00 ECHR (2004).

[50] Saunders, supra n. 25, at n. 5, quoting Richard G. Wilkins & Jacob Reynolds, "International Law and the Right to Life," *Ave Maria Law Review* 4 (2006): 131. "Nothing contained [herein] shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...." U.N. Charter art. 2, para. 7, and a 1960 General Assembly Resolution stating: "[A]ll peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory." Declaration on the Granting of Independence to Colonial Countries and Peoples, preamble, G.A. Res. 1514 (XV), at 66, U.N. GAOR, 15th Sess., Supp. No 16, U.N. Doc. A/4684 (Dec. 14, 1960).

[51] *Vo*, 53924/00 Eur. Ct. H.R. at 82: "It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere...."

[52] See *The Attorney General v. X. and Others* [1992] 1 I.R. 846P: The Supreme Court of Ireland ruled that "threat of suicide" constituted "a real and substantial threat to the life of the pregnant woman or girl" allowing abortion in Ireland under sec. 40.3.3 of the Irish Constitution. The High Court had interpreted that same Constitutional provision as protecting the life of the unborn child, and had thus enjoined a 14-year-old Irish girl (allegedly pregnant by rape) from traveling to England for an abortion. No legislation had been enacted in the eight years following the passage of the amendment to provide guidelines for balancing the rights of the child and the mother.

coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention."[53]

The Court interpreted Article 40.3.3 of Ireland's Constitution to allow abortion when the "life" of the mother is at stake, as opposed to her health or well-being.[54]

Plaintiff C had asserted that her pregnancy constituted a potential risk to her life. She suffered from a rare form of cancer, and feared a pregnancy might increase the risk of its recurrence, for which, if proven true, she could not obtain treatment in Ireland while pregnant.[55] Plaintiff C (echoing *Tysiąc*) also claimed that "she required a regulatory framework by which any risk to her life and her entitlement to a lawful abortion in Ireland could be established, so that any information provided [to her about abortion options] outside such a framework was insufficient."[56] Since Ireland had not passed any legislation to implement the Court's interpretation of Article 40.3.3, the Court found that Ireland violated Article 8 of the Convention.[57] Under the ECHR's interpretation of Article 40.3.3 (as noted above) application of the *Tys*iąc principle would require Ireland to put in place measures to inform women of a right to abortion under Irish law – a concept that has reinvigorated abortion as a political subject in Ireland and caused an uproar in the country as to how to comply.[58]

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[53] *A, B, and C*, 25579/5 Eur. Ct. H.R. at 249 (citing *S.H. and Others v. Austria*, no. 57813/00, § 74, 1 April 2010).

[54] Ibid. at 265: Implementation of legislation to regulate the application of Article 40.3.3 would allow "pregnant women who establish that there is a real and substantial risk to their life to have an abortion in Ireland rather than traveling out of the jurisdiction ."

[55] Ibid. at 125.

[56] Ibid. at 130.

[57] Ibid. at 267-268: "[A]uthorities failed to comply with their positive obligation to secure to [Plaintiff "C"] effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which [Plaintiff "C"] could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention."

[58] Mary Minihan, *The Irish Times, News,* "Expert group on abortion ruling to report by July," http://www.irishtimes.com/newspaper/ireland/2012/0316/ 12243133 95195.html (March 16, 2012). Ireland's Ambassador to the UN confirms the expert

R.R. v. Poland.[59] The *Tysiąc* principle was further applied by the Court to undermine pro-life views in the case *R.R. v. Poland*, decided by the ECHR in 2011. In *R.R.* the plaintiff alleged that the conscientious objections of medical staff denied her the right to choose an abortion that might have been allowed under Poland's "health" exception if results of genetic tests had been obtained in a timely manner.[60]

Following a prenatal ultrasound, the plaintiff had been informed that the fetus might have some genetic abnormality, possibly Turner syndrome.[61]

> Turner syndrome...is a genetic condition in which a female does not have the usual pair of two X chromosomes. Girls who have this condition usually are shorter than average and infertile due to early loss of ovarian function. Other health problems that may occur with TS include kidney and heart abnormalities, high blood pressure, obesity, diabetes mellitus, cataract, thyroid problems, and arthritis. Girls with TS usually have normal intelligence, but some may experience learning difficulties.[62]

The plaintiff ultimately gave birth to a baby girl affected with Turner syndrome.

In her civil suit, the plaintiff claimed that she was unable to obtain genetic testing in time to qualify for the health exception for abortion, on account of "unreasonable procrastination" by the doctors dealing with her case, and that they "failed to provide her with reliable and timely information about the foetus' condition [and]...failed to establish the foetus' condition in time for her to make an informed decision as to whether or not to terminate the pregnancy."[63]

The Supreme Court of Poland ruled against the medical professional

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group tasked with making recommendations on implementing an ECHR ruling on abortion will report to the Government by July. Ireland's rejection of 6 recommendations by UN member States on "reproductive rights" was decried by an Irish Family Planning Association member as "astonishing" for a state that expresses respect for human rights; while a spokesperson for the Society for Protection of Unborn Children pointed out that the UDHR and Irish Constitution both recognize and protect the right to life.

[59] *R.R. v. Poland*, 27617/04 Eur. Ct. H.R (2011).

[60] Ibid. at 43.

[61] Ibid. at 9, 33.

[62] Ibid. at 16 (n. 2).

[63] Ibid. at 43.

defendants and found that the plaintiff's rights had been violated under the same two Convention articles involved in *A, B, and C v. Ireland*: Article 3, Inhuman or Degrading Treatment[64] and Article 8, Right to Respect for Private and Family Life.[65] In reviewing this decision, the ECHR stated that whether the abnormality would have entitled the plaintiff to an abortion was not at issue; rather, what was at issue was the legal obligation to provide prenatal genetic testing "within the time-limit for abortion to remain a lawful option for her."[66] Referring to its aforementioned finding in *Tysiąc* – if a right to abortion has been provided for in law, the State must make it available *in fact*. The State has a "positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion."[67] In other words, Poland had not effectively instituted procedures to allow the plaintiff access to genetic testing in time to get an abortion, thus affirming that her Convention rights were violated under Articles 3 and 8.[68] When one reflects that the woman met resistance from a decidedly pro-life medical culture, one sees that *in practice* this decision undermines the conscience rights of that pro-life medical culture.

Conscientious Objection

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

> [S]tates are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to

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[64] Ibid. at 161-62; see supra n. 45.

[65] Ibid. at 214; see supra n. 38.

[66] Ibid. at 202-04.

[67] Ibid. at 200.

[68] Ibid. at 108-109. Delighted at the outcome of *R.R. v. Poland*, the CRR exulted in a press release "For the first time in its history, the European Court of Human Rights specifically found that an abortion-related violation amounted to inhuman and degrading treatment." Center for Reproductive Rights, Press Room, "European Court Issues Landmark Decision Against Poland, Says Women Entitled to Prenatal Genetic Testing," http://reproductiverights.org/en/press-room/ european-court-issues-landmark-decision-against-poland-says-women-entitled-to-prenatal-genetic-testing (5.26.11).

which they are entitled under the applicable legislation.[69]

The plaintiff in *R.R.* had argued that the violations of Articles 3 and 8 of the Convention (as found by the ECHR) resulted in part from "the unregulated and chaotic practice of conscientious objection under Polish law...."[70] Echoing this argument, a Special Rapporteur submitted comments to the Court stating:

> The consensus among UN Treaty Monitoring Bodies and international health organizations was that the right of a health care provider to conscientiously object to the provision of certain health care services must be carefully regulated so that it did not effectively deny a woman the right to obtain such services which were guaranteed by the law, in this case pursuant to Article 8 of the European Convention.[71]

Article 9 of the Convention guarantees freedom of conscience, as well as of thought and of religion, subject only to limitations necessary to protect "public order, health or morals or...the rights and freedoms of others."[72] The Convention is the treaty – the binding law – which provides for rights of conscience; however, these rights are under attack.[73]

The call for limitation of conscience rights was again put forward by Special Rapporteur, Christine McCafferty, in a report to the Parliamentary Assembly of the Council of Europe (PACE) on Conscientious Objection.[74]

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[69] *R.R.,* 27617/04 ECHR at 206.

[70] Ibid. at 94.

[71] Ibid. at 128: Third party submission of "*Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the office of the United Nations High Commissioner for Human Rights*."

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

[73] *R.R.,* 27617/04 ECHR at 94, 128.

[74] Parliamentary Assembly, Council of Europe, Report: Social, Health and Family Affairs Committee, *Women's access to lawful medical care: the problem of unregulated use of conscientious objection*, Rapporteur: Ms Christine McCafferty, United Kingdom, Socialist Group, Doc. 12347 (20 July 2010).

PACE ultimately rejected proposals in the draft resolution, referred to as "McCafferty Report," which would have imposed stringent regulations on the rights of conscientious objection of both individual healthcare workers and institutions.[75] The report gave lip service to the right of conscientious objection, while recommending that member states adopt rigorous regulations on that right, including obliging individuals and institutions to provide abortions in cases of emergency.[76] "Emergency" in the draft resolution is defined to include danger to the patient's life or health.[77] A healthcare provider would also be obligated under the draft resolution to provide "the desired treatment" when there is no equivalent practitioner within a reasonable distance to which the patient can be referred.[78] If PACE had adopted the McCafferty Report's recommendations, anti-life forces would be able to badger governments to restrict conscience rights based on the argument that such a vote represented a 'European consensus.'

Fortunately, PACE rejected much of the McCafferty Report's recommendations and instead adopted a resolution recognizing the right to conscientious objection by both individuals and institutions, which stated that conscientious objection is "adequately regulated" in the "vast majority of council of Europe member states."[79]

Why All This Matters in the United States

Supreme Court opinions in cases such as *Lawrence v. Texas*[80] and *Roper v. Simmons*[81] provide a chilling preview of what establishment of an "international" right to abortion could mean down the road for the United States. The Court's willingness to justify opinions that undermine traditional views on moral issues by citing to European viewpoints and trends in European court decisions provides yet another disturbing piece of evidence that "soft

[75] Ibid.

[76] Ibid. at A. Draft Resolution at 4.1.3; C. Explanatory Memo at 29, 40, 56.

[77] Ibid. at A. 4.1.3.

[78] Ibid.

[79] Parliamentary Assembly, Council of Europe, "The right to conscientious objection in lawful medical care," Resolution 1763, at n. 3 (2010) (available at: http://assembly.coe.int/Documents/AdoptedText/ta10/ERES1763.htm).

[80] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[81] *Roper v. Simmons*, 543 U.S. 551 (2005).

norms" are hardening into hard law.

In reviewing the constitutionality of a Texas statute that criminalized same-sex sodomy, the *Lawrence* Court found the liberty interest of the Due Process Clause of the 14th Amendment provided homosexuals a right to enter into private sexual conduct in the privacy of the home.[82] The Court found the statute unconstitutional, and overruled its prior decision in *Bowers v. Hardwick*[83] that had upheld a similar Georgia statute that criminalized sodomy in general. Writing for the Court in *Lawrence*, Justice Kennedy relied on the fact that the ECHR had rejected the reasoning and holding of *Bowers* and that "other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[84]

In *Roper v. Simmons*, Justice Kennedy again relied extensively on the viewpoints and laws of numerous countries to justify the conclusion that the 8th and 14th amendments forbid imposition of the death penalty on offenders who committed their crimes before turning 18.[85] In his opinion, Justice Kennedy opined that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty"[86] and "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[87]

Viewing international custom as *informing* U.S. Supreme Court decisions is a short step away from viewing such law as *binding* on those decisions. This is the reality that the United States faces down the road if the Supreme Court decides that customary international law must be applied as federal common law in the United States. Numerous U.S. Court of Appeals decisions already affirm this idea in their holdings, as well as other lower court decisions.[88] Should the Court ever overturn *Roe*, and if the Supreme Court determines that customary international law *must* be cited as U.S. federal common law, then establishment of an international right to abortion would provide abortion advocates the failsafe back-stop they seek to protect the right to an abortion in

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[82] 539 U.S. at 558.
[83] *Bowers v. Hardwick*, 478 U.S. 186 (1986).
[84] 539 U.S. at 560.
[85] 543 U.S. at 551.
[86] Ibid. at 578.
[87] Ibid.
[88] Saunders, supra n. 25, at n. 27.

the U.S. for all time.

The San Jose Articles

The San Jose Articles are the most recent effort by the international pro-life community to rebut the Left's notion that a consensus exists as to an international right to abortion in customary international law. In March 2011, a group of pro-life Government, academic, legal and civil society representatives met in Costa Rica. The result of that meeting was the San Jose Articles. The San Jose Articles provide "ammunition" for pro-life nations against growing pressure to abandon pro-life policies in order to be "in compliance" with international treaty "obligations."[89] The purpose of the San Jose Articles is to provide "expert testimony that no such right exists" – testimony that courts can cite as evidence that there is *no international human right to abortion on demand*, because there is *no unanimity in the international community* on this issue.[90] This expert testimony is the result of the efforts of a group of experts: law professors, philosophers, Parliamentarians, Ambassadors, human rights lawyers, and UN General Assembly delegates – who prepared these articles to demonstrate how human rights instruments protect the unborn child – contrary to the voices on the Left, urging the opposite conclusion.[91]

In sum, the San Jose Articles reaffirm a number of important concepts – in particular, that life begins at conception and that conception creates a "human being," entitled from that point on to protection of his or her inalienable human rights. Also, they reaffirm that these rights are explicitly protected in the UDHR and the ICCPR – the fundamental human rights documents – and that no such right has been established in customary international law in the intervening years by way of interpretation; nor has any UN Treaty established such a right. Any treaty-mMonitoring body that purports

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[89] United Nations, Department of Public Information, News and Media Division, New York, "Press Conference on Launch of 'San Jose Articles'," http://www.un.org/News/briefings/docs/2011/
111006_Holy_See.doc.htm (6 October 2011).

[90] "San Jose Articles, Abortion and the Unborn Child in International Law, Why the San Jose Articles?," http://www.sanjosearticles.com/?page_id=47 (accessed 2.23.12).

[91] Ibid.

to find such a right is acting contrary to its mandate and outside its authority. Governments should not bow to pressure to change their laws based on these false assertions, but should continue to adhere to the fundamental protections for life as affirmed in the original human rights documents.

The San Jose Articles

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

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

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

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

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

Article 6. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) and other treaty monitoring bodies have directed governments to change their laws on abortion. These bodies have explicitly or implicitly interpreted the treaties to which they are subject as including a right to abortion. Treaty-monitoring bodies have no authority, either under the treaties that created them or under general international law, to interpret these treaties in ways that create new state obligations or that alter the substance of the treaties. Accordingly, any such body that interprets a treaty to include a right to abortion acts beyond its authority and contrary to its mandate. Such *ultra vires* acts do not create any legal obligations for states party to the treaty, nor should states accept them as contributing to the formation of new customary international law.

Article 7. Assertions by international agencies or non-governmental actors that abortion is a human right are false and should be rejected. There is no

international legal obligation to provide access to abortion based on any ground, including but not limited to health, privacy or sexual autonomy, or non-discrimination.

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

Article 9. Governments and members of society should ensure that national laws and policies protect the human right to life from conception. They should also reject and condemn pressure to adopt laws that legalize or depenalize abortion. Treaty-monitoring bodies, United Nations agencies and officers, regional and national courts, and others should desist from implicit or explicit assertions of a right to abortion based upon international law. When such false assertions are made, or pressures exerted, member states should demand accountability from the United Nations system. Providers of development aid should not promote or fund abortions. They should not make aid conditional on a recipient's acceptance of abortion. International maternal and child health care funding and programs should ensure a healthy outcome of pregnancy for both mother and child and should help mothers welcome new life in all circumstances.[92]

Conclusion

Not surprisingly, release of the San Jose Articles has unleashed criticism – and fear – from abortion advocates. In an AlterNet internet article, one author goes so far as to admit that current human rights agreements do not contain a right to abortion. "The [San Jose] articles point out that there is technically no 'right to abortion' in any current global human rights agreement. And they're right. But this is beside the point."[93] Presumably she is referring to the absence of a right under a treaty, for she goes on to claim that "States' failures to ensure

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[92] "San Jose Articles, Abortion and the Unborn Child in International Law, The Articles," http://www.sanjosearticles.com/?page_id=47 (accessed 2.23.12).

[93] Jessica Mack, AlterNet, Gender, "What Are the "San Jose Articles"? Don't Be Fooled by the Conservative Global Elites' Latest Ploy to Attack Science, Women, and the United Nations," http://www.alternet.org/reproductivejustice/152868 (October 25, 2011).

access to...abortion violates human rights established in international law...including the right to...reproductive health."[94]

The author justifies her position by referring to "precedence" established over decades by "reproductive rights advocates" for the "right to health" which "establishes precedence for access to safe and legal abortion."[95] Presumably, she is, in effect, claiming a right to abortion under customary international law has developed.

In any case, "precedence" does not international law make. As discussed extensively in this paper, unanimity is required to establish customary international law under either the traditional or the modern position. Thus, unless there is unanimity among nations on a particular point, even under the modern view, no position is "established" in customary international law without it.

The San Jose Articles provide a solid counter to the notion that a right to abortion has been established in customary international law. Efforts by abortion advocates to sneak abortion into international law must be exposed and opposed. The rights of sovereign nations must be upheld to determine their own law on this and other issues. Courts must respect "traditional" international law and not succumb to efforts to supplant the traditional understanding of international law with the "bold" position, and use the soft norms of the bold position of customary international law to cement abortion rights into law.

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[94] Ibid.
[95] Ibid.