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I. Introduction

The Convention on the Rights of the Child (“Convention”), which entered into force on September 2, 1990,\(^1\) is the first binding international instrument embodying “international legal recognition of the human rights of children.”\(^2\) To date, 192 countries—every country save the United States and Somalia—have ratified the Convention; it is “the most universally accepted human rights instrument in history.”\(^3\)

The Convention on the Rights of the Child has been hailed as “the most authoritative standard-setting instrument in its field.”\(^4\) It stipulates, inter alia, every child’s right to life and survival,\(^5\) to a nationality,\(^6\) to an identity,\(^7\) to be heard,\(^8\) to “freedom of thought, conscience and religion,”\(^9\) and to health.\(^10\) However, the convention is silent on the age at which childhood begins, and unclear regarding whether the rights reserved to children under the Convention apply to the unborn.

Convention article 1 defines “a child” as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”\(^11\) The article 1 definition allows for several interpretations of when childhood might begin under the Convention: at


\(^{5}\) Convention on the Rights of the Child, supra note 1, art. 6, 1577 U.N.T.S. at 47 (“1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”).

\(^{6}\) Id. at art. 7 (“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”).

\(^{7}\) Id. at art. 8 (“States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”).

\(^{8}\) Id. at art. 12, 1577 U.N.T.S. at 48 (“[T]he child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”).

\(^{9}\) Id. at art. 14, 1577 U.N.T.S. at 49 (“States Parties shall respect the right of the child to freedom of thought, conscience and religion.”).

\(^{10}\) Id. at art. 24, 1577 U.N.T.S. at 52 (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”).

\(^{11}\) Id. at art. 1, 1577 U.N.T.S. at 46.
fertilization, at conception, at birth, or at some other point between conception and birth. Preambular paragraph 9 of the Convention seems to point toward protection of the unborn by quoting the 1959 Declaration on the Rights of the Child: “the child . . . needs special safeguards and care, including appropriate legal protection before as well as after birth.”

The Convention’s textual ambiguity calls into question the legality of abortion under the Convention; if an unborn fetus is “a child” for the purposes of the Convention, then, under article 6, the fetus would have “the inherent right to life.” But, the possibility of a fetus’s right to life conflicts directly with the rights guaranteed to a pregnant girl under the Convention, which safeguard her right to health, to life, and to consideration of her best interests if the pregnancy threatens her physical or mental health.

This note will demonstrate that, confronted with the Convention’s textual ambiguity, developing international law recognizes that, under the Convention, the rights of a pregnant child trump the rights of a fetus.

The note will first examine the relevant Convention provisions and the drafting history of the Convention, as well as states parties’ declarations and reservations to the final Convention text. It will establish that the language of the Convention is ambiguous and could be read to confer the right to life on the unborn. Next, this note will analyze practice under the Convention in the almost thirteen years since it entered into force. The Committee on the Rights of the Child, the treaty body established “[f]or the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the . . . Convention,” reveals, in its observations and meeting reports, a developing interna-

12 Philip Alston distinguishes between fertilization and conception: [Fertilization] refers to the union of an ovum and sperm which can take place shortly after intercourse. Conception, on the other hand, is generally defined as occurring only at the time of implantation in the uterine mucosa, a process which is not completed until around fourteen days after fertilization has occurred. Philip Alston, The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child, 12 HUM. RTS. Q. 156, 173 (1990).

13 An example of such a time between conception and birth is “ensoulment,” the point recognized under Sha’riah law as “the time at which a foetus [sic] gains a soul,” commonly viewed as 120 days after conception. 1 U.N. DEP’T OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIV., ABORTION POLICIES: A GLOBAL REVIEW 5, U.N. Doc. ST/ESA/SER.A/187 (2001).

14 Convention on the Rights of the Child, supra note 1, pmbl. para. 9, 1577 U.N.T.S. at 45 (emphasis added).

15 Id. at art. 6, 1577 U.N.T.S. at 47.

16 Id. at art. 24, 1577 U.N.T.S. at 52.

17 Id. at art. 6, 1577 U.N.T.S. at 47.

18 Id. at art. 3, 1577 U.N.T.S. at 46.

19 Id. at arts. 1, 24, 1577 U.N.T.S. at 46, 52.

20 Id. at art. 43, 1577 U.N.T.S. at 58-59.
tional norm that the rights of a child-mother supercede the right to life of an unborn child under the Convention. The practice of regional human rights bodies since the Convention’s entry into force has not contradicted this emerging norm. Although no regional body has directly addressed the question of fetal rights under the Convention, both the European Court of Justice and the Inter-American Commission on Human Rights have delivered opinions consistent with denying a fetus’s right to life.

II. AMBIGUITY IN THE CONVENTION TEXT

The Convention’s ambiguity regarding whether the rights ensured by the Convention extend to the unborn derives from three portions of the final Convention text adopted by the General Assembly in 1989: (1) article 1, which defines the term “child” for the purposes of the Convention but fails to define a minimum age of childhood; (2) preambular paragraph 9, which describes the need for “legal protection, before as well as after birth”; and (3) article 6(1), which protects every child’s “inherent right to life.”

Faced with the question of whether the Convention could protect the rights, including the right to life, of the unborn, an interpreter is guided by the Vienna Convention on the Law of Treaties (“Vienna Convention”) articles 31 and 32 on the interpretation of treaties.

A. The ordinary meaning of the term “child” could encompass or exclude an unborn child.

Vienna Convention article 31 instructs that “[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.” The Convention’s purpose is to recognize and safeguard “the inherent dignity and . . . the equal and inalienable rights” of the child.

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21 Id. at art. 1, 1577 U.N.T.S. at 46 (“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”).
22 Id. at pmbl. para. 9, 1577 U.N.T.S. at 45 (“Bearing in mind that, as indicated in the Declaration of the Rights of the Child, ‘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’”).
23 Id. at art. 6, 1577 U.N.T.S. at 47.
25 Vienna Convention, supra note 24, art. 31, 1155 U.N.T.S. at 340.
26 Convention on the Rights of the Child, supra note 1, pmbl. para. 1, 1577 U.N.T.S. at 44.
Whether its purpose encompasses the unborn depends solely on the definition of the term “child.” The plain meaning of the Convention’s terms does not clarify whether the Convention provisions apply to a “child” before birth. Convention article 1, which purports to define “child,” does not provide a minimum age (the point at which one becomes a child) for application of the Convention, though it does indicate a maximum age (the point at which one ceases to be a child) for Convention purposes. Arguably, if the drafters had intended “child” in the Convention to apply to a point before birth, they would have explicitly noted that application in the article 1 definition. Conversely, the drafters, coming from different perspectives on the question of when life begins, might have felt that restricting the rights guaranteed by the Convention to children only from birth would have required a specific mention of that limitation in the article 1 definition. During drafting debates on the subject, Italy’s representative went so far as to claim that “the rule regarding the protection of life before birth could be considered as jus cogens since it formed part of the common conscience of members of the international community.” While this representative overstated the international status of fetal rights, her comment illustrates that at least one delegate might have considered the ordinary meaning of “child” to include the unborn.

In his article considering the rights of the unborn under the Draft Convention on the Rights of the Child, Philip Alston asserts that the “natural and ordinary meaning of the term “child” does not encompass an unborn child:

In international law, at least, there is no precedent for interpreting either that term, or others such as ‘human being’ or ‘human person,’ as including a fetus. Where the intention has been to extend the reach in that way, the practice has been to specify that fact—an approach which was rejected during the drafting of the Convention. However, several issues suggest that, in spite of the facts considered by Alston, the Convention could be read as protecting the rights of the unborn. First, during the Convention’s drafting, a number of states’ representatives voiced concern that without further clarification the ordinary meaning of the term “child” would, in fact, be unclear. Also, the drafters seem to have rejected an explicit definition of “child” in order to encourage more widespread ratification of the treaty by allowing different interpretations of the term and therefore different understandings of the treaty’s scope. Finally, the Convention, as distinguished from other

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28 Alston, supra note 12, at 170 (citation omitted).
29 See infra part III.B.2.
30 See discussion infra part III.B.
international legal instruments, contains a preamble specifically addressing the rights of the unborn, the effect of which will next be examined.

B. The Convention preamble provides a context which could extend the meaning of “child” to include an unborn child.

The Convention’s ninth preambular paragraph quotes language from the Declaration of the Rights of the Child, noting the necessity of protecting the unborn: “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.” The plain meaning of this text suggests that a child is to be considered a “child” before birth, and that an unborn “child” is entitled to legal protection. However, the preambular text does not define “child” for the purposes of the Convention, because a treaty’s preamble is not binding law for the states parties.

As Philip Alston points out, a convention’s “preamble ‘does not possess any obligatory force’ of its own.” Opinions of the International Court of Justice (“ICJ”) support this assertion. In a 1993 decision, the ICJ noted that member states “encapsulated” their “declarations, determinations, aims and objectives” into the U.N. Charter’s first article to avoid the problem of the preamble’s non-justiciability. In its 1966 South West Africa decision, the ICJ said, “the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do now, however, in themselves amount to rules of law.” Therefore, neither the definition of “child” implicit in preambular paragraph 9 nor the text’s call for legal protection before birth could be relied upon by itself to assert the right to life of a fetus.

The preambular text, however, is not entirely impotent; it provides context as a basis of Convention interpretation. The Vienna Convention states, in article 31, that “meaning [is] to be given to the terms of the treaty in their context” and “[t]he context for the purpose of the interpretation of a treaty shall comprise [inter alia] the text, including its preamble . . . .” Since there seems not to exist a definitive ordinary meaning for the term “child” in the Convention, interpretive weight should be given to the preambular provision in the search for a definition. In light

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31 Convention on the Rights of the Child, supra note 1, pmbl. para. 9, 1577 U.N.T.S. at 45.
32 Alston, supra note 12, at 169 (quoting NGUYEN QUOC Dinh ET AL., DROIT INTERNATIONAL PUBLIC 122 (3d ed. 1987)) (citation omitted).
35 Vienna Convention, supra note 24, art. 31, 1155 U.N.T.S. at 340.
of the preamble’s concern with the unborn “child,” an argument could be made that the unborn are guaranteed the rights of the child under the Convention.\textsuperscript{36}

If preambular paragraph 9 does not extend the meaning of “child” under article 1 to provide the Convention’s legal protection, then what is the function of this preambular text? In 1990, Alston concluded “its significance is to endorse the already very widespread practice of taking whatever measures the state considers ‘appropriate’ with a view to protecting the fetus . . . What is ‘appropriate’ in that regard is for each state to determine for itself . . . provided that other human rights guarantees were not thereby violated.”\textsuperscript{37} Alston’s conclusion is plausible in light of the drafting history of the Convention, which reveals that the ambiguity of the meaning of “child” was deliberate and intended to secure the widest possible ratification of the Convention.

III. HISTORY OF THE CONVENTION

A. General History of the Convention

In 1978, at the 34th session of the United Nations Commission on Human Rights (“UNCHR”), the Polish delegation presented a draft proposal of a convention on the rights of the child (“Polish Proposal”).\textsuperscript{38} The Polish Proposal was based on the United Nations’ 1959 Declaration on the Rights of the Child, a non-binding document that called on state governments to recognize the rights of children.\textsuperscript{39} Speakers at the 34th session spoke on behalf of a binding convention, citing the fact that “children were suffering through wars and other forms of aggression, and under colonialism, racism, and apartheid.”\textsuperscript{40} Both Poland and the U.N.

\textsuperscript{36} Philip Alston came to the opposite conclusion, based on his understanding that the term “child” has an ordinary meaning that does not encompass the unborn:

In the present case it would be inconsistent with the general principles of treaty interpretation to suggest 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 to natural and ordinary meaning of the actual terms used in Articles 1 and 6 [definition of child, and right to life, respectively]. While the preambular paragraph can be considered to form one part of the basis for interpretation of the treaty, there is no obvious reason why the preamble would be resorted to in order to interpret what would otherwise appear to be a natural and ordinary meaning of the term “child.”

Alston, \textit{supra} note 12, at 169-70 (citation omitted).

\textsuperscript{37} \textit{Id.} at 172.


\textsuperscript{39} \textit{Guide to the “Travaux Préparatoires,” supra} note 27, at 21.

hoped the proposed convention would be adopted by the General Assembly in 1979, the International Year of the Child.\footnote{41}

The U.N. Secretary General “circulated the proposal to governments and international organizations for their ‘views, observations and suggestions.’”\footnote{42} The comments received prompted the realization that the draft convention should not be rushed to adoption in 1979, but rather should be closely reviewed and carefully modified.\footnote{43} To that end, in 1979, during its 35th session, the UNCHR established the Open-ended Working Group on the Question of a Convention on the Rights of the Child (“Working Group”) to draft a text of the Convention.\footnote{44}

The Working Group was composed of representatives from any of the forty-three member states that desired to attend. Intergovernmental organizations (“IGOs”) and U.N. member states participated as observers “with the right to take the floor” and non-governmental organizations (“NGOs”) sent representatives who could request to speak. The Working Group met annually for ten years to work on the draft convention. Decisions of the group were arrived at by consensus.\footnote{45}

By its tenth session in 1988, the Working Group had formulated a first reading, which it submitted to the U.N. Secretariat for technical review. Eight months after the first reading, the Working Group submitted the final draft text, which incorporated the Secretariat’s comments to the UNCHR. After approval by the UNCHR and by the U.N. Economic and Social Council, the draft was sent to the U.N. General Assembly for adoption. The General Assembly adopted the convention without a vote on November 20, 1989.\footnote{46}

B. Debates on the Definition of “Child” and the Rights of the Unborn

During the drafting process of the Convention, beginning with the first comments solicited by the Secretary General in response to the Polish Proposal and continuing through the Working Group sessions, concerned states debated the Convention’s language regarding the minimum age of childhood and the rights of the unborn. During these debates, a compromise evolved which purposefully left ambiguous the definition of a “child” under the Convention. In 1978, the International Committee on the Red Cross predicted the results of the drafting process: “The notion of ‘child’ has not . . . been made clear,” the Red Cross wrote, “[t]his silence seems wise and will facilitate universal application of the Convention irrespective of local peculiarities.”\footnote{47}

\footnote{41} Guide to the “Travaux Préparatoires,” supra note 27, at 21, 48-49.
\footnote{42} Id.
\footnote{43} Id.
\footnote{44} Id. at 21-22.
\footnote{45} Id. at 22.
\footnote{46} Id. at 22.
\footnote{47} Id. at 58.
Austria’s comments on the Polish Proposal, dated October 12, 1978, were the first to address the potential issue surrounding the definition of a child and rights of the unborn under the Convention. Austria noted that “the draft [of article 1] does not define the term ‘child.’”48 In response to article 449 Austria observed, “The scope of article IV is not clear. There is a possible inconsistency between ‘the child’s’ right to adequate pre-natal care and the possibilities for legal abortion provided in some countries.”50 In all, seven states and the International Committee of the Red Cross submitted questions or observations regarding their specific concerns regarding the ambiguity of the term “child” in the Polish Proposal.51 Notably, Barbados asked, “How far should [the child’s right to life] go? Does the child include the unborn child, or the foetus [sic]? Under specified circumstances, should a foetus [sic] be aborted without an offence being committed or at the relevant time was the foetus [sic] a human life?”52 New Zealand inquired, “Does the definition [of a child] begin at conception, at birth, or at some point in between?”53 That states raised questions regarding the scope of the word “child”—questions which were not clearly resolved in the Convention’s final text—demonstrates their concern over the term’s definition.

The first Revised Draft Convention on the Rights of the Child (“first Revised Draft”), adopted by the Working Group in 1980, did temporarily resolve the problem of the definition of a child. In article 1 of the first Revised Draft, a “child” is defined as “every human being from the moment of his birth to the age of 18 years unless, under the laws of his state, he has attained his age of majority earlier.”54

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48 Id. at 57.
49 Article 4 of the Polish Proposal reads:
The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

Id. at 34.
51 Austria, Barbados, France, Madagascar, Malawi, New Zealand, and Portugal are the states which submitted relevant comments. GUIDE TO THE “TRAVAUX PRÉPARATOIRES,” supra note 27, at 41-85.
54 Report of the Open-Ended Working Group Established by the Commission to Consider the Question of a Convention on the Rights of the Child, Commission on
Draft also abandoned the preambular language of the Polish Proposal entitling children to protection before birth.55 The debates that followed, however, led only to the restoration of the initial uncertain status of the unborn in the final Convention text.

1. Development of the Preamble

The first Revised Draft preamble did not contain reference to protection for the unborn. The Holy See led a proposal to reintroduce the words “before as well as after birth” to the fifth preambular paragraph.56 Those in favor of the amendment “stated that the purpose of the amendment was not to preclude the possibility of an abortion.”57 Those opposed felt that the “preambular paragraph should be indisputably neutral on issues such as abortion.”58 The Working Group did not resolve the issue until 1989, when participants consented to inclusion of the quotation from the 1959 Declaration on the Rights of the Child, “before as well as after birth.”59 The drafting group requested inclusion of the following statement in the travaux préparatoires: “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 States Parties.”60 Presumably, the group requested the statement’s inclusion so that if an issue of interpretation arose, an examination of the Convention’s drafting history would clearly reveal the drafters’ intentions. However, some delegations expressed the opinion, also recorded in the travaux préparatoires,

55 GUIDE TO THE “TRAVAUX PRÉPARATOIRES,” supra note 27, at 95. The Polish Proposal preambular paragraph 3 is nearly identical to the final Convention’s preambular paragraph 9. It reads: “Recognizing also that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” Id. at 34.

56 Considerations 1980 Working Group, Commission on Human Rights, 36th Sess., U.N. Doc. E/CN.4/L.1542 (1980), reprinted in GUIDE TO THE “TRAVAUX PRÉPARATOIRES,” supra note 27, at 102. The fifth preambular paragraph of the first Revised Draft reads: “Recognizing that the child due to the needs of his physical and mental development requires particular care and assistance with regard to health, physical, mental, moral and social development as well as legal protection in conditions of freedom, dignity, and security.” Report of the open-ended Working Group established by the Commission to consider the question of a convention on the rights of the child. Id. at 95.

57 Id. at 102.

58 Id.

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that “in all national legal systems protection was provided to the unborn child.” These delegates might logically conclude that the article 1 definition of “child” could include the unborn regardless of the preambular language. By this stage of the drafting, the text of article 1 was identical to the final Convention text; it did not define the minimum age of childhood. The United Kingdom sought advice from the U.N. Legal Counsel regarding the legality and legal force of the travaux préparatoires statement. Counsel warned that “seeking to establish the meaning of a particular provision of a treaty, through an inclusion in the travaux préparatoires may not optimally fulfil [sic] the intended purpose,” because Vienna Convention article 32 allows interpretive recourse to the travaux préparatoires only if the text of the treaty is determined to be unclear.

2. Development of Article 1

Article 1 of the first Revised Draft defined a “child” as “every human being from the moment of birth . . . .” In response to the argument of several states that childhood begins at conception, rather than at birth, Morocco “proposed that the words ‘from the moment of his birth’ should be deleted from the article in order to solve the difficulty.” Morocco’s modification, which resulted in the final wording of article 1(1), was subsequently adopted; the ‘difficulty’ of the definition of “child,” however, was not resolved. In 1989, Malta and Senegal proposed the addition of wording clearly defining childhood beginning at conception. The two countries withdrew their proposals before a vote “in light of the text of” the preamble, which called for “legal protection, before as well as after birth.”

61 Id. at 109. The state delegations supporting this view included Italy, Venezuela, Senegal, Kuwait, Argentina, Austria, Colombia, Egypt, and an NGO. Id.


63 GUIDE TO THE “TRAVAUX PRÉPARATOIRES,” supra note 27, at 115.


65 Id.


3. Development of Article 6

In 1988, the Working Group took up the issue of the right to life, embodied “in a proposal submitted by India.” The question of the right to life of the unborn was not broached because “in discussing the inclusion of a child’s right to life, the working group had agreed not to reopen the discussion concerning the moment at which life begins.” The Working Group thus foreclosed any interpretation of the rights of the unborn under the Convention based on the drafting history of what would become article 6.

4. Development of Article 24

Likewise, in its discussion of the text that was to become article 24 of the Convention, the “right of the child to the highest attainable standard of health,” the Working Group did not consider the possibility of conflicts between a guaranteed right to life of a fetus and the right to well-being of a child-mother whose pregnancy threatens her health. During the first comment period, Austria did note a possible inconsistency between “the child’s right to adequate pre-natal care and the possibilities for legal abortion,” but the issue was not addressed again by the Working Group during article 24’s drafting. The drafting history of article 24 is silent on the question of how the Convention might reconcile a possible conflict between a mother’s health and a fetus’s right to life or between the right to pre-natal care and the right to an abortion.

C. Ratification of the Convention

To date, 192 states, every state except the United States and Somalia, have ratified the Convention on the Rights of the Child, making it the most widely ratified convention in history. The Convention’s silence on the controversial issue of when childhood begins likely facilitated its widespread ratification, as the Red Cross predicted, since the laws of the states parties incorporate vastly differing notions regarding the legal

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69 Id. at 121.
73 See supra text accompanying note 45.
status of the unborn.\textsuperscript{74} The indistinctness of the definition of “child” in the Convention allowed these states to ratify the Convention without altering their views, or laws, on the subject.

D. \textit{Declarations and reservations of States Parties reveal states’ concerns that the textual ambiguity may effect domestic abortion law.}

Though the Convention’s failure to define a minimum age of childhood might have contributed to its sweeping ratification, some states parties were concerned with the Convention’s potential effect on domestic abortion laws. Twelve states parties submitted related declarations or reservations. Argentina, Ecuador, Guatemala, and the Holy See each put forward a declaration expressing their understanding that the Convention would “safeguard the rights of the child” from the moment of conception.\textsuperscript{75} In its declaration, the Holy See expressed its belief that “the ninth preambular paragraph will serve as the perspective through which the rest of the Convention will be interpreted, in conformity with article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969.”\textsuperscript{76}

France, Tunisia, the United Kingdom, and China each submitted a declaration affirming the right to voluntary abortions in their countries.\textsuperscript{77} The United Kingdom and China declared the Convention “applicable only following a live birth,” while Tunisia and France each expressed that the Convention would not interfere with domestic legislation “concerning voluntary termination of pregnancy.”\textsuperscript{78}

Four states, Indonesia, Luxembourg, Malaysia, and Botswana, submitted reservations, and Poland submitted a declaration indicating simply

\textsuperscript{74} Abortion laws of states parties provide evidence of these disparate views. For example, the Holy See considers “that a human being is to be respected and treated as a person from the very moment of conception.” 2 \textit{United Nations Dep’t of Economic and Social Affairs, Population Div., Abortion Policies: A Global Review} 46 (2001). Under Islamic (Sha’riah) law, the legality of abortion often depends on “whether the abortion is performed before ensoulment, the time at which a foetus [sic] gains a soul,” which is commonly considered to be 120 days after conception. 1 \textit{Abortion Policies: A Global Review}, \textit{supra} note 13, at 5. In England, Scotland, and Wales the Abortion Act of 1967 allows abortion “virtually on request” due to the “broad interpretation about what constitutes a threat to [the mother’s] health.” 3 \textit{United Nations Dep’t of Economic and Social Affairs, Population Div., Abortion Policies: A Global Review} 157 (2002).


\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.}
that domestic reproductive health law would supercede Convention provisions.\(^{79}\)

Some states that deposited declarations or reservations have insulated themselves from the invalidation of their domestic abortion law based on the Convention. However, the states that declared their understanding that a child should be protected from the moment of conception are still subject to a challenge of anti-abortion laws based on the competing rights of a pregnant child under the Convention. Whether the Convention can be used to contest domestic abortion laws, either to challenge the legality of abortion based on a fetus’s right to life or to challenge the illegality of abortion based on a pregnant mother’s right to life and to health, is not evident from the Convention text or from its history. To answer those questions, this note will next examine reports and observations of the Committee on the Rights of the Child (“the Committee”) and decisions of regional human rights bodies in the almost thirteen years since the Convention entered into force.

IV. THE EMERGENCE OF AN INTERNATIONAL NORM FROM SUBSEQUENT PRACTICE UNDER THE CONVENTION

A consideration of the text and history of the Convention reveals that the Committee on the Rights of the Child and regional human rights bodies could interpret the Convention to protect the right to life of the unborn. However, such an interpretation would conflict with the rights guaranteed to a pregnant child under the Convention. Subsequent practice of the Committee under the Convention recognizes this variance and suggests the emergence of an international norm in which the rights of a pregnant child trump the right to life of a fetus. Although regional human rights bodies have not directly addressed the question of fetal rights under the Convention, neither have they revealed a contrary practice. In fact, both the European Court of Justice and the Inter-American Commission on Human Rights have delivered opinions consistent with the norm’s limitation of fetal rights.

A. The practice of the Committee on the Rights of the Child under the Convention has developed an international norm.

The Committee on the Rights of the Child is the treaty body established by article 43(1) of the Convention “[f]or the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the . . . Convention.”\(^{80}\) Treaty bodies “provide authoritative interpretations of the treaty provisions,” so the Committee’s

\(^{79}\) Id.

\(^{80}\) Convention on the Rights of the Child, supra note 1, art. 43(1), 1577 U.N.T.S. at 58.
observations and discussions are an invaluable reference for determining which rights are, and are not, ensured under the Convention.

Originally, pursuant to article 43, the Committee consisted of ten members “elected by states parties from among their nationals” and serving as individual experts rather than as representative of their states. In 1996, as a result of the widespread ratification of the Convention, the U.N. General Assembly passed a resolution to amend the number of Committee members to eighteen. The Convention requires states parties to submit periodic reports to the Committee. Article 44(1) stipulates that a state must make its first report “within two years of the entry into force of the Convention for the State Party concerned” and “[t]hereafter every five years.” Rule 66 of the Committee’s Rules of Procedure, which were established according to Convention article 43(8), indicates that the Committee will submit a list of issues for the state party to address in its periodic report. Under Convention article 44, the Committee considers reports submitted and publishes concluding observations with general recommendations on each state’s report. Also, according to Rule 35 of the Committee’s Rules of Procedure, the secretariat prepares summary records of Committee meetings, including sessions during which the Committee considers state submissions, for general distribution.

Since it began monitoring states parties’ behavior under and implementation of the Convention, the Committee has inquired into and commented on states’ abortion laws. The Committee’s concluding observations and summary records of meetings reveal that the Committee does not interpret the Convention as foreclosing legal abortions. In fact, the Committee encourages the legalization of abortion to protect the life and health of the mother. However, while the Committee never suggests that abortion should be illegalized, it does condemn the use of abortion as a contraceptive technique, thereby opining that it is appropriate to protect a fetus when neither a mother’s life nor well-being is in jeopardy.

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81 Id. at art. 43, 1577 U.N.T.S. at 58-59.
1. The Committee’s Concluding Observations recognize the superiority of a pregnant child’s rights over the rights of a fetus.

In its concluding observations, which the Committee issues as a body, the Committee has consistently addressed abortion as a health concern as opposed to a right to life issue. In its observations on Libyan Arab Jamahiriya in 1998 and on Suriname in 2000, inter alia, the Committee included abortion in a list of health concerns, noting its concern “over the absence of data on adolescent health, including on teenage pregnancy, abortion, suicide, violence, and abuse.”\textsuperscript{87} Discussions about abortion in the Committee’s concluding observations fall under headings such as “Right to health (art. 24),”\textsuperscript{88} “Adolescent health,”\textsuperscript{89} and “Health and health services.”\textsuperscript{90}

In the concluding observations, the Committee has also repeatedly expressed its conviction that states parties should make efforts to “reduce the use of abortion as a means of contraception.”\textsuperscript{91} It expressed its concern in 2001 over the “growing use of abortion as a method of birth control” in Latvia.\textsuperscript{92} In its 2000 report on Armenia, the Committee listed as a concern “that abortion is the most commonly used means of family planning.”\textsuperscript{93}

In some instances, the Committee has expressed concern at high abortion rates in some states, but that disquiet seems to stem from concern for protecting teenage mothers from the health dangers of abortion. In its


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2000 report on Colombia, “concern is expressed that the practice of abortion is considered the leading cause of maternal mortality.” The Committee also “note[d] the high maternal mortality rates, due largely to a high incidence of illegal abortion” in its 2000 report on Paraguay.

The Committee never suggests in a concluding observation that the termination of a pregnancy is a violation of a fetus’s rights under the Convention, or that legal abortion violates the Convention. In fact, in two concluding observations, the Committee urges the member state to legalize abortions sought in certain circumstances. In its 1999 concluding observations on Chad, the Committee noted its concern “at the impact the punitive legislation regarding abortion can have on maternal mortality rates for adolescent girls” and “encourage[d] the State party to review its practices under the existing legislation authorizing abortions for therapeutic reasons, with a view to preventing illegal abortions and improving protection of the mental and physical health of girls.” In its 2001 concluding observations on Palau, the Committee “note[d] that abortion is illegal except on medical grounds and expresse[d] concern regarding the best interests of child victims of rape and/or incest in this regard.” The Committee recommended that Palau “review its legislation concerning abortion, with a view to guaranteeing the best interests of child victims of rape and incest.”

In its concluding observations, then, the Committee does not interpret the Convention as ensuring a fetus’s legally-enforceable right to life. The concluding observations suggest that the Committee recognizes fetuses to be entitled to some consideration, probably in light of preambular paragraph 9 (although no specific reference was made by the Committee to that provision), given its disapproval of the use of abortion to prevent unwanted births. However, the Committee clearly understands the Convention as conferring on adolescent mothers the right to life, to physical and to mental health, and to have her best interests considered in her state’s legislation, all of which definitively trump any consideration of a fetus’s life.

98 Id.
The summary records of the Committee meetings reveal the Committee members’ opinions that the rights guaranteed to a pregnant child under the Convention supercede any protection afforded to a fetus.

The summary records of the Committee meetings record the comments of individual Committee members in meetings considering the annual reports submitted by states parties. The summary records document the work of the Committee as it formulates concluding observations, and so necessarily reveal the same understanding of the Convention. The summary records are a useful supplementary tool in consideration of the Committee’s interpretation of the Convention because the summary records more clearly record the reasoning, grounded in Convention articles, of individual Committee members.

In the Committee’s 298th meeting, concerning China, Committee-member Mr. Hammarberg addressed the possibility of article 6 guaranteeing a fetus’s right to life. Hammarberg said there was no incompatibility between Chinese family planning policy, which allows abortion, and Convention article 6, which ensures a child’s right to life, “emphasizing that article 6 of the Convention did not concern abortion.” According to Mr. Hammarberg, article 6 should not be read to protect the unborn by prohibiting abortion. Other Committee members agreed. For example, in the Committee’s 86th meeting, regarding El Salvador, Mr. Mombeshora’s comments revealed his opinion that the Convention’s provisions should not apply to the unborn. According to Mr. Mombeshora, given that Salvadorian law prohibits abortion, and illegal abortion “tended to be most prevalent among unmarried adolescents, it seems that the lives of both the foetus [sic] and the girl-mother were being placed at risk by legislation that purported to offer protection from the moment of conception.”

One revealing discussion involving the relation of Convention articles 3 and 12 to abortion came during the Committee’s 281st meeting considering Croatia. The representative from Croatia asked the Committee whether the Convention prohibited a law obliging a girl to inform her parents of her intention to have an abortion. Miss Mason responded that “the Committee could not give a categorical answer to the Croatian question on a girl child’s freedom to choose,” but that national legislation should conform to article 3 (regarding the best interests of the child and consideration of the rights of parents) and article 12, (regarding a

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102 Article 3 reads, in pertinent part:
child’s right to be heard.

Mr. Hammarberg agreed with Miss Mason. Mrs. Karp took a culturally relativistic view and asserted that “what was best for a child varied from culture to culture. In the drafting of abortion legislation, there were many factors that needed to be weighed in the balance” including the repercussions of a girl informing her parents. During these discussions, the Committee members did not consider the fetus’s life; their only concern seemed to be the rights and best interests of the pregnant girls embodied in articles 3 and 12 of the Convention.

On several occasions, Committee members urged states to legalize abortion in order to protect the rights of girl-mothers. In the 356th meeting, for example, Ms. Karp urged Panama to reconsider its absolute prohibition on abortion “in view of the conflict between children’s right to survival [article 6] and the constraints imposed by early parenthood.” The majority of suggestions to legalize abortion were made by Ms. Karp, raising the concern that only one member, and not the Committee as a whole, considered legal abortion not only condoned by the Convention, but possibly encouraged by the Convention’s guarantee of rights to child-mothers. However, in its recommendations to Chad and Palau,
the Committee as a whole concluded that those states’ abortion laws should be liberalized,\textsuperscript{106} revealing some consensus on the issue.

The summary records of the Committee’s meetings reveal an attitude dismissive of a justiciable right to life of the unborn based on article 6, and accepting of legal abortion and favoring a pregnant child’s rights under the Convention over any potential consideration of the unborn child based on articles 3, 6, and 12. The next issue is whether the decisions of regional human rights bodies reveal anything about the interpretation of the Convention, specifically about the Convention’s protection of the unborn.

B. \textit{The practice of regional human rights bodies under the Convention has not contradicted the emerging norm.}

Each of the major regional human rights bodies, the African Commission on Human and Peoples’ Rights, the European Court of Human Rights, and the Inter-American Commission on Human Rights, is empowered to decide cases and make recommendations based on international human rights instruments, including the Convention on the Rights of the Child. The European Court of Human Rights may also decide human rights cases if they involve the interpretation of the Treaty of the European Community. Since the Convention came into force in September 1990, a number of complaints have been made to these regional bodies based in part on Convention provisions, and a number of decisions have been rendered with consideration to Convention provisions. No case has been heard by any of the regional bodies that addresses the rights of the unborn under the Convention. However, both the European Court of Human Rights and the European Court of Justice have delivered opinions consistent with the emerging international norm established by Committee practice.

1. African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (“African Commission”) was established “within the Organisation [sic] of African Unity to promote human and people’s rights and ensure their protection in Africa” by article 30 of the African Charter of Human and Peoples’ Rights (“African Charter”).\textsuperscript{107} The African Charter entered into force on October 21, 1986 and, as of September, 2001 was ratified by 53 states.\textsuperscript{108} Both the general provisions of the African Charter and those describing the mandate of the African Commission contain language suggesting that the Commission should consider international human rights instruments.

\textsuperscript{106} See text accompanying notes 95-97.
\textsuperscript{108} \textit{Id.}
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such as the Convention on the Rights of the Child. Article 18(3) of the African Charter provides that “[t]he State shall ensure . . . the protection of the rights of women and the child as stipulated in international decisions and conventions.”\(^\text{109}\) Article 60 enumerates the “applicable principles” of law to be considered by the African Commission, including “provisions of . . . other instruments adopted by the United Nations and by African countries in the field of Human and Peoples’ Rights . . . .”\(^\text{110}\)

Though it is at liberty to hear petitions based on, and to apply, the Convention, there has only been one complaint to the African Commission based on the Convention. In *African Legal Aid v. The Gambia*, the petitioner brought a claim based in part on 11, 32(1), and 32(2).\(^\text{111}\) However, the Commission did not reach the merits of the case, finding the complaint “inadmissible for non-exhaustion of local remedies.”\(^\text{112}\) The African Commission has not yet heard a case revealing its interpretation of the rights of the unborn under the Convention or otherwise.

2. The European System: European Court of Human Rights and European Court of Justice

The European human rights system is characterized by tension among the three sources of human rights law: domestic law, the European Convention on Human Rights, and European Community law. In Europe, both the European Court of Human Rights and the European Court of Justice rule on human rights issues. Their rulings contend with the various sources of human rights law in Europe. While the courts’ decisions do not reveal a position on the status of the unborn under the Convention on the Rights of the Child, neither do they contravene the emerging international norm placing the rights of a child mother above the rights of a fetus.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) established the European Court of Human Rights (“ECHR”) in 1959.\(^\text{113}\) Until 1998, complaints to the ECHR “were first the subject of a preliminary examination by the [European Commission on Human Rights], which determined their admissibility.”\(^\text{114}\) In 1998, with the entry into force of Protocol 11 to the European Convention, the European Commission on Human Rights

\(^{109}\) *Id.* at art. 18(3), 21 I.L.M. 62 (emphasis added).

\(^{110}\) *Id.* at art. 60, 21 I.L.M. 67.


\(^{112}\) *Id.*


\(^{114}\) *Id.*
was eliminated, leaving determination of admissibility to the ECHR.\textsuperscript{115} Pursuant to article 32 of the European Convention as amended by Protocol 11, the ECHR’s jurisdiction “extend[s] to all matters concerning the interpretation and application of the [European] Convention and the protocols thereto.”\textsuperscript{116} Though the European Convention does not contain a provision to this effect, the practice of the ECHR shows that if a complaint before it implicates the guarantees of other human rights instruments, the courts will consider those instruments.\textsuperscript{117} The ECHR has considered twenty-two cases involving reference to the Convention on the Rights of the Child.\textsuperscript{118} However, the ECHR has not yet heard a case soliciting its opinion on the rights of the unborn under the Convention.

The ECHR has heard two cases, Open Door and Dublin Well Women v. Ireland (“Open Door”) and Odievre v. France (“Odievre”), in which it considered the right to life of a fetus under domestic law and under the European Convention.\textsuperscript{119} In both cases, the ECHR explicitly refused to decide whether the right to life guaranteed by the European Convention article 2 extends to the unborn.\textsuperscript{120} Yet, in both cases, the ECHR found the domestic goal of protecting a fetus’s life to be a “legitimate aim.”\textsuperscript{121} The court’s determination that a European state’s endeavor to protect the life of the unborn is legitimate does not, however, indicate a conflict with the developing international norm protecting the rights of a pregnant girl over the potential rights of her unborn fetus. Importantly, in both cases the ECHR positions the protection of a fetus as a governmental \textit{aim} rather than as \textit{right} held by the unborn child. In a conflict between an aim and an explicitly granted Convention right, the right will trump the aim.

In Open Door, the ECHR considered the proportionality of restricting a party’s European Convention article 10 rights—to provide and receive information about abortion facilities outside of Ireland’s jurisdiction—in order to achieve the Irish government’s aim of protecting a fetus’s right

\textsuperscript{115} Id.
\textsuperscript{118} Based on author’s search of the European Court of Justice Database of the Case-law of the European Convention on Human Rights \textit{at} http://hudoc.echr.coe.int/hudoc/ (last visited Sept. 1, 2003).
The ECHR held that the Irish restriction violated European Convention article 10, explaining that while “[i]t is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights . . . they must do so in a manner which is compatible with their obligations under the [European] Convention.” The court’s reasoning suggests that if confronted with a conflict between a pregnant child’s rights and the protection of her unborn child, the court would find that the pregnant child’s rights supercede the protection of the fetus, even if domestic law pursues the legitimate aim of protecting the fetus.

The European Court of Justice (“ECJ”), which has jurisdiction in the European Union over disputes between member states, European Union institutions, and individuals, can decide human rights issues when the conflict implicates the interpretation or application of community law. The ECJ has not addressed the right to life of the unborn under the Convention on the Rights of the Child, but has delivered a preliminary ruling regarding whether abortion is a service within the meaning of Treaty of Rome. In Society for the Protection of Unborn Children v. Grogan, the ECJ addressed the same conflict as in Open Door, and held “that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.” The ECJ, restricted to ruling on community law, refrained from commenting on the legality of abortion, saying, “It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.” The ECJ has not delivered an opinion inconsistent with preferring the rights of a pregnant child to the potential rights of a fetus, and given the ECJ’s limited competence in the human rights area, it is unlikely that its future practice will contravene the emerging norm.

3. Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (“IACHR”) became an organ of the Organization of American States (“OAS”) by the

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123 Id. at para. 69.
126 Id. at para. 21.
127 Id. at para. 20.
1970 revisions to the OAS Charter. The IACHR’s main function is “to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.” Article 33 of the American Convention on Human Rights (“ACHR”) gives competence “with respect to matters relating to the fulfillment of the commitments made by the States Parties to the Convention” to both the IACHR and the Inter-American Court of Human Rights, established by Chapter VIII of the ACHR. The IACHR conducts fact-findings and country studies, issues decisions on human rights situations within the OAS, and receives petitions from member states that it can refer to the Inter-American Court of Human Rights.

The IACHR has heard petitions and decided cases based in part on the rights enumerated in the Convention on the Rights of the Child, including, inter alia, article 37(a) in several cases protesting the death penalty imposed on children, articles 37(a) and 40 in a case regarding the arrest and torture of a minor, article 6 in a case regarding the shooting of a civilian girl, and articles 91(1), 37, and 39 in a case regarding the rape of a seven-year-old. In its discussion of the rape case, the IACHR noted that the Convention offers “real and effective protection of children’s rights.”

In spite of its recourse to the Convention, the IACHR, like the African Commission and the ECHR, has not rendered a decision directly revealing its understanding of the rights of the unborn under the Convention; no such claim has been brought under the Convention. Reluctance to assert fetal rights claims before the IACHR could be due to its 1981 opinion in a case against the United States and the Commonwealth of Massachusetts protesting the reversal of conviction of a doctor who per-
formed an abortion ("Baby Boy"). The Baby Boy opinion suggests that the IACHR would interpret the rights of the unborn under the Convention consistently with the emerging international norm preferring the rights of a pregnant child.

In the Baby Boy case, the IACHR offered its interpretation of article 4 of the American Convention on Human Rights, which 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.” Though this article seems to guarantee the right to life of a fetus, the IACHR eschewed a finding that “the American Convention had established the absolute concept of the right to life from the moment of conception.” The court based this conclusion in part on the drafting history of the American Convention, during which the words “in general” were added to the article, “based on the legislation of American States that permitted abortion, inter alia, to save the mother’s life and in case of rape.” The IACHR interpreted the words “in general” as providing an exception to the explicitly granted right to life from the moment of conception.

Given this interpretation of the American Convention, which seems to explicitly provide rights to the unborn, the IACHR would likely interpret the Convention on the Rights of the Child as providing only very limited protection for the unborn. The IACHR would almost certainly reject a claim against the legality of abortion in an OAS member state based in part on the Convention, especially given the Convention’s explicit grant to girl-mothers of the right to life, to survival and development, to physical and mental health, and to having her best interests considered. One uncertainty that remains is the possibility of bringing a claim legalizing abortion before these regional bodies based on the enumerated rights of the girl-mother.

V. Conclusion

The Convention on the Rights of the Child is unclear on the issue of whether, under its provisions, a child’s life begins at birth, at conception, or at some point in between. The possibility of asserting the rights of the unborn under the Convention raises the problem of the right to life of a fetus conflicting with the right to life, health, and best interests of a pregnant girl. Since the Convention entered into force in 1990, the practice of the treaty body charged with its interpretation and application has sug-

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140 Id.
gested an emerging normative approach to this problem. In light of the ambiguity in the Convention, international law has developed which considers that the rights of the mother supercede the right to life of an unborn child under the Convention. The law also affords a fetus limited right to protection, evidenced by the Committee on the Rights of the Child’s disapproval of the use of abortion as a contraceptive method. There is no regional human rights practice contrary to the emerging norm. In fact, an investigation of regional bodies’ positions on the rights of the unborn suggest that their future practice would be consistent with this emerging norm.

Those states parties that submitted reservations and declarations safeguarding domestic legal abortion against the Convention predicted that the Convention’s ambiguity regarding fetal rights might be used to challenge the legality of abortion under international human rights law. Though subsequent interpretations of the Convention have not yet been used to challenge national abortion laws, the opposite of those reserving states’ predictions may prove true. The international law that has emerged from the Convention’s ambiguity might be used, instead, to strike down laws restricting the legality of and access to abortions for pregnant children, when abortion would protect a girl’s life, health, or best interests.

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