International Human Rights Law and the "Unborn": Texts and *Travaux Préparatoires*

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I. INTRODUCTION

The Council of Europe's 1997 Convention on Human Rights and Biomedicine[1] was the first comprehensive foray of human rights law in the field of bioethics (inaugurating what can be termed as "human rights biolaw"). As a Council of Europe Convention, this particular document is an example of regional human rights "hard" law. Since then, three further documents applying human rights law to bioethical concerns have been promulgated, none of which count as hard law. They are: UNESCO's 1997 Universal Declaration on the Human Genome and Human Rights, the 2005 United Nations Declaration on Human Cloning, and UNESCO's 2005 Universal Declaration on Bioethics and Human Rights.[2]

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1. To give the treaty its full title, see Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, April 4, 1997, 2137 U.N.T.S. 171. For a critical analysis on the underlying theories of personhood and dignity in this and the other instruments mentioned in the paragraph, see Thomas Finegan, *A Matter of Consistency: Dignity and Personhood in Human Rights Biolaw*, 14 MEDICAL L. INT'L 80 (2014).

2. U.N. Educ., Cultural, & Sci. Org. [UNESCO], Universal Declaration on the Human Genome and Human Rights, at 41, Records of the General Conference, Twenty-Ninth Session, Vol. I: Resolutions, 29 C/Resolution 16 (1997); G.A. Res. 59/280, Declaration on Human Cloning, U.N. Doc. A/RES/59/280 (March 23, 2005); UNESCO, *Universal Declaration on*

Yet, earlier human rights law documents did—albeit somewhat obliquely—cover areas of biolaw interest by dint of explicit textual provisions and their *travaux préparatoires* (henceforth "*travaux*"). The link with bioethical matters is strongest in relation to the human rights status of the "unborn."[3] This particular link is especially evident in regards to three of the most important human rights law documents: the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, and the 1989 United Nations Convention on the Rights of the Child. It goes without saying that the subject is a matter of continuing academic and legal controversy. Unfortunately, it has received little by way of focused attention. For one thing, studies on this topic invariably suffer from insufficient and partial analyses of the relevant *travaux*.[4] This facilitates a simplistic, binary approach to the subject: either international human rights law unequivocally protects the unborn's human rights[5] or, what is a much more common position, undeniably offers no genuine human rights protection to the unborn.[6] The present study aims to address the lacuna in this area by offering the first systematic analysis of the *travaux* pertaining to the unborn in relation to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Convention on the Rights of the Child.

From the perspective of international law, it is curious that the *travaux* would be so routinely ignored or, at best, partially investigated; Article 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT) views the *travaux* as a supplementary means of treaty

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Bioethics and Human Rights, at 74, Records of the General Conference, Thirty-Third Session, Vol. I: Resolutions, 33 C/Resolution 36 (2005).

3. On another matter of biolaw interest, Article 3 of the Universal Declaration of Human Rights on the Right to Life was part inspired by the Nazi use of involuntary euthanasia on "aged, insane, and incurable people," who were described as being "useless eaters." Needless to say, any ethical proposition relating to assisted suicide or euthanasia that supposes some human beings are "useless eaters" or, euphemistically, do not possess human dignity, is *prima facie* inconsistent with the Declaration and its progeny. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 39-40 (1999) [hereinafter MORSINK, UDHR].

4. In this Article, where a particular debate forming part of the *travaux* is sufficiently covered by a commentator, the commentator's report of the *travaux* is cited. Where a relevant debate is not adequately reported by a commentator, reference is made to the official U.N. report.

5. *See*, *e.g.*, RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD (2009). Joseph's work may be too quick to draw this particular conclusion, though it does offer an indispensable wealth of much overlooked material.

6. *See*, *e.g.*, Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPRODUCTIVE HEALTH MATTERS 120, 126 (2005).

interpretation, used when meaning is ambiguous or obscure. The legal hermeneutic employed by this study is based on the rules laid down by Articles 31 and 32 of the VCLT.[7] As of April 2014, the VCLT has been ratified by 114 states.[8] Although it did not come into effect until 1980, meaning that, in one sense, its application is limited to treaties concluded after this date, much of the VCLT is regarded as a codification of pre-existing customary international law.[9] So, notwithstanding the fact that some commentators[10] bemoan its generality, the VCLT remains far and away the most legally authoritative guide to the accurate interpretation of those international legal treaties that do not delegate the right of authoritative interpretation to some judicial institution.[11] The most relevant provisions of the VCLT, for present purposes, are Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"); Article 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended"); and Article 32.

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or

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7. These Articles are reflected verbatim in Articles 31 and 32 of the (as yet inoperative) 1986 Vienna Convention on the Law of Treaties between States and International Organizations. Vienna Convention on the Law of Treaties Between State and International Organizations or Between International Organizations arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

8. *Vienna Convention on the Law of Treaties*, UNITED NATIONS [U.N.], https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003902f (last visited Nov. 5, 2016).

9. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 17 (4th ed. 2003) ("[T]he Vienna Convention is largely, though not entirely, a codification of the existing customary law of treaties. . . ."); ANTONIO CASSESE, INTERNATIONAL LAW 171 (2d ed. 2005) ("As for the status of the Convention, most of its provisions either codify customary law or have given rise to rules belonging to the corpus of general law . . . [t]his instrument is therefore endowed with great significance, even in those areas where it only appears to be potential customary law.").

10. Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INT'L & COMP. L. Q. 281, 282 (2006). *But see* CASSESE, *supra* note 9, at 179. Cassese describes the VCLT's interpretative rules as "a balanced and satisfactory regulation . . . [upholding] the most advanced views [of international treaty law hermeneutics]."

11. The International Court of Justice has repeatedly held that Articles 31 and 32 of the VCLT reflect customary law. *See*, *e.g.*, Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 41 (Feb. 3); *see also* Oil Platforms (Iran v. U.S.), Preliminary Objection, 1996 I.C.J. Rep. 803, ¶ 23 (Dec. 12).

(b) leads to a result which is manifestly absurd or unreasonable.[12]

Article 31(2) further clarifies that a treaty's context includes the text (including the preamble and any annexes) itself—thus a holistic approach to textual interpretation is endorsed. It is clear from Articles 31 and 32 that the "ordinary meaning" of the treaty's text is the key to its interpretation.[13] The "object and purpose" of the treaty shines a light on the terms of the treaty, meaning that a free-standing "purposive" hermeneutical approach is ruled out.[14] Recourse to the *travaux* is warranted when the meaning resulting from the application of Article 31 requires confirmation, or when it leads to ambiguity, obscurity, manifest absurdity or manifest unreasonableness.

Thus, the texts (inclusive of preambles) assume priority in this study. Since there is a degree of ambiguity over what the relevant texts provide in relation to the unborn, or at least a need to confirm the meaning resulting from an application of Article 31, the *travaux* (and the relevant circumstances) are consulted as a supplementary form of interpretation.[15] Unlike so many other analyses in this area, this investigation avoids the tendency of viewing the debate exclusively through the lens of the abortion controversy. While the topic of abortion often appears in the preparatory debates concerning the unborn, it does not always do so. In fact, some of the international law provisions relevant to the unborn have little or nothing to do with abortion, which is unsurprising since the human rights status of the unborn is relevant to legal areas outside of the abortion issue, such as medical negligence, civil liability for wrongful death, fetal homicide, capital punishment, and even socio-economic rights.

Part I of this Article examines the Universal Declaration of Human Rights; Part II examines the International Covenant on Civil and Political Rights (with a brief analysis of the International Covenant on Economic, Social and Cultural Rights); while Part III examines the United Nations

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12. Vienna Convention, *supra* note 7, art. 32. Various provisions of Article 31 are less significant for the purposes of interpreting the human rights instruments under discussion here, i.e. provisions—designated as clarificatory of the term "context" in Article 31(1)—relating to further conclusory agreements and instruments. *See id.* arts. 31(2)(a)-(b), 31(3)(a)-(c).

13. JANIS, *supra* note 9, at 30 ("According to the Vienna Convention, treaties are to be interpreted primarily by reference to the terms of the treaty's text[.]").

14. CASSESE, *supra* note 9, at 179 ("[G]reat weight was attributed to the purpose pursued by contracting parties, as laid down in the text of the treaty.").

15. *See generally* LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATORIES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1993).

Convention on the Rights of the Child. As well as investigating the text and *travaux* of the various relevant provisions, each of these Parts engages with influential academic commentary on the matters involved. Part IV critiques various treaty monitoring bodies' interpretations of the relevant human rights law as regards the unborn.

II. UNIVERSAL DECLARATION OF HUMAN RIGHTS[16] (1948)

Outside of the various human rights biolaw instruments mentioned in the introduction, only two[17] human rights legal documents originating under the auspices of the United Nations or the Council of Europe directly refer to the human rights status of unborn human beings.[18] Indirect recognition of the human rights status of the unborn does exist, however, as do illuminating debates during various *travaux*. The issue certainly arose during the drafting of the 1948 Universal Declaration of Human Rights (UDHR). A significant number of scholars argue that the final text of the UDHR excludes unborn children from human rights protection on account of Article 1, beginning with "[a]ll human beings are born free and equal in dignity and rights."[19] They claim that a proposal was made to delete the term "born" precisely on the basis that it seemed to exclude the unborn from human rights recognition, and that this proposal was rejected.[20] But as Johannes Morsink shows in his study into the origins of the UDHR, debates over the retention or rejection of the term "born" did not center on the question of abortion or the moral status of fetal life, but on whether human rights are inherent to human nature or, instead, are attributed to human beings from some source

16. The Universal Declaration of Human Rights is not, of course, a treaty and yet is nonetheless included in this study. There are good reasons for this. The Declaration is arguably a part of customary international law. It is appealed to by virtually every study on this particular topic, and it provides an indispensable backdrop for the understanding of every other human rights instrument mentioned here. G.A. Res. 217 (III) A, Universal Declaration of Human Rights pmbl. (Dec. 10, 1948) [hereinafter UDHR].

17. *See* Convention on the Rights of the Child pmbl., Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC]; G.A. Res. 1386 (XIV), Declaration of the Rights of the Child pmbl. (Nov. 20, 1959).

18. Outside of these organizations, Article 4 of the 1969 American Convention on Human Rights provides, "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." American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

19. UDHR, *supra* note 16, art. 1(A).

20. *See* Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 263 (2008) (arguing that "the term 'born' was intentionally used to exclude the [fetus] or any other antenatal application of human rights").

extrinsic to their very existence, such as society or law.[21] It is true that by dint of a philosophical misunderstanding some delegates objected to the term "born" on the grounds that it could imply disregard for the unborn child, namely the Venezuelan and Mexican delegates.[22] But these objections were extraneous to the real issue at hand, the debate over the philosophical basis of human rights—a natural law-type account of rights versus a constructivist account of rights. Further, no delegate argued in favor of retaining the term "born" on the basis that it meant that only actual physically born human beings could claim human rights. The argument in favor of retaining the term was based exclusively on support for the view that both equal dignity and human rights are inherent in all human beings. As an example of further terminological confusion, some of those who supported this "inherence" view of human rights argued *against* the retention of the word "born" because they believed it carried the implication that human rights could be lost *after* birth.[23]

Thus, it is highly misleading to imply, as Rhonda Copelon and others have, that the French delegate's contention that the right to freedom and equality is "inherent from the moment of birth" was

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21. MORSINK, UDHR, *supra* note 3, at 290-93. Tore Lindholm concurs with Morsink on this point. Tore Lindholm, *Article 1*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 48 (Asbjørn Eide et al. eds., 1992) ("[T]he locution 'are born' (etc.) was interpreted by most speakers, it appears, to indicate the pre-positive and normative status of freedom and equal dignity."). Morsink goes on to state of the various delegates, "They saw this moral birth as a rider to the physical births people have. And although they did not say when this moral rider attached itself to the physical process—a question that did interest some of the Latin delegations concerned about abortion rights—the large majority of the drafters thought that such a moral birth did take place when a new human being was born into the human family." MORSINK, UDHR, *supra* note 3, at 292. This is a slightly unclear passage in the sense that Morsink seems to be equivocating between saying, on the one hand, that the debate was really about the metaphysics of human rights and, on the other, that it was really about the metaphysics of human rights *and* that most delegates affirmed the moment of birth as the marker whereby these rights began to inhere in the person. His own presentation of the drafting process does not support the latter interpretation. In a subsequent work Morsink is clearer on the specific point. *See* JOHANNES MORSINK, INHERENT HUMAN RIGHTS: PHILOSOPHICAL ROOTS OF THE UNIVERSAL DECLARATION 29 (2009) (citations omitted) [hereinafter MORSINK, INHERENT] ("Most of the drafters felt that the physical or biological birth of a person is accompanied by a moral birth into the realm of rights-bearers. They did not agree as to when this moral rider attached itself to the biological process, but they rejected the idea that the only rights people have are legal ones that accrue to them because they inhabit territories covered by positive legal systems.").

22. *See* U.N. GAOR, 3rd Sess., 98th mtg. at 111, U.N. Doc. A/C.3/SR.98 (Oct. 9, 1948) [hereinafter U.N. Doc. A/C.3/SR.98]; U.N. GAOR, 3rd Sess., 99th mtg. at 121, U.N. Doc. A/C.3/SR.99 (Oct. 11, 1948) [hereinafter U.N. Doc. A/C.3/SR.99].

23. The Lebanese delegate, Karim Azkoul, argued for the rejection of the term on the basis that there should be no implication that people, though born equal, might lose that equality for any reason. U.N. GAOR, 3rd Sess., 96th mtg. at 97, U.N. Doc A/C.3/SR.96 [hereinafter U.N. Doc A/C.3/SR.96].

directed against a proposed amendment to delete the term "born" as a way of including unborn human beings within the ambit of human rights protection.[24] In fact, this particular French rebuttal was aimed not at those seeking to protect unborn children, but at the Soviet suggestion that equality of rights before the law is "determined not by the fact of birth, but by the social structure of the state."[25] The insertion of the term "born" in the first place was at the behest of a joint French and Philippine proposal.[26] It echoes Rousseau's *Social Contract* and Article 1 of the 1789 French Declaration of the Rights of Man and the Citizen, which Rousseau helped inspire ("Men are born and remain free and equal in rights").[27]

Rousseau's moral opposition to abortion[28] indicates that he had no difficulty employing "born" as a signifier without implying that the value of "humanity" has no pre-natal application. Neither did René Cassin of France, the co-proposer of the term,[29] nor the Chilean delegate, Hernán Santa Cruz, who spoke in favor of the philosophy underpinning the term.[30] Both delegates stated their support for the human rights status of

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24. Copelon et al., *supra* note 6, at 121-22. For the statement from the French delegate, see U.N. Doc. A/C.3/SR.99, *supra* note 22, at 116.

25. U.N. Doc. A/C.3/SR.98, *supra* note 22, at 110.

26. MORSINK, UDHR, *supra* note 3, at 291.

27. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1750), *reprinted in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 41 (Victor Gourevitch ed., 1997) ("Man is born free, and everywhere he is in chains."); DECLARATION ON THE RIGHTS OF MAN (1789).

28. In the *Discourse on the Origin and Foundations of Inequality Among Men*, Rousseau displays a heavily negative view of abortion. JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND BASIS OF INEQUALITY AMONG MEN (1755), *reprinted in* THE BASIC POLITICAL WRITINGS 66 (Donald A. Cress ed., 2d ed. 2011). He then goes on to write,

> How many are the shameful ways to prevent the birth of men or to fool nature: either by those brutal and depraved tastes that insult its most charming work, tastes that neither savages nor animals ever knew, and that have arisen in civilized countries only as a result of a corrupt imagination; or by those secret abortions, worthy fruits of debauchery and vicious honor; or by the exposure or the murder of a multitude of infants, victims of the misery of their parents or of the barbarous shame of their mothers; or, finally, by mutilation of those unfortunates. . . . What would happen if I were to undertake to show the human species attacked in its very source, and even in the most holy of all bonds, where one no longer dares to listen to nature until one has taken into account one's financial interests, and where, with civil disorder confounding virtues and vices, continence becomes a criminal precaution, and the refusal to give life to one's fellow man an act of humanity? But without tearing away the veil that covers so many horrors, let us content ourselves with pointing out the evil, for which others must supply the remedy.

Id. at 102-03.

29. U.N. ESCOR, 2nd Sess., 9th mtg. at 21-22, U.N. Doc. E/CN.4/AC.2/SR.9 (Dec. 10, 1947).

30. U.N. Doc. A/C.3/SR.99, *supra* note 22, at 120.

unborn human beings during the course of drafting.[31] If any implication is to be drawn in this regard, it is that the emphasis that the term "born" places on what Morsink properly calls the "inherent" view of human rights (i.e., the view that human rights inherent in the human condition) constitutes a presumption in favor of the unborn child as a genuine subject of human rights. After all, Article 2 of the UDHR states that "everyone" is entitled to human rights "without distinction of any kind."[32]

There was another dimension to the debates concerning the unborn. Proposals were made to explicitly include the unborn within the terms of Article 3 (which at the time was draft Article 4), dealing with the right to life. One such proposal was made by the Chilean delegate, who stated "unborn children, incurables, the feeble[-]minded and the insane have the right to life."[33] This suggestion would eventually be discussed alongside the reccomendation of Charles Malik of Lebanon: "Everyone has the right to life and physical integrity from the moment of conception regardless of his or her physical or mental condition. Everyone has the right to liberty and personal safety."[34] Both proposals were rejected.

Two reasons were advanced against their adoption: the need for concision within the UDHR[35] and the fact that not all countries prohibit abortion in all circumstances.[36] No delegate argued that unborn children were not entitled to human rights protection *per se*. For instance, Cassin took a stand against Malik's proposal on the basis that it was not acceptable to every member, while at the time, expressed his agreement with the proposal's substance.[37] Malik is also reported as requesting:

> [T]hat reference should be made in the summary record of the meeting to the statements made by the representatives of China, the Union of Soviet Socialist Republics, and the United Kingdom in connection with [the then] article 4 . . . while the delegations of those three countries wished to omit

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31. *See* U.N. ESCOR, 2nd Sess., 35th mtg. at 4, U.N. Doc. E/CN.4/AC.1/SR.35 (May 17, 1948) [hereinafter U.N. Doc. E/CN.4/AC.1/SR.35]; U.N. ESCOR, 1st Sess., 2nd mtg. at 10, U.N. Doc. E/CN.4/AC.1/SR.2 (June 11, 1947).

32. UDHR, *supra* note 16, art. 2; *see also* MORSINK, INHERENT, *supra* note 21, at 29.

33. U.N. Doc. E/CN.4/AC.1/SR.35, *supra* note 31, at 3. The remainder of the proposal read, "Everyone has the right to enjoy conditions of life compatible with human dignity and the normal development of his or her personality. Persons incapable of satisfying their own needs have the right to maintenance and support." *Id.*

34. *Id.* at 4.

35. *Id.* (Eleanor Roosevelt on behalf of the United States).

36. *Id.* at 5 (Alexei Pavlov on behalf of the USSR).

37. *Id.* at 4.

> the phrase "from the moment of conception" in the interests of brevity, they considered that idea to be implied in the general terms of article 4.[38]

In response to Malik's request, the Chinese delegate stressed that the wording of the draft Article not only implied, but actually contained the idea expressed by the Lebanese amendment;[39] while the U.K. delegate stated that Article 4 *could* be understood to contain such an idea but did not *necessarily* do so.[40] The proposals to include "from the moment of conception" and "regardless of his or her physical or mental condition" were each voted on separately and were each defeated six votes to two.[41]

These particular debates concerning proposals to include the unborn under Article 3 have received surprisingly scant attention from human rights scholars.[42] A standard interpretation is that "compromise dictated silence."[43] But this is not quite the full story. The proposal to explicitly protect the unborn child was rejected for the sake of succinctness and generality, and because its inclusion may have proved an obstacle to some states signing the UDHR. No argument was made

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38. *Id.* at 5.

39. *Id.*

40. *Id.*

41. *Id.* at 6. An earlier, briefer engagement with the issue proved a prefigurement for this particular debate. Cassin referred to Chilean and Lebanese proposals (which were almost identical to the proposals eventually voted on) to amend the then Article 7 (which would become Article 3) in order to explicitly protect the right to life of unborn children, and stated that they appeared to expand considerably the idea expressed in the article in question. U.N. ESCOR, 2nd Sess., 3rd mtg. at 5, U.N. Doc. E/CN.4/AC.2/SR/3 (Dec. 6, 1947) [hereinafter U.N. Doc. E/CN.4/AC.2/SR/3]. August Vanistendael of the International Federation of Christian Trade Unions followed up by suggesting that the relevant article should include a mention of when life began since the majority of laws include measures protecting life born or conceived. He added that the right to life should be guaranteed to everyone regardless of their physical or mental condition and that individuals, with specific mention of the working class, should be able to live their lives in conditions worthy of the human race. He then proposed an addition which would protect the right to life from the first moment of physical development and which included in the right to life the right to conditions enabling one to live a dignified life. *Id.* at 7. Bodil Begtrup of the Commission on the Status of Women responded by arguing that this proposal could not be reconciled with legislation which in certain cases provided for the right to abortion. *Id.* at 8. The Chairman (Eleanor Roosevelt) stated that the Drafting Committee's more succinct text "covered all the aspects mentioned." It read, "Everyone has the right to life, to personal liberty and to personal security." This text was voted on and was adopted by four votes with two abstentions. *Id.* at 8. Cassin ended by stating that the more detailed provisions related to the right to life could be dealt with in a Convention. *Id.*

42. Morsink and Joseph barely mention these debates. Verdoodt offers a very brief summary. *See* JOSEPH, *supra* note 5; MORSINK, UDHR, *supra* note 3; ALBERT VERDOODT, NAISSANCE ET SIGNIFICATION DE LA DECLARATION UNIVERSELLE DES DROITS DE L'HOMME 97-98 (1964).

43. WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 25 (3rd ed. 2002).

against the proposal to the effect that the unborn child did not possess human rights. The very most that was argued during the drafting of the UDHR was that the proposal to explicitly protect the invariable right to life of unborn children could not be reconciled with extant legislation providing for the right to abortion in "certain cases."[44] Thus, out of the two distinct positions put forward on the issue, one explicitly argued that the unborn child possessed human rights, while the other position, which was officially endorsed, was an admixture of stylistic and sovereignty concerns. The final text of the UDHR did present a "compromise" of sorts on the matter, but this compromise can be interpreted in two distinct ways, both of which can claim some justification from the *travaux*.

The first possible interpretation is that the UDHR adopts a thoroughly neutral stance on the issue and leaves it entirely to individual states to decide the matter for themselves. This interpretation emphasizes the sovereignty concerns raised during drafting debates; it is labeled here as the "sovereignty interpretation." The second possible interpretation is that the silence of the UDHR on the matter is more stylistic than substantive; the "stylistic interpretation." This interpretation emphasizes four distinct issues: (1) the concerns raised over the need for concision, (2) that the only substantive views on the issue of unborn human rights aired during drafting were in favor of the idea, (3) that a proposal to explicitly mention the human rights of the physically and mentally less abled was defeated by the same margin in tandem with the proposal to explicitly mention unborn children, and (4) that the UDHR recognizes the human rights of *all* human beings. According to this interpretation there is a presumption in favor of unborn children possessing human rights. Albert Verdoodt adopts this second interpretation by suggesting that there is a question mark over whether limited abortion legislation complies with the right to life just as there is a question mark over the human rights legality of both euthanizing "incurables" and providing for the death penalty.[45]

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44. U.N. Doc. E/CN.4/AC.2/SR/3, *supra* note 41, at 8 (Begtrup's statement). Later that year during drafting of what was to become the International Covenant on Civil and Political Rights Begtrup indicated that the primary case she had in mind was provision for abortion in order to save the mother's life. U.N. ESCOR, 2nd. Sess., 8th mtg. at 12, U.N. Doc. E/CN.4/AC.2/SR.8 (Dec. 10, 1947). Elsewhere during drafting of the UDHR Begtrup indicated her belief that motherhood begins prior to birth by proposing that the term "mothers" in the then Article 34 (which was to become Article 25(2)) be replaced by "motherhood" precisely in order to cover the pre-natal state. *Id.* at 120. Her proposal was voted on and accepted. *Id.* at 13.

45. VERDOODT, *supra* note 42, at 100.

Adopting the VCLT interpretative methodology, "everyone" in Article 3 (and in 6 and 7) must be understood in light of the preamble's invocation of "all members of the human family," and Article 1's reference to "all human beings." The ordinary meaning of these terms plainly rejects a narrow and arbitrary interpretation of who counts as a human being. Additionally, the *travaux* clarify that Article 1's use of the term "born" signifies the inherence view of human rights, the view that human rights inhere in the human condition.[46] From this interpretation, it seems to follow that the UDHR recognizes the human rights status of unborn human beings. However, for a variety of reasons (not least of which is knowledge of the *travaux*), this "ordinary meaning" reading is either lacking confirmation or fails to sufficiently dispel ambiguity over the human rights status of the unborn.

Recourse to the *travaux* reveals that a more direct recognition of the human rights status of the unborn (as well as the mentally and physically less abled) was rejected. There were two reasons provided for the rejection, stylistic concerns and sovereignty concerns. No one directly argued against the principle that the unborn, as human beings, have human rights, while many—including some who rejected the specific proposal—explicitly supported the principle. Out of the six votes against the proposal, two were clearly motivated by stylistic concerns: the votes of the United States and China.[47] Three were primarily motivated by sovereignty concerns: the votes of the United Kingdom, the Union of Soviet Socialist Republics and France. The *travaux* shed no light on the intention behind the Australian vote.

If the vote was motivated by a concern for sovereignty, then the "sovereignty interpretation" is the correct interpretation. However, if the Australian vote was motivated by a desire for concision, an approach urged by the Chairperson just prior to the vote,[48] then a split-intention would have formed the successful vote. To supply a determinate picture of corporate intent in such a circumstance it would be necessary to have recourse to the entirety of the votes cast, meaning that a five-to-three majority voted consistent with the view that unborn human beings have human rights. Hence, from the materials available, both the "stylistic interpretation" of the UDHR and the "sovereignty interpretation" of the matter are plausible, though the latter relies on a particular view of

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46. The "object and purpose" of the UDHR is to protect the human rights of human beings, so a purposive appeal neither adds to nor subtracts from the "ordinary meaning" reading.

47. *See* U.N. Doc A/C.3/SR.96, *supra* note 23.

48. U.N. Doc. E/CN.4/AC.1/SR.35, *supra* note 33, at 6.

corporate intent. Since neither can be confirmed, the *travaux* leave the matter somewhat underdetermined and unclear.[49]

Two further points should be borne in mind about the vote. First, even if the "sovereignty interpretation" is the correct interpretation (assuming the matter can ever be settled), the intention behind opposing the unambiguous recognition of the human rights of unborn children was related to sovereignty concerns in the context of one specific, discrete issue only: that of abortion. No one at any stage questioned the application of human rights to the unborn outside of abortion legislation. Considering how emphatically inclusive of humanity and insistent upon inherent human equality the UDHR text is, it follows that there are solid grounds for confining the "sovereignty interpretation" only to abortion legislation and not construing it any wider than required by the actual concerns raised during drafting.

Second, the context for votes based on sovereignty concerns was a near-universally restrictive domestic abortion law regime. Abortion at the time, where legal, was almost always restricted to the grounds of safeguarding the mother's life and, sometimes, her physical health. Hence, it is therefore unfounded to hold that the "sovereignty interpretation" can, without further argument, be co-opted to support the human rights permissibility of highly unrestrictive abortion legislation today, especially since the UDHR does not contemplate a right to abortion.

III. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)

Relative to the UDHR, the *travaux* of the 1950 European Convention on Human Rights are silent on the right to life article, Article 2. The only discussion concerning a contentious application of Article 2 was on the issue of genocide.[50] Debate concerning the status of unborn

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49. This proposition is to be distinguished from the (inaccurate) proposition that the particular vote in question certainly amounted to a refusal to include unborn human beings under the scope of the UDHR's protections. *See* Harald Schmidt, *Whose Dignity? Resolving Ambiguities in the Scope of "Human Dignity" in the Universal Declaration on Bioethics and Human Rights*, 33 J. MED. ETHICS 578, 582 (2007) ("[I]n refusing to make reference to the point of conception, the drafters of the UDHR explicitly placed an important and crucial emphasis on the scope of 'human dignity.' They established that human dignity and human rights can clearly and with certainty be ascribed only to *born* human beings.").

50. *See generally* Bertie G. Ramcharan, *The Drafting History of Article 2 of the European Convention on Human Rights*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 57, 60-61 (Bertie G. Ramcharan ed., 1985); Katherine Freeman, *The Unborn Child and the European*

children most certainly did precede the 1966 International Covenant on Civil and Political Rights (ICCPR), however. Some elements of this debate have been picked up by scholars, but the very earliest debates, which took place in December 1947 prior to the finalization of the UDHR, have gone practically unnoticed.[51]

At that early stage, a Working Party composed of delegates from Chile, China, Egypt, Lebanon, the United Kingdom, and Yugoslavia produced a "Proposed Draft International Bill of Human Rights" that contained the following Article 4:

> 1. It shall be unlawful to deprive any person of his life save in the execution of the sentence of a court following on his conviction of a crime for which this penalty is provided by law.
> 2. It shall be unlawful to procure abortion except in a case in which it is permitted by law and is done in good faith in order to preserve the life of the woman, or on medical advice in order to prevent the birth of a child of unsound mind of parents suffering from mental disease, or in a case where the pregnancy is the result of rape.[52]

Paragraph 2 of this Article prohibits abortion on the grounds that it contravenes the right to life. Three exceptions were offered to this prohibition: in order to preserve the life of the mother (which need not be understood as an exception to the right to life at all),[53] rape, and the eugenic grounds of eliminating the mentally inferior. Paragraph 2 was met with strong opposition when the Commission on Human Rights met to discuss the draft. Jos Serrarens of the International Federation of Christian Trade Unions labelled it "exceptionally serious," and argued that the fact that certain countries permitted abortion did nothing to alter its illegality.[54] The Chilean delegate, Eduardo Cruz-Coke, described Paragraph 2 in its entirety as "shameful" and reminiscent of the "Hitler

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Convention on Human Rights: To Whom Does "Everyone's Right to Life" Belong?, 8 EMORY INT'L L. REV. 615, 648-49 (1994).

51. Joseph and Bossuyt mention the early debates in passing. *See* JOSEPH, *supra* note 5, at 27; *see also* MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 113-14 (1987).

52. Rep. of the Working Party on an International Convention on Human Rights, 2nd Sess., at 6, U.N. Doc. E/CN.4/56 (Dec. 11, 1947). Prior to the finalization of the Working Party's draft a proposal was made to insert mention of "at any stage of his human development" after "it shall be unlawful to deprive any person." The proposal was initially accepted but then rejected. *See* BOSSUYT, *supra* note 51, at 113-14.

53. Here, the intention need not be to end the unborn child's life at all, but to accept their death as a foreseen yet unintended side effect of treatment intended to save the mother's life.

54. U.N. ESCOR, 2nd Sess., 35th mtg. at 12, U.N. Doc. E/CN.4/SR.35 (Dec. 12, 1947).

regime."[55] He argued that children from "mentally deranged parents" had become famous or even geniuses, and that in the majority of cases of abortion on grounds of rape, the ground in question is used only as a pretext.[56] Bodin Begtrup of the Commission on the Status of Women did not offer support for either exception, eugenics or rape, and simply argued that a large number of civilized countries allowed abortion in order to preserve the life of the mother. She felt that the complete deletion of paragraph 2 would prevent ratification of the Convention by certain countries on the grounds that the right to life would prohibit abortion outright.[57]

The only defense of paragraph 2 in its entirety came from Lord Dukeston of the United Kingdom, the chairman of the Working Group responsible for the draft. He said the paragraph was an acknowledgment that many countries permitted abortion in well-defined circumstances. He explicitly argued in favor of abortion on eugenic grounds: many children born of "mentally deranged" parents were affected by their parents' condition. He also argued that just because some women may use rape as a pretext for abortion, it did not then follow that no genuine cases existed. He concluded by stating that if the exception to protect women's lives was omitted, states such as the United Kingdom would have difficulty ratifying the draft Convention. It was in this spirit, according to Lord Dukeston, that the Working Group on the Convention had arrived at a compromise.[58]

The Chilean delegate responded by stating that the deletion of paragraph 2 was in itself a compromise since silence on such a grave question showed great restraint.[59] The paragraph was deleted by ten votes to three. The Chairman of the proceedings, Eleanor Roosevelt, suggested that delegations in favor of paragraph 2's deletion send in comments concerning their motivations, and that these comments should be inserted into the report. The Panamanian delegate then announced that he objected to the now deleted paragraph 2 because it was at variance with a great juridical tradition, was unscientific, conflicted with a great many national constitutions, was too detailed a measure to contain in a Convention, and may open the door to all kinds of abuses and offenses

55. *Id.*
56. *Id.* at 13.
57. *Id.* at 13.
58. *Id.* at 15.
59. *Id.* at 16.

on both large and small scales.[60] The minute keeper concluded this debate's report by stating that a cursory review of opinions prevailing among the delegates indicated general support for the Panamanian view that, contrary to the wishes of the Chairman, discussion over the paragraph should be deleted from the commentary.[61] Paragraph 2 contained a very limited right to abortion as a derogation from the unborn child's right to life. From the available records, it is fair to assume that the most likely reason for its rejection was concern for domestic sovereignty over the matter, a concern expressly motivated by a forthright rejection of all forms of abortion on human rights grounds.[62]

In 1957, roughly ten years after this "abortion proposal," a joint proposal by Belgium, Brazil, El Salvador, Mexico, and Morocco was submitted. The proposal stated that "[t]he right to life is inherent in the human person. From the moment of conception, this right shall be protected by law."[63] Aside from noting that this proposal was eventually defeated (and then drawing their own free-standing conclusions from this defeat), scholars have paid little or no attention to the actual debates surrounding it. Yet, it is impossible to understand the import of the vote for interpreting Article 6 of the ICCPR without analyzing the debates surrounding it. After asserting that the draft Article 6 on the right to life did not refer "explicitly" to the right to life before birth, Mr. Delhaye of Belgium stated that the Third Committee would have to decide whether provisions concerning the protection of the unborn child, whose mother had been sentenced to death, were sufficient, or whether such protection should be extended to all unborn children.[64]

In first proposing the amendment, Mr. Delhaye argued that life should be protected from conception as a matter of natural logic.[65] A number of delegates spoke in favor of this idea, all citing similar reasons: the need to protect the life of the unborn child (Mr. Lima, El Salvador);[66]

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60. *Id.* at 16-17.

61. *Id.* at 17.

62. This particular "sovereignty interpretation" of the vote obviously does not entail an endorsement of national legislative sovereignty as an excuse for an unrestricted abortion regime.

63. Bossuyt's work contains a summary record of the progress of this particular proposal. BOSSUYT, *supra* note 51, at 120-21.

64. U.N. GAOR, 12th Sess., 810th mtg. at 241 ¶ 2 , U.N. Doc. A/C.3/SR.810 (Nov. 14, 1957) [hereinafter U.N. GAOR 810th Mtg.].

65. U.N. GAOR, 12th Sess., 813th mtg. at 253 ¶ 3, U.N. Doc. A/C.3/SR.813 (Nov. 18, 1957) [hereinafter U.N. GAOR 813th Mtg.].

66. U.N. GAOR, 12th Sess., 811th mtg. at 245 ¶ 9, U.N. Doc. A/C.3/SR.811 (Nov. 14, 1957). Later he argued that since many national laws protect the unborn child the Covenant

the notion human beings should be protected before birth, which would imply the prohibition of voluntary abortion (Mr. Gomez Robledo, Mexico);[67] that there were many long-standing precedents from protecting life from the point of conception and so there could not be much disagreement on the principle (Miss Branco, Brazil);[68] that the right to life began at conception (Mr. Coloma, Ecuador);[69] that the amendment would provide greater protection for human life (Mr. Rojas, Venezuela);[70] that the right to life began at conception, although the language used in the amendment might be open to criticism on legal and technical grounds (Miss Radic, Yugoslavia);[71] it was a matter of justice (Mr. Hernandez, Colombia).[72] The proposal was nonetheless defeated by thirty-one votes to twenty (with seventeen abstentions),[73] with the Belgian delegate remarking that the defeat signaled that the United Nations seemed to show no concern for the fate of unborn children.[74]

This remark is not supported by the drafting records for Article 6. There were two categories of reason provided for opposing the proposal—sovereignty and legal clarity. The former reason was offered by the U.K. delegate, Sir Hoare. He explained that the phrase "from the moment of conception" extended the scope of the Article to embrace ante-natal life, whereas all the other provisions of the Covenants related to post-natal life only (this is factually false—it need only be considered that the same draft Article protected the unborn child from the death penalty).[75] He also argued that the provision involved the delicate

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should do no less. U.N. GAOR, 12th Sess., 817th mtg. at 275 ¶ 25, U.N. Doc. A/C.3/SR.817 (Nov. 22, 1957) [hereinafter U.N. GAOR 817th Mtg.].

67. U.N. GAOR, 12th Sess., 812th mtg. at 249 ¶ 7, U.N. Doc. A/C.3/SR.812 (Nov. 15, 1957) [hereinafter U.N. GAOR 812th Mtg.]. Later he argued that the idea of protecting the child's interests from conception dated back to Roman law and was now enshrined in the legislation of a great many countries. He also stated that the proposed amendment would not preclude states from authorizing necessary medical interventions to save the mother's life. U.N. GAOR, 12th Sess., 818th mtg. at 279 ¶ 6, U.N. Doc. A/C.3/SR.818 (Nov. 22, 1957) [hereinafter U.N. GAOR 818th Mtg.].

68. U.N. GAOR, 12th Sess. 815th mtg. at 265 ¶ 5, U.N. Doc. A/C.3/SR.815 (Nov. 20, 1957) [hereinafter U.N. GAOR 815th Mtg.].

69. *Id.* at 267 ¶ 28.

70. U.N. GAOR, 12th Sess., 816th mtg. at 272 ¶ 8, U.N. Doc A/C.3/SR.816 (Nov. 21, 1957).

71. U.N. GAOR 818th Mtg., *supra* note 67, at 279 ¶ 3.

72. U.N. GAOR, 12th Sess., 820th mtg. at 291 ¶ 29, U.N. Doc. A/C.3/SR.820 (Nov. 25 1957) [hereinafter U.N. GAOR 820th Mtg.].

73. *Id.* at 290 ¶ 9.

74. U.N. GAOR 12th Sess. 821st mtg. at 293 ¶ 9, U.N. Doc A/C.3/SR.821 (Nov. 26, 1957) [hereinafter U.N. GAOR 821st Mtg.]

75. U.N. GAOR 815th Mtg., *supra* note 68, at 268 ¶ 37.

question of the rights and duties of the medical profession: legislation on the matter was based on different principles in different countries, and it was, therefore, inappropriate to include the provision in an international instrument.[76] Mr. Mahmud of Ceylon expressed support for this position and for the reasons advanced by the U.K. delegate.[77] No other delegates expressing opposition to the proposal offered these reasons.

Rather, out of those delegates who expressed opposition to the proposal and who at the same time offered a rationale for this opposition,[78] all, with only one exception,[79] based their stance on the lack of legal clarity inherent in the proposal: it was impossible for the state to determine the moment of conception and, accordingly, to undertake to protect life from that moment (Mr. Baroody, Saudi Arabia);[80] the proposal was not sufficiently clear and was weaker than the original text (Mrs. Sysoeva, Byelorussian Soviet Socialist Republic);[81] the provision was too vague (Mr. Polyanichko, Ukrainian Soviet Socialist Republic);[82] and that the provision might be interpreted as prohibiting any measure which sought to protect the mother when her life was in danger (Mr. Currie, Canada).[83]

It is impossible to state with certainty whether a majority of the votes opposing the "conception proposal" were cast for reasons of concern over sovereignty or for concern over legal clarity. Nevertheless, since only two delegations articulated the former reason, while four

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76. *Id.*

77. U.N. GAOR 817th Mtg., *supra* note 66, at 275 ¶ 5.

78. Some delegates expressed opposition without offering a rationale: Miss Ammundsen of Denmark merely stated that she would vote against all bar one of the amendments to paragraph 1 of the Article on the grounds that they were all, to varying degrees, mere statements of principle and were less satisfactory than the provisions of the original text. *See* U.N. GAOR 12th Sess. 819th mtg. at 284 ¶ 14, U.N. Doc A/C.3/SR.819 (Nov. 25, 1957) [hereinafter U.N. GAOR 819th Mtg.] (though she cited the sovereignty rationale in opposing an amendment to abolish the death penalty, she did not cite it in the context of the "conception proposal"). Mrs. Rössel of Sweden simply announced an intention to vote against the proposal. *Id.* at 286 ¶ 43. Though she did refer to how the language of various, unspecified amendments was often vague and ambiguous. *Id.* at 286 ¶ 44.

79. The Pakistan delegate, Mrs. Jehan-Murshid, described the proposal as "pointless" while also saying that the same was true of another proposal under discussion, which introduced nothing new into the Covenant. U.N. GAOR 818th Mtg., *supra* note 67, at 280 ¶ 13. It is possible that she opposed the proposal on the grounds that the Pakistani delegation believed that Article 6 already protected the unborn child.

80. U.N. GAOR 817th Mtg., *supra* note 66, at 278 ¶ 37.

81. U.N. GAOR 818th Mtg., *supra* note 67, at 280 ¶ 9.

82. U.N. GAOR 819th Mtg., *supra* note 78, at 283 ¶ 6.

83. U.N. GAOR 821st Mtg., *supra* note 74, at 294 ¶ 13. He mentioned that some medical measures intended to save the mother would be to the detriment of the "unborn child."

relied on the latter, it is likely that the majority of votes opposing the conception proposal were motivated by the view that the proposal lacked sufficient legal clarity. This position is strengthened by a couple of other considerations.

First, even the Yugoslav delegate, who supported the proposal, alluded to how the language used in the amendment may be open to criticism on legal and technical grounds.[84] Second, the concurrent debates over the human rights legitimacy of the death penalty clearly illustrate that delegates were not hestitant to articulate national sovereignty concerns in opposition to a particular proposal. The proposal to abolish the death penalty was defeated fifty-one votes to nine, with twelve abstentions.[85] Virtually every delegate who spoke against the proposal appealed to some version of the sovereignty argument.[86] Hence, it is unlikely that the same delegates during the same debates would be reticent about using this type of argument or would deploy another argument as its cover.

Assuming that the best interpretation of the vote against the "conception proposal" is in fact the "legal clarity" interpretation, it follows that a majority of opponents of the proposal, and therefore a clear majority of delegates overall, supported the human rights status of unborn children in principle. The vote against the proposal was thus neither a direct rejection of unborn human rights, nor an affirmation of national sovereignty, but rather a rejection of the *specific* manner in which the right to life of the unborn was being posited. From what can be gleaned from the *travaux*, the primary sticking points were uncertainty over how states could vindicate the right from the precise moment of conception, and uncertainty over whether the right permitted medical interventions intended to vindicate the right to life of the mother.

This interpretation of the vote construes it as containing an indirect or inchoate recognition of the right to life of the unborn child—the same vote that rejected the explicit enshrinement of the right accepted the general principle and only opposed the specific measure due to insufficient clarity. This is not to say that Article 6(1) unequivocally protects the right to life of unborn children according to international human rights law, as the "conception proposal" was, after all, defeated. Rather, it contextualizes the vote over the "conception proposal" as

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84. U.N. GAOR 818th Mtg., *supra* note 67, at 279 ¶ 3.

85. U.N. GAOR 820th Mtg., *supra* note 72, at 290 ¶ 7.

86. The argument often amounted to a concern to ensure that as many states as possible became party to the Covenant.

indicating a presumption in favor of, rather than against, the right to life of the unborn.

This matters for interpreting Article 6(1) according to the VCLT methodology. The paragraph begins: "[e]very human being has an inherent right to life." It was voted through by an overwhelming majority of delegates (sixty-five votes to three, with four abstentions),[87] and contained an implicit, though clear, natural law stance, "the right to life is not a right conferred on the individual by society."[88] The ordinary meaning of "human being" is quite clear—as a biological term, it includes unborn human beings. There is no refuge from this conclusion in exclusively positivist hermeneutics, since another paragraph in the same article, Article 6(5), recognizes the unborn human being as a matter of law.

When the *travaux* are analyzed in order to clarify the meaning of this paragraph or to dispel any ambiguity concerning it, attention turns to the "conception proposal." The vote to defeat this proposal was likely motivated by concerns over legal clarity, not sovereignty concerns, and certainly not a direct rejection of unborn human rights. There was no indication given from delegates opposing the vote on legal clarity grounds that defeating the proposal would render the paragraph inapplicable to the unborn child. Moreover, there was no unambiguous indication given from delegates voting in favor of the proposal that the amendment was necessary to render the paragraph applicable to the child pre-birth.[89] Thus, the *travaux* do not void the ordinary meaning of Article 6(1), rather they qualify it, while remaining broadly compatible with it. So it is more plausible to judge that Article 6(1) protects the right to life of the unborn to some indeterminate extent than to judge that it does not protect the right to life of the unborn to any extent.

The foregoing interpretation of Article 6(1) is harmonious with the text of Article 6(5) and its drafting. That paragraph, proceeding from and normatively contingent upon the Article's first paragraph, protects the right to life of unborn children whose mothers have been sentenced to death ("Sentence of death . . . shall not be carried out on pregnant

87. U.N. GAOR 820th Mtg., *supra* note 72, at 290 ¶ 8.

88. BOSSUYT, *supra* note 51, at 119. Others have noted the natural law dimension to this article. *See*, *e.g.*, MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 105 (1993) [hereinafter NOWAK, CCPR].

89. While the Belgian delegate challenged the Third Committee to extend protection to all unborn children he also remarked that the relevant paragraph, without the amendment, did not "explicitly" refer to the right to life of children before birth. U.N. GAOR 810th Mtg., *supra* note 64, at 241 ¶ 2.

women.").[90] Some commentators do recognize that the *travaux* show the provision was added out of consideration for "the interests of the unborn child."[91] What becomes clear from reading the entirety of the debates is the extent to which supporters of the provision based their support on the full humanity of the unborn child. Delegates from Peru,[92] Indonesia,[93] India,[94] Canada,[95] Israel,[96] and Japan[97] each referenced the need to protect either the "child" or "children" or "persons" from the death penalty, while referring specifically to the unborn.[98] The provision was adopted by fifty-three votes to five, with fourteen abstentions.[99]

No delegate voiced opposition to the paragraph on the grounds that it protected the unborn child. The Canadian delegate's position was illustrative of those who did not vote in favor. Since Canadian law did not expressly prevent the death sentence from being imposed for crimes committed by persons below eighteen years of age, he felt obliged to abstain, yet expressed regret that the proposal to vote on the two parts of the paragraph separately had been rejected, and thus denied him the opportunity to support the text relating to pregnant women and their unborn children.[100]

Judging that Article 6(1) protects the right to life of unborn human beings to some indeterminate extent hardly amounts to adopting a fully unambiguous position on the matter. At the same time a number of determinate (albeit general) propositions follow from this interpretation of the paragraph. Among these propositions is that the paragraph does not reject the human rights status of the unborn; that it does not permit states absolute discretion in how they undertake to guarantee the right to life of the unborn; that the right to life of the unborn is applicable to both civil and criminal law, including abortion law, to some indeterminate

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90. International Covenant on Civil and Political Rights art. 6(5), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. A similar provision is contained in Article 4(5) of the 1969 American Convention on Human Rights. American Convention, *supra* note 18, art. 4(5).

91. *See* SCHABAS, *supra* note 43, at 134; *see also* BOSSUYT, *supra* note 51, at 141-43.

92. U.N. GAOR 810th Mtg., *supra* note 64, at 242 ¶ 14.

93. U.N. GAOR 812th Mtg., *supra* note 67, at 252 ¶ 32.

94. U.N. GAOR 813th Mtg., *supra* note 65, at 256 ¶ 36.

95. U.N. GAOR 12th Sess. 814th mtg., at 262 ¶ 42, U.N. Doc. A/C.3/SR.814 (Nov. 19, 1957).

96. U.N. GAOR 819th Mtg., *supra* note 78, at 285 ¶ 33.

97. U.N. GAOR 820th Mtg., *supra* note 72, at 289 ¶ 6.

98. It is probable though not certain that the Danish delegate was referring specifically to the unborn child when referencing the need to protect "persons" from the death penalty, U.N. GAOR 819th Mtg., *supra* note 78, at 284 ¶ 17.

99. U.N. GAOR 820th Mtg., *supra* note 72, at 291 ¶ 25.

100. U.N. GAOR 821st Mtg., *supra* note 74, at 294 ¶ 15.

extent; and, last, that the paragraph cannot be understood to contemplate a right to abortion.[101] Thus, the unborn possess a right to life according to Article 6(1) of the ICCPR, even if the precise contours of that right are more indeterminate than for post-birth humans. Further, the entirety of the *travaux* make it clear that rather than abortion being considered a human right, it was cast more in terms of being a violation of the human right to life.

However, the understanding of Article 6(1) is altered if the "sovereignty interpretation" of the "conception proposal" vote is the correct interpretation. Though this interpretation does not justify viewing the vote's defeat as incorporating a right to abortion into Article 6(1), it does construe the vote as an indication of a significant limit upon the extent to which the paragraph could be said to place a duty upon states to recognize a fetal right to life, particularly in the context of abortion.[102] This view of Article 6(1) would significantly dilute the plausibility of claiming that states' abortion laws are circumscribed by the unborn child's right to life. However, as with the UDHR's "sovereignty interpretation," the particular context for concerns over sovereignty should not be airbrushed out of the picture. The relevant context includes the earlier ICCPR debate on the "abortion proposal," a proposal voted down on the grounds that any recognition of a human right to abortion was unacceptable. It also includes the fact that extant abortion laws in 1957 were not as obviously incompatible with the right to life of unborn human beings as that fact is today. With the exception of communist countries, the overwhelming majority of U.N. Member States provided for abortion on only very exceptional grounds, if at all. The general rule was that the unborn child's right to life was protected by Member States' criminal laws. Only two years after the "conception proposal" was debated, the United Nations Declaration of the Rights of the Child could affirm that the child is "entitled to appropriate legal protection, before as well as after birth."[103] The international medical community was likewise positively disposed towards the status and rights of the unborn human being at the time.[104] Hence, judging the

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101. Unless one understands abortion as including necessary medical treatment to save a mother's life and which has the side-effect of causing the death of her unborn. On this understanding abortion would not be defined by the specific intention of the act but by the consequences it produces. *See*, *e.g.*, ICCPR, *supra* note 90, art. 6(1).

102. *Id.*

103. *See* G.A. Res. 1386 (XIV), *supra* note 17, art. 6.

104. The 1949 International Code of Medical Ethics affirmed "the importance of preserving human life from the time of conception." The 1948 World Medical Association's

"sovereignty interpretation" of Article 6(1) to be the most accurate reading requires bearing in mind that domestic laws at the time adopted an almost universally restrictive approach in criminal law surrounding abortion, an approach that was motivated by a genuine concern for the right to life of unborn children. As such, the gap between protecting the right to life of unborn children in Article 6(5) in one context, and accommodating sovereignty concerns over that right in another context in Article 6(1), was perhaps not as big a lacuna as might appear from the perspective of today's legal minds.[105] Further, as with the UDHR's "sovereignty interpretation," it is important to consider that abortion laws were likely the sole motivation for the sovereignty objection to the "conception proposal."[106] As such, and recalling both the express text of Article 6(1) as well as the import of Article 6(5) that derived from it, there are good grounds to hold that even from a "sovereignty interpretation" perspective, Article 6(1) still applies to the fetal interest in life outside of the abortion issue, in such cases as fetal homicide and civil liability for wrongful death.

Whether one judges the "legal clarity" or "sovereignty" interpretation to be the correct interpretation of the vote on the "conception proposal," Zampas and Gher are still mistaken to conclude on the back of this vote that the ICCPR "rejects the proposition that the right to life attaches before birth."[107] Aside from neglecting to mention Article 6(5) of the ICCPR, which manifestly affirms this proposition, the authors offer no analysis of the relevant *travaux*. The most plausible interpretation of the vote in question, the "legal clarity interpretation," contributes to construing Article 6(1) as offering genuine, though indeterminate, recognition of the right to life of unborn children. But even if the "sovereignty interpretation" of the vote is adopted it still does not follow that Article 6(1) "rejects" the right to life of unborn children: it is fallacious to claim that since the proposal was rejected its strict contrary was affirmed.

Such a depiction of the vote overlooks the fact that the contrary proposal (i.e., the right to life begins from birth only) was not

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Declaration of Geneva pledged to "maintain the utmost respect for human life from the time of conception" (a pledge re-affirmed *verbatim* in the 1968 version of the Declaration). JOSEPH, *supra* note 5, at 16, 20, 192.

105. ICCPR, *supra* note 90, art. 6(1), (5). It is plausible to argue that victory for the sovereignty position at the vote over the "conception proposal," if this is what actually happened, was not necessarily intended to permit unrestricted access to legal abortion.

106. Zampas & Gher, *supra* note 20, at 263.

107. *Id.*

proposed—let alone accepted—either as an argument or as an amendment at all, as well the fact that the *travaux* can indicate not only positive and negative stances towards human rights propositions, but also neutral (i.e., compromise) stances. The "sovereignty interpretation" of the relevant vote would, at its limit, imply a strictly neutral view of Article 6(1) in the context of the unborn child's right to life, not a rejection of the purported right. Unsurprisingly, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) did not discuss the right to life of unborn children in the context of the abortion controversy. It did, however, indirectly recognize that the unborn child requires human rights protection in the child-centric Article 12(2)(a). In the context of ensuring that "everyone" enjoys the highest standard of physical and mental health, "steps to be taken by the State Parties to the present Convention . . . shall include . . . the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child."[108] Schabas cites this provision (as well as Article 10(2), though that is more maternal-centric) as being entirely compatible with Article 6(5) of the ICCPR.[109]

IV. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1989)

The 1989 United Nations Convention on the Rights of the Child (UNCRC) was itself based on the 1959 United Nations Declaration of the Rights of the Child (UNDRC). The second preambular paragraph to the UNDRC begins: "[w]hereas the United Nations has, in the Universal Declaration of Human Rights, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind. . . ." It is then followed by the third preambular paragraph: "[w]hereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection,

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108. As per the 1959 United Nations Declaration on the Rights of the Child, "child" included the child before birth. G.A. Res. 1386 (XIV), *supra* note 17, pmbl. Article 12(2) of the ICESCR is undeniably child-centric and so the human rights requirement to reduce the still-birth rate is based primarily on the human rights status of the unborn human being. International Covenant on Economic, Social and Cultural Rights art. 12(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

109. *See* SCHABAS, *supra* note 43, at 134-35; *see also* ICESCR, *supra* note 108, arts. 10(2), 12(2). The ICESCR does affirm that motherhood begins prior to birth, "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits." *Id.* art. 10(2). It therefore coheres with the understanding of motherhood in Article 25(2) of the UDHR. UDHR, *supra* note 16, art. 25(2).

before as well as after birth."[110] Article 1 refers to "[e]very child, without any exception whatsoever . . . without distinction or discrimination . . . ." Article 4 provides that the child "shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and his mother, including adequate pre-natal and post-natal care."[111] Taken in conjunction, these articles indicate there is a very obvious stress on the equal human status of the unborn child.

The inclusion of the phrase "before as well as after birth" in the UNCRC forms the centerpiece of extensive commentary concerning the status of unborn children according to this document. Before examining the phrase's transposition from the UNDRC preamble to the UNCRC preamble, it is worth noting that the status of the unborn entity came up for discussion in other contexts. Initially, during drafting in 1979, Article 1 of the Convention provided that childhood began at the moment of birth.[112] This provision was amended to simply employ the terms "child" and "human being," without mentioning a specific lower age limit for human rights protection.[113] In 1988, two separate amendments were put forward by Malta and Senegal to insert "every human being from conception" into that Article.[114] The sponsors later withdrew these amendments as part of a compromise over the final version of the preamble.[115]

But the real story is that of the preamble. In 1980, a proposal was put forward by a group of delegations to include within it the phrase "before as well as after birth."[116] After a lengthy debate, a compromise was reached that involved referring to the UNDRC, but omitted the

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110. The proposal to adopt the phrase "before as well as after birth" was adopted by a margin of 58-1 with 10 abstentions. This vote was taken after an initial proposal to insert the phrase "from the moment of conception" was defeated by a margin of 40-20 with 9 abstentions. This particular defeat was at least partly based on the objection that it is impossible to determine the exact moment of conception. *See* JUDE IBEGBU, RIGHTS OF THE UNBORN CHILD IN INTERNATIONAL LAW 133 (Vol. I 2000).

111. UNCRC, *supra* note 17, art. 4.

112. OFF. U.N. HIGH COMM. H. RTS., LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD 305 (Vol. I 2007), http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf [hereinafter LEGISLATIVE HISTORY].

113. Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 163 (1990).

114. LEGISLATIVE HISTORY, *supra* note 112, at 305.

115. *Id.* at 167. Another proposal (by the Holy See) to make mention of the unborn child from the moment of conception was put forward in the context of Article 6 and the survival and development of the child. This proposal did not seem to elicit much debate. *Id.* at 164.

116. *Id.* at 165-66.

words "before as well as after birth."[117] At the final session of the Working Group in 1989, the debate was opened on precisely the same issue. Two formal amendments were proposed, both involving the inclusion of the phrase "before as well as after birth." One amendment was made by the Federal Republic of Germany and the other by the Holy See, Ireland, Malta and the Philippines. The matter was referred to a drafting group consisting of the principal protagonists on each side of the debate. A tripartite agreement followed.

First, the Malta and Senegal "conception proposals" relating to Article 1 were to be withdrawn *sub silentio*. Second, the words "before as well as after birth" were to be included within the ninth preambular paragraph as per the third preambular paragraph of the UNDRC. Third, an interpretative statement would be placed in the *travaux* "on behalf of the entire Working Group": "in adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by State parties."[118] The interpretative statement itself would be the subject of a legal opinion from the U.N.'s Legal Counsel at the behest of the U.K. delegate, an opinion that was furnished after the Working Group had completed its work:

> Regarding your request of 30 November 1988 on whether the Chairman of the Working Group preparing the draft convention on the rights of the child may on behalf of the entire Working Group include a statement in the *travaux préparatoires* which would read [quoted above] . . . we have not, of course, seen the text of the preambular paragraph in question or the text of any of the provisions of the draft convention[119] and, thus, our views set out below are somewhat abstract in nature.
>
> The preamble to a treaty serves to set out the general considerations which motivate the adoption of the treaty. Therefore, it is at first sight strange that a text is sought to be included in the *travaux préparatoires* for the purpose of depriving a particular preambular paragraph of its usual purpose, i.e. to form part of the basis for the interpretation of the treaty. Also, it is not easy to assess what conclusions States may later draw, when interpreting the treaty, from the inclusion of such a text in the *travaux préparatoires*. Furthermore, seeking to establish the meaning of a particular provision of a treaty, through an inclusion in the *travaux préparatoires* may not optimally fulfil the intended purpose, because, as

117. *Id.*

118. *Id.* at 167.

119. Considering the emotive nature of the topic in question this particular fact adds to the objectivity of the opinion.

> you know, under Article 32 of the Vienna Convention on the Law of Treaties, *travaux préparatoires* constitute a "supplementary means of interpretation" and hence recourse to *travaux préparatoires* may only be had if the relevant treaty provisions are in fact found by those interpreting the treaty to be unclear.
>
> Nevertheless, there is no prohibition in law or practice against the inclusion of an interpretive statement in *travaux préparatoires*. Though this is better done through the inclusion of such interpretative statement in the final act or in an accompanying resolution or other instrument. (Inclusion in the final act, etc., would be possible under Article 31 of the Vienna Convention on the Law of Treaties). Nor is there a prohibition in law or practice from making an interpretative statement; in the negative sense, intended here as part of the *travaux préparatoires*.[120]

Most commentators interpret the foregoing to mean that the unborn child is not protected under the UNCRC.[121] The most influential and comprehensive statement of this position is a 1990 article by Philip Alston in the journal *Human Rights Quarterly* (an article this section cites extensively).

Alston's position is based on five pillars, each unstable. First, he claims that a preamble is not an "operative" part of a treaty, with the implication being that it is "inoperative."[122] This claim is misleading from the perspective of international law. A preamble does not contain justiciable rights as such, but that legal fact alone falls short of making it legally redundant. As the above quoted legal opinion indicates, a preamble sets forth the general considerations and principles that motivate the treaty.

Further, Article 31(1) of the VCLT provides that "a treaty shall be interpreted in good faith . . . in the light of its object and purpose." The most obvious place to look for the object and purpose of a treaty is in its preamble. Further still, Article 31(2) of the VCLT expressly states that for the purpose of a treaty's interpretation, the text includes the preamble. Thus, the preamble certainly has legal operation, otherwise there would

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120. *See* SHARON DETRICK, UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 113 (1992). Alston does not quote the opinion in full. The U.N. Legal Counsel who wrote the opinion was Karl August Fleischhauer. Fleischhauer served as judge of the International Court of Justice from 1994 to 2003.

121. *See*, *e.g.*, LEGISLATIVE HISTORY, *supra* note 112, at xxxvii. Lopatka argues that the Convention deals with rights only applicable to born children, an argument that disintegrates upon reading Article 6(1), among others. The minority of commentators argue that the unborn child is protected by the UNCRC. *See*, *e.g.*, ALFRED GLENN MOWER, THE CONVENTION ON THE RIGHTS OF THE CHILD: INTERNATIONAL LAW SUPPORT FOR CHILDREN 29 (1997).

122. *Id.* at 168-69.

not be such acute concern over the inclusion of the phrase "before as well as after birth" in the UNCRC preamble.

Alston further claims that the ordinary meaning of the terms "child" and "human being" exclude the unborn child.[123] He argues that if one accepts that the preamble may be used to interpret treaty provisions, it is not tantamount to accepting "that a provision in the preamble which is not reflected in the operative part of the text, can be relied upon, on its own, to extend very considerably the natural and ordinary meaning of the actual terms used in Articles 1 and 6."[124] This appears to be a strange position to take for someone who acknowledges that a fetus may be described as an "unborn child" according to "common usage."[125] Thus, according to "common usage," a fetus is a type of child and, therefore, a type of human being. A preamble that defines a child as including the unborn child can hardly be said to "extend very considerably the natural and ordinary meaning" of the term in question.

Here, it is important to note that the "natural and ordinary meaning" of a term should not be confused with the paradigmatic meaning of the term. For most Westerners, the paradigmatic example of a "human being" resembles a healthy, autonomous adult—but that does not illustrate that the natural and ordinary meaning of "human being" does not include the sick, the intellectually disabled, the elderly, the heavily pregnant, or the newborn. It is natural and ordinary for a pregnant woman to refer to "my baby" when talking about the being in her womb or for a media report into pioneering *in utero* surgery to refer to how it could benefit "unborn children." Perhaps Alston was referring to the unborn child satisfying the "natural and ordinary meaning" of the term "human being" according to a strictly scientific view, but even if so, his position would have been even more untenable.[126] It would be

123. *Id.* at 169-70.

124. *Id.* at 169.

125. *Id.* at 156.

126. All leading textbooks on human embryology affirm that the uniting of the male and female gametes (sex cells) during the conception process, which includes the integration of their respective chromosomal structures, results in the creation of an entirely distinct cell, an individual human organism—which is none other and can be none other than an individual human being. The human being at this earliest of stages, variously labeled an embryo or zygote, is neither genetically nor functionally part of his or her mother. In common with human beings at all stages, this organism directs its own growth towards the greater and greater realization of its own intrinsic capacities. He or she (not figurative personification, the zygote from conception really is either a he or a she) is not a potential human being but a human being with an entire life of potential before them. T.W. SADLER, LANGMAN'S MEDICAL EMBRYOLOGY 13, 39 (10th ed. 2010); GARY C. SCHOENWOLF ET AL., LARSEN'S HUMAN EMBRYOLOGY 2, 4, 7, 15 (4th ed. 2009); KEITH L. MOORE & T.V.N. PERSAUD, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 2

unsurprising to find Alston confused on this last issue considering his grasp of the science of embryology; in the same article he asserts that conception is "generally defined" as occurring fourteen days after fertilization and at the time of implantation.[127]

Perhaps Alston realized that this particular claim was dubious. He eventually offers that, "[i]n international law, at least, there is no precedent for interpreting either that term [child], or others such as 'human being' or 'human person,' as including a fetus."[128] Here Alston overlooks Article 6(5) of the ICCPR, Article 12(2) of the ICESCR, Article 4 of the American Convention on Human Rights, Article 6(4) of the 1977 Geneva Protocol II,[129] and Article 2(d) of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.[130] To some extent overlooking these provisions is understandable because international law textbooks tend not to highlight them. What is perplexing is how Alston could overlook both the third preambular paragraph and Article 4 of the UNDRC, and Article 24(2)(d) of the UNCRC[131] (so much for the child before birth "not being reflected in the operative part of the text").

Hence, even excepting the ninth preambular paragraph of the UNCRC, international children's rights law does recognize the humanity of the unborn child. Not only this, even if one were to ignore the preamble to the UNCRC altogether, a strong case can be made that the "natural and ordinary meaning" of both Articles 1 and 6 includes the unborn human being. Article 1 refers to "every human being below the age of eighteen years"—the unborn child satisfies both these criteria.

(8th ed. 2007); SCOTT F. GILBERT, DEVELOPMENTAL BIOLOGY 3-4 (2006); BRUCE M. CARLSON, HUMAN EMBRYOLOGY AND DEVELOPMENTAL BIOLOGY 2, 32 (2004); BRUCE M. CARLSON, PATTEN'S FOUNDATIONS OF EMBRYOLOGY 3 (1996).

127. Alston, *supra* note 113, at 173.

128. *Id.* at 170.

129. "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children." Geneva Protocol Relating to the Protection of Victims of Non-international Armed Conflicts art. 6(4), June 8, 1977, 1125 U.N.T.S. 609.

130. "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . Imposing measures intended to prevent births within the group." Convention on the Prevention and Punishment of the Crime of Genocide art. 2(d)., Dec. 9, 1948, 78 U.N.T.S. 277.

131. "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health . . . States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: . . . . To ensure appropriate pre-natal and post-natal health care for mothers." Implicit within this provision is the view that motherhood begins while the child is *in utero*. *See* UNCRC, *supra* note 17, arts. 1, 6, 24(2)(d).

Article 6 refers to "every child" having "the inherent right to life."[132] "Inherent," as a natural law term, means existing in something on the basis of that thing's essential nature, which in this context can only mean the child's human nature.

Alston's fourth argument focuses on the status of the interpretative statement as part of the *travaux*. His analysis here is colored by his aforementioned claims. He begins by noting that Article 32 of the VCLT provides for the use of the *travaux* as a supplementary means of interpretation when the standard interpretative provisions of Article 31 leave the meaning "ambiguous or obscure."[133] Alston then proceeds to effectively ignore the existence of the ninth preambular paragraph, repeats his claim that the "natural and ordinary meaning" of the terms at issue clearly does not include the unborn child, and concludes that the interpretative statement is nothing more than an uncontroversial appendage to a relatively straightforward matter. But, as the U.N. Legal Counsel at the time noted, the issue is not so straightforward at all.

The preamble to a treaty, as Alston acknowledges,[134] enunciates the broad general principles relevant to the treaty. The ninth preambular paragraph thus enunciates the principle that what proceeds it concerns all children, born and unborn. No article of the UNCRC comes close to contradicting this principle. Indeed, Article 24(2)(d) presupposes it, while Articles 1 and 6 can be interpreted as perfectly harmonious with it.[135]

So how is it possible to resolve the paradox of a preambular provision that seems to be nullified by an interpretative statement in the *travaux*? This conundrum extends far beyond the abortion dispute since the UNCRC's protections are relevant to the unborn's interests generally. The interpretative statement attempts to rob part of the preamble of all meaning and, hence, a holistic interpretation is ruled out. Such a direct conflict can only be resolved by according one or the other provisions priority. Alston avoids this conclusion by supposing that the interpretative statement is obviously harmonious with the Convention itself, which begs the question, why is it inserted in the first place?

The U.N. Legal Counsel's opinion points out that the *travaux* are a "supplementary means of interpretation" according to Article 32 of the VCLT. Article 31(2) of the VCLT states that the preamble forms part of

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132. *Id.* art. 6.
133. Alston, *supra* note 113, at 170.
134. *Id.* at 171.
135. UNCRC, *supra* note 17, arts. 1, 6(1), 24(2)(d).

the text to be interpreted. According to Article 31(1) of the VCLT, the text is to be interpreted "in the light of its object and purpose"—which is precisely how a preamble operates, by indicating the object and purpose of a treaty.

The preamble ranks higher than the *travaux* as a hermeneutic key according to the VCLT: Article 32 states that recourse may be had to the *supplementary* means of interpretation "in order to confirm the meaning resulting from the application of [A]rticle 31, or to determine the meaning when the interpretation according to [A]rticle 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable." The preambular provision at issue reads: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." This provision only becomes inherently and manifestly problematic if one presupposes that abortion is a type of human right—a claim that has no basis in international human rights law, even today (it can only appeal for support to a regional legal provision: Article 14(2)(c) of the 2003 Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa).[136]

Nonetheless, the ninth preambular paragraph is not entirely self-explanatory and does raise questions as to its precise scope and application, not only in relation to the issue of abortion, but also in terms of other matters affecting children's interests. Yet the interpretative statement does not purport to clarify its scope and application, but to nullify them. Here, the U.N. Legal Counsel's opinion is again instructive. The opinion notes that there is no prohibition in either law or practice against the inclusion of an interpretive statement in the *travaux*, nor is the inclusion of a "negative" interpretative statement prohibited. But it also notes that it is "strange" for such an interpretative statement to seek to deprive a preambular paragraph of its usual purpose of forming part of the basis for the treaty's interpretation. By this, it means that such an interpretative statement is not really an interpretative statement at all but is more akin to a voiding clause.

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136. "States Parties shall take all appropriate measures to: . . . protect the reproductive rights of women by authori[z]ing 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]." Only just over half of the fifty-three African Union member states have ratified this protocol. Afr. Comm'n Hum. & Peoples Rts., Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(c) (July 11, 2003), http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

The opinion points out that such an interpretative statement itself renders ambiguous what conclusions states may later draw when interpreting the treaty. The opinion then indicates that the inclusion of the statement in the *travaux* "may not optimally fulfil the intended purpose," since recourse to the *travaux* may only be had if the relevant treaty provisions are unclear. It seems to be on this basis that the opinion considers preferable the inclusion of the interpretative statement in the final act or in some other accompanying instrument (i.e., to include the interpretative statement in the general or primary means of interpretation rather than the supplementary means).

This makes sense, for it is difficult to see the value of a supplementary means of interpretation that renders a provision in the actual treaty unintelligible by seeking to effectively void it, especially since the legal status of the interpretative statement is considerably more ambiguous than that of the preamble. The U.N. Legal Counsel, therefore, advises placing the statement on an equal legal footing to the ninth preambular paragraph, otherwise it "may not optimally fulfill the intended purpose." This suggestion was not taken up, and it, therefore, remains illicit to grant interpretative priority to an element of the *travaux* that has uncertain legal standing over that of the clear, ordinary meaning of an explicit textual provision of the Convention itself.

Alston's final argument against the meaningfulness of the UNCRC's ninth preambular paragraph is an appeal to the overarching intention of delegates party to the Convention's drafting.[137] His claim is that the intention of the drafters was to reach a compromise on the status of the unborn child and not to link it in any way the unborn child with Articles 1 and 6. Alston is correct in pointing out that many of the statements and votes throughout the drafting proceeded by way of a concern for neutrality and compromise on the issue. There is no denying this, but neither is there any denying that the UNCRC's drafting began by stating that the rights enumerated by it existed only from "birth," soon dropped this wording, thereafter only dealt with proposals to explicitly include unborn children in the Convention, and finished by adopting a preamble including the key phrase "before as well as after birth" (adopted in part in order to satisfy delegates pushing the "conception proposal").

Analogous to the question of the interpretative statement's legal status vis-à-vis that of the preamble, intentionality, as illustrated by the

137. Alston, *supra* note 113, at 170-73.

travaux, cannot easily nullify the express, ordinary meaning of the ninth preambular paragraph. This is all the more the case when a genuine question mark hangs over the idea of a relatively singular, overarching intention descriptive of the drafting process as a whole in the context of this discrete issue. While it is one thing to say that drafting intentionality according to the *travaux* may help explain an issue partially underdetermined by textual provisions, as per above treatments of the UDHR and ICCPR, it is another to say that this use of the *travaux* may completely undermine explicit textual provisions.

In the end, Alston goes so far as to argue that the phrase "appropriate legal protection, before as well as after birth" contains not even an implicit assumption that the unborn child has a right to life.[138] He adopts a thoroughgoing legal relativism by asserting that it is entirely at the discretion of states to determine what counts as "appropriate" (though his special pleading dictates that this particular view is directed only towards the "before birth" element of the paragraph).[139] Notwithstanding the foregoing criticisms levelled at Alston, whose article is still the most influential analysis on the specific topic, it remains unwarranted to claim that the UNCRC protects the unborn child's right to life to an extent that renders all forms of abortion impermissible.[140] A thorough analysis of the *travaux* precludes such a conclusion, since sensitivities over domestic abortion laws were the reason for omitting an even more explicit affirmation of the human rights of unborn children.[141] So it is partially correct to describe the final text of the UNCRC as a compromise of sorts.

Yet it was very far from an entirely neutral compromise, as the unborn child's status as a bearer of human rights was explicitly recognized even if the implications of this status vis-à-vis abortion, in

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138. *Id.* at 172.

139. *Id.* Alston's hermeneutical approaches are partly explained by his seeming support of abortion as a type of human right. In this context, for example, he acknowledges that on his reading of the UNCRC states are still free to protect the unborn child's right to life "provided that other human rights guarantees were not thereby violated." *Id.* at 172. Ordinarily the protection of one human right would not raise such an immediate prospect of other human rights being violated. The meaning of this statement becomes clearer at the end of his article when he suggests that an unborn child's right to life could clash with the rights of the mother to "life, mental and physical health, and privacy." *Id.* at 178. He ends the article on the same page with the suggestion that "legalized abortion is not necessarily inconsistent with increasing the level of protection accorded to the fetus." *Id.* In the final footnote he cites the examples of England, France, and Canada. *Id.*

140. *See* JOSEPH, *supra* note 5, at 27.

141. *See generally* UNCRC, *supra* note 17.

particular, were not positively unpacked with the degree of specificity and precision associated with statute law. The right to life of the unborn child contained in the UNCRC does apply to abortion law but, as the *travaux* indicate, only in an indeterminate sense—a sense qualified by sovereignty concerns. Outside of the abortion controversy, there is no convincing reason to think that the UNCRC does not protect the relevant rights of the child *in utero*. The only objections to unborn human rights arose from a concern to protect sovereignty over abortion laws.[142] Furthermore, neither the text nor the *travaux* gives any indication that the UNCRC contains a right to abortion.

V. TREATY MONITORING BODIES

Since the relevant materials do not always permit certitude, some of the conclusions reached so far have been relatively tentative. What can be said definitively is that the human rights documents examined in this article neither provide for such a legal norm as a "right to abortion," nor propose its corollary, the sub-human character of unborn human beings. Yet, the Human Rights Committee (HRC), a body established pursuant to Article 28 of the ICCPR, declares that compliance with the ICCPR requires the decriminalization of abortion in cases of "rape, incest, serious risks to the health of the mother, [and] fatal fetal abnormality."[143]

The HRC also expresses concern at the "discriminatory impact" of an abortion law which criminalizes most abortions within a jurisdiction, thus preventing women of lesser economic means from procuring an abortion abroad.[144] The HRC routinely challenges states with restrictive

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142. This is illustrated by the various negative Declarations and Reservations entered to the UNCRC. Argentina entered a Declaration to the UNCRC to the effect that Article 1 applies from conception; China entered a Reservation to the effect that Article 6 does not interfere with "family planning" laws in China; Ecuador entered a Declaration to the effect that the ninth preambular paragraph should be borne in mind when interpreting all the articles of the Convention; France entered a Declaration to the effect that Article 6 does not pose an obstacle to its abortion legislation; Guatemala entered a Declaration to the effect that Article 1 applies from conception; the Holy See entered a Declaration to the effect that the ninth preambular paragraph will act as the lens through which the rest of the UNCRC is viewed in accordance with the VCLT; Luxembourg entered a Reservation to the effect that Article 6 poses no obstacle to abortion legislation; Tunisia entered a Declaration to the same effect; the United Kingdom entered a Declaration to the effect that the UNCRC only applies post-birth. *See generally* UNCRC, *supra* note 17.

143. Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of Ireland, ¶ 9, U.N. Doc. CCPR/C/IRL/CO/4 (Aug. 19, 2014).

144. *Id.* The HRC's advocacy in favour of a right to abortion began in its 1996 Concluding Observations regarding Peru. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: Peru, ¶ 15, U.N. Doc. CCPR/C/79/Add.72 (Nov. 18, 1996). There the HRC called

abortion laws and does so primarily by appeal to Article 3 of the ICCPR ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"), Article 6 ("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"), and Article 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation").[145] The HRC's justification for these interpretations of the various ICCPR provisions is unclear: the manifold "concluding observations" concerning abortion simply assert that the Articles in question contain a right to abortion. There is no forensic appeal to the specific textual provisions or *travaux* of the ICCPR, still less a sophisticated appeal to a general theory of legal interpretation, such as an unanchored teleological or evolutive hermeneutic capable of bypassing the strict, posited law at issue. Nor does the interpretation of the relevant provisions bear even a passing resemblance to the VCLT methodology. That methodology reveals that there is nothing in the ICCPR to justify construing abortion as a human right, nor is there anything there to justify a necessary presupposition of such a construal: the subhuman character of the unborn human being.

This dual dimension to a right to abortion is important to consider when conducting legal hermeneutics. If a legal instrument is *prima facie* silent on such a right, while also silent on the status of the unborn human being, then an interpretation that appends a right to abortion onto, say, an enumerated right to health, cannot claim neutrality on the question of the status of the unborn child—it will have decided *against* the unborn being a human rights subject in a particular context. So an instrument like the ICCPR which does recognize the unborn as a human rights subject (Article 6(5)) and does not provide for a right to abortion in its text (as illuminated by the *travaux*), and is thus positively disposed to the human rights status of the unborn, can only be read to provide for a right to abortion by suppressing rather than unpacking both its text and *travaux*.

It is not clear whether the HRC believes that its abortion observations are incontrovertible, self-evident, and in need of no justification whatsoever, or whether it believes that it has the power to

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for the decriminalization of abortion in the case of rape and posited that clandestine abortions effected by the general criminalization of abortion are the main cause of maternal mortality in the country.

145. ICCPR, *supra* note 90, arts. 3, 6(1), 7.

develop human rights law beyond (or perhaps against) what is provided for in the ICCPR. As regards the former possibility, it is not surprising that the HRC would be oblivious to its interpretative shortcomings since the majority of scholars in the field likewise suppose that how the HRC and other treaty-monitoring bodies proceed on this issue is entirely unproblematic from hermeneutical and human rights law perspectives.[146] As regards the latter possibility, the HRC's "observations" and "general comments" do not form part of binding international human rights law.[147]

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146. *See*, *e.g.*, Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1, 33 (2003). Cook and Dickens also move seamlessly from outlining Article 12 of CEDAW to the CEDAW Committee's endorsement of a right to abortion under that Article without even hinting at a critique of the Committee's interpretation of the Article in question. *Id.* at 35-36. Their piece not only omits to critically engage with the hermeneutical extravagances of the various treaty monitoring bodies, it also offers a truncated and misleading picture of how international human rights conventions treat of the unborn, *viz.* contending that such conventions are not applicable (i.e., offer no human rights protection) before the completed birth of a human being. *Id.* at 24-25.

147. Even among scholars sympathetic to the activities of the HRC this is a generally accepted proposition. *See* Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 215 (2008) ("These Concluding Observations have a non-binding and flexible nature."); Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251, 252 (2007) (describing as "non-binding" the decisions and concluding observations and recommendations of the treaty monitoring bodies); NOWAK, CCPR, *supra* note 88, at 668-69 ("The fact that . . . it cannot be termed a court in the strict sense of the word follows not only from the relatively brief term of office of its members and the lack of internationally binding effect of its decisions but also from its designation as a 'Committee.'"); HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 964-65 (3rd ed. 2008) ("The differences between the handling of complaints within the UN system by a body such as the ICCPR Human Rights Committee and the European Court are striking. . . . [T]he Court's opinions take the traditional forms of the law—the facts of the dispute, argument about the interpretation of the text and related argument about the policies or principles involved, reflection on the institutional role of the Court in relation to national political orders, the ultimate decision applying the Convention in a decision binding the state[s] parties, and possible recourse to a political body if a state does not comply with the Court's decision. . . . [A] study of the European Court's decisions best illustrates the promise of an international (regional) *legal* order brought to bear on national human rights issues."); Zampas & Gher, *supra* note 20, at 253 ("Committees are not judicial bodies and their Concluding Observations are not legally binding[.]"). Zampas and Gher immediately go on to assert that Committees' "general comments" and "concluding observations" "may" be considered a type of jurisprudence—but, by their own admission, it would have to be a non-legally binding type of "jurisprudence." *Id.* The International Law Association, too, indicates that treaty monitoring bodies do not determine the content of human rights law, "It seems to be well accepted that the findings of the treaty bodies do not themselves constitute binding interpretations of the treaties. . . . Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty." INT'L LAW ASS'N, BERLIN CONFERENCE, FINAL REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES

The HRC simply does not have the legal power to develop, delete or add to the ICCPR's provisions. This is clear from the text of the ICCPR itself: Article 40(1) provides for states party to the Covenant "to submit reports [to the HRC] on measures they have adopted which give effect to the rights recognized herein [i.e., in the ICCPR itself]." Article 40(4) requires the HRC to transmit reports and general comments to the state parties. Since this is the extent of the HRC's powers under the ICCPR it acts *ultra vires* when it seeks to alter, add to, or diminish the rights recognized by the ICCPR or to otherwise amend that instrument.[148]

The problematic nature of the HRC's approach to the human rights of the unborn child is mirrored in most other U.N. treaty-monitoring bodies. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee),[149] established pursuant to Article 17 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is perhaps the most insistent on a human right to abortion. The CEDAW Committee regularly appeals to Article 12(1) of CEDAW to support abortion rights ("States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning").[150] Yet, like the ICCPR, CEDAW makes no provision for abortion as a human right, either in Article 12(1) or elsewhere. This is ascertainable from a good faith reading of its actual textual provisions and confirmed by its *travaux* (which indicate that abortion was not understood as a human right

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¶¶ 15-16 (2004). It is also worth mentioning here the disparity between the ECHR's continued rejection of a right to abortion and the HRC's affirmation of same, despite the fact that the ECHR contains no analogue to the ICCPR's Article 6(5) (and is thus presumptively freer to bypass the human status of the unborn).

148. The same holds true as regards the power of the HRC under the First Optional Protocol to the ICCPR. The First Optional Protocol establishes the power of the HRC to review individual cases. However, it does not authorize the HRC to give judicial "rulings" or "decisions" that are legally binding under international law. It merely authorizes (via article 1) the HRC to "receive and consider" communications alleging a rights violation, and (via article 5(4)) to give its "views" on the communications. The Protocol nowhere envisages sanctions or enforcement mechanisms to give effect to the views of the HRC. *See generally* Erik Möse & Torkel Opsahl, *The Optional Protocol to the International Covenant on Civil and Political Rights*, 21 SANTA CLARA L. REV. 271, 272-73, 327 (1981).

149. The CEDAW Committee has analogous powers to the HRC: it issues non-binding "suggestions and general recommendations" (Article 21(1)) based on "the provisions of the present Convention" (Article 18 (1)). Discrimination Against Women on Its Twentieth Session, at 3, U.N. Doc. A/54/38/Rev.1 (1999).

150. *Id.* at 3 ¶ 8.

component of "family planning" or any other CEDAW provision).[151] Neither the CEDAW Committee nor its commentators,[152] who support its stance on abortion, make any kind of concerted effort to adopt a VCLT interpretative methodology for the purposes of evaluating the claim of a human right to abortion under CEDAW.

VI. CONCLUSION

The UNCRC is similar to the ICCPR and the ICESCR in that it positively recognizes the human rights status of the unborn child. The UNCRC and its preamble are more explicit on this than the other treaties. Still, the ICCPR and ICESCR undoubtedly protect unborn children in some articles, namely Articles 6(5) and 12(2) respectively. In depth analysis of the ICCPR and the UNCRC reveals that each recognizes the general right to life of unborn children, though not to any determinate extent in the context of abortion laws.

Outside of the abortion context, both Conventions offer clearer and more determinate protection for the human rights of the unborn. It is not possible to pronounce definitively on whether the UDHR recognizes the right to life of unborn children in the context of abortion or is instead neutral on the matter. There are good grounds for holding that even if the "sovereignty interpretation" of that document is more plausible, it should be confined to abortion law and should not extend to other laws impinging upon fetal interests. None of the human rights legal documents examined in this Article positively reject the human rights status of unborn human beings or provide for a right to abortion. Furthermore, none of them clearly permit an absolute margin of appreciation for states seeking to provide unrestricted access to abortion.

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151. *See* REHOF, *supra* note 15, at 144. In 2005 Amnesty International subscribed to this good faith interpretation of CEDAW by describing as a "myth" the claim that CEDAW supports abortion through its invocation of family planning, "CEDAW does not address the matter of abortion . . . [and] [m]any countries in which abortion is illegal . . . have ratified the Convention." AMNESTY INT'L, A FACT SHEET ON CEDAW: TREATY FOR THE RIGHTS OF WOMEN (Aug. 25, 2005), https://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf. There is no real need to have recourse to supplementary interpretative materials on this point because the ordinary meaning of "family planning" does not involve abortion, as even the contemporary Oxford, Cambridge and Merriam-Webster dictionaries testify (never mind editions in circulation in 1979 when CEDAW was adopted).

152. *See*, *e.g.*, Barbara Stark, *The Women's Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL'Y 261, 272 (2011). Stark implies that CEDAW contains a right to abortion but then in a footnote to this contention offers, "CEDAW does not explicitly assure the right to abortion, reflecting the lack of consensus among states." *Id.* at 272 n. 64. Later in the same footnote she states, "The CEDAW Committee has criticized states for prohibiting abortion, however." *Id.*

Most commentators who examine these instruments adopt an overtly dichotomous approach and split along the lines of proposing either that the unborn child has an indisputable and absolute right to life in all circumstances according to international human rights law, or that states are free to ignore unborn human rights entirely. But on closer inspection, the positions reached by the relevant human rights instruments are more nuanced and indeterminate than this dichotomous approach suggests. For one thing, it is certainly accurate to claim that outside of the abortion question international human rights law offers genuine protection to unborn children.[153] This includes an overall presumption in favor of the unborn's right to life being recognized outside the parameters of the abortion issue. And while it is inaccurate to claim that international human rights law clearly protects unborn human beings from all forms of abortion, it is true to say both that abortion is not a human right and that a genuine question mark hangs over at least some forms of abortion from a human rights legal perspective.

Saying that there is a "presumption in favor" of a particular right or a "genuine question mark" over a specific practice is certainly not a statement usually associated with binding, determinate, positive law. In this sense, it is understandable why commentators adopt an either/or approach to human rights hermeneutics. But neither is such talk meaningless from a legal point of view. Academic and legislative debate, policy formation, and even sometimes judicial decisions all have recourse to these types of propositions. This is unsurprising considering that so much of international human rights law is posited in a rather general and declaratory fashion. Since appeals to international human rights law on matters pertaining to the unborn show no signs of abating, and since the human rights status of the unborn remains such a disputed topic, a matter which has not been definitively settled in all contexts by international human rights law, it is important that scholarly debate be as fully informed as possible by way of having clear and accurate recourse to the entirety of the relevant human rights provisions and their *travaux*.

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153. Dinah Shelton states that there is "general agreement" on this point, though no other scholarly sources are cited by her. Dinah Shelton, *International Law and the Protection of the Fetus*, *in* ABORTION AND THE PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE 14 (Stanislaw J. Frankowski & George F. Cole eds., 1988).