

# Neither By Treaty, Nor By Custom:

## *Through the Doha Declaration, the World Rejects Claimed International Rights to Abortion and Same-Sex Marriage, Affirming Traditional Understandings of Human Rights*

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*[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>1</sup>*

## INTRODUCTION

Over three decades ago, left-wing social deconstructionists at the United Nations ("U.N.") and worldwide began to lay the groundwork for a massive push to claim "human rights" as their own, increase access to legal abortions, and redefine traditional notions of the family structure<sup>2</sup> by inserting vague language that arguably supports liberalized abortion access into international human rights documents. Arguably, they saw their first success with the 1979 Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")<sup>3</sup> and continued with the 1989 Convention on the Rights of the Child ("CRC")<sup>4</sup> and a number of informal documents produced by regional or

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1. Universal Declaration of Human Rights, pmbl., G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, at 71 (Dec. 12, 1948) [hereinafter UDHR].

2. "There are three major elements to . . . feminist ideology as it has related to multilateral dialogue: the sexual autonomy of minor children, especially girls; the redefinition of family and marital life; and abortion rights. Of these three, the most highly sought-after component . . . has been abortion, with the ultimate goal of establishing an international right to abortion-on-demand for women and girls." Douglas Sylva & Susan Yoshihara, *Rights by Stealth: The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion*, 7 NAT'L CATH. BIOETHICS Q. 97 (2007), reprinted in DOUGLAS A. SYLVA & SUSAN YOSHIHARA, *RIGHTS BY STEALTH: THE ROLE OF UN HUMAN RIGHTS TREATY BODIES IN THE CAMPAIGN FOR AN INTERNATIONAL RIGHT TO ABORTION 2* (2d ed. 2009), available at [http://www.c-fam.org/docLib/20100126\\_IORG\\_W\\_Paper\\_Number8FINAL.pdf](http://www.c-fam.org/docLib/20100126_IORG_W_Paper_Number8FINAL.pdf).

3. Convention on the Elimination of All Forms of Discrimination against Women: Commission on the Status of Women: CSW, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979) [hereinafter CEDAW]. A Minority Views Senate Report filed in 2002 by committee ranking member Jesse Helms (R-NC) and Senators Richard Lugar (R-IN), Chuck Hagel (R-NE), Bill Frist (R-TN), George Allen (R-VA), Sam Brownback (R-KS), and Michael Enzi (R-WY) asserts that CEDAW is "the most ambitious multilateral convention on women ever undertaken by the international community." S. REP. NO. 107-9, at 15 (2002); see Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123, 154-57 (2006); see also Laurel MacLeod & Catherina Hurlburt, *Exposing CEDAW* (Sept. 5, 2000), <http://www.dadi.org/cedaw.htm>.

4. Convention on the Rights of the Child, G.A. Res. 44/25, at 167, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989) [hereinafter CRC] (adopted in connection with the World Summit for Children); see William L. Saunders, Jr., *Committees Gone Wild: How U.N. Bureaucrats Are Turning 'Human Rights' Against the Family*, 24 THE FAMILY IN AMERICA 51, 57 (2010) (noting that the CRC was adopted in connection with the World Summit for Children).

Certain sections of the CRC (most notably Articles 28 and 29) can be interpreted as diverging from the previous two covenants and the Declaration due to their extensive treatment of the responsibility of the state regarding education. Yet the CRC reaffirms many of the provisions regarding education and the family in the 1948 Declaration and the 1966 covenants.

Saunders, *supra*, at 58. More generally,

"[i]nternational conventions are often designed, not only to clarify the content of international law, but to alter national norms in identified substantive areas . . . . But even while setting forth norms designed to govern national law, international documents may simultaneously—and somewhat inconsistently—disclaim any intent to override national policies (perhaps to encourage joinder by non-compliant nations)."

international meetings.

In recent years, attorneys around the world have begun to utilize this framework by pushing for customary international law to be used by national courts as they decide cases arising under domestic law<sup>5</sup> and by pressuring these national courts to interpret vague language in international human rights documents requiring legalized abortion. Members of committees under various human rights treaties have done likewise.

One such illuminating case was decided by the Colombian Corte Constitucional (Constitutional Court) in 2006,<sup>6</sup> the “first constitutional decision that pro-

Wilkins & Reynolds, *supra* note 3, at 124 n.5.

5. See generally Wilkins & Reynolds, *supra* note 3, at 131. This is in spite of the U.N. Charter itself, which states: “Nothing contained [herein] shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter,” U.N. Charter art. 2, para. 7, and a 1960 General Assembly Resolution stating: “[A]ll peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,” Declaration on the Granting of Independence to Colonial Countries and Peoples, pmbl., G.A. Res. 1514 (XV), at 66, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960); Robert John Araujo, *Sovereignty, Human Rights and Self-Determination: The Meaning of International Law*, 24 *FORDHAM INT’L L.J.* 1477, 1483–84 (2001). Prominent scholars have noted that in practice, however, “[a] complete analysis of how international law shapes the contours of domestic policies—including the interpretation of the United States Constitution—would require numerous chapters in a fairly hefty book.” Wilkins & Reynolds, *supra* note 3, at 125.

6. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.). This case was brought by plaintiffs Monica Roa, Program Director at Women’s Link Worldwide and a native Colombian expatriate attorney, along with students from Universidad de los Andes. Although none of the plaintiffs demonstrated concrete injury, this is not a requirement of standing in Colombia. CONSTITUCION POLÍTICA DE COLOMBIA [C.P.] art. 242.

In the pertinent parts, the plaintiffs argued that the articles of the Código Penal (Criminal Penal Code) that criminalized or otherwise related to the criminalization of abortion, C. PEN. art. 32 no. 7, 122–124, were in violation of a number of international human rights treaties that, they claim, make up the “constitutional block.” See Verónica Undurraga & Rebecca J. Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006*, in *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW* 215–47 (Susan H. Williams ed. 2009) 216, 218 n.17, 226–27 n.36 (further addressing the Corte’s resolution of the potential discrepancy between Constitución Política de Colombia [C.P.] art. 93 (“International treaties and agreements ratified by Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international human rights treaties ratified by Colombia.”) and art. 4 (“The Constitution is the supreme law. In all cases of incompatibility between the Constitution and the law or any other legislation or regulation, the constitutional provisions will apply . . .”) by using the French “bloc de constitutionalité” concept, though noting that international law has not been incorporated in the “bloc de constitutionalité” in France or the “bloque de constitucionalidad” in Spain); see also *id.* at 228–31, 244–45 (discussing “questions” and “problem[s]” with the “constitutionalization of international human rights law,” noting that “neither [the domestic constitution nor the international law may] keep its original meaning after their fusion,” and that “giving priority to the treaty looks very similar to creating an alternative procedure of constitutional reform,” and both “reduc[es] the importance of legislative deliberation [and] entrust[s] important political decisions to non-elected judges.”) (citing Mariano Fernández-Valle, *La supremacía internacional y la construcción justa de soberanía política: ¿hacia dónde vamos?*, in *SEMINARIO INTERNACIONAL JUSTICIA Y REPARACION PARA MUJERES VÍCTIMAS DE VIOLENCIA SEXUAL EN CONTEXTOS DE CONFLICTO ARMADO INTERNO* 155–70 (2007)). The plaintiffs further argued, inter alia, that these articles of the Código Penal violated the

vide[d] an international human-rights framework to review the constitutionality of abortion under domestic law.”<sup>7</sup> Despite the Colombian Constitution’s explicit protection of life,<sup>8</sup> the Corte Constitucional there declared portions of the articles of the Colombian Código Penal [Criminal Code] that criminalized abortion to be unconstitutional.<sup>9</sup> The Corte ruled that abortion could not be illegal when the mother’s life or physical or mental health is at risk, when the preborn child has serious malformations indicating probable non-viability, or when the pregnancy is the result of rape, incest, unwanted artificial insemination, or unwanted implantation of a fertilized ovum.<sup>10</sup> This was based on the

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following rights they enumerated in the Constitution: the right to dignity in article 1; the right to life in article 11; the right to bodily integrity in article 12; the right to equality and to liberty in article 13; and the right to health in article 42.

7. Undurraga & Cook, *supra* note 6, at 241.

8. The Constitución Política de Colombia [C.P.] protects the right to life in its preamble (on “ensur[ing] . . . life”), in article 2 (noting that the “authorities of the Republic are established in order to protect all persons residing in Colombia, [including] their life . . .”), and in article 11 (“The right to life is inviolable. There will be no death penalty.”). The Corte accounted for this in its finding that the “life of the unborn is a constitutional objective value, and, as such, is under the protection of the state,” Undurraga & Cook, *supra* note 6, at 232 (citing Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, (Colom.), para. 5).

However, the Corte “borrowed heavily from the German [Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] I, 1975; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (an official summary of which may be found at [http://www.bundesverfassungsgericht.de/en/decisions/fs19930528\\_2bvf000290en.html](http://www.bundesverfassungsgericht.de/en/decisions/fs19930528_2bvf000290en.html) (last visited Aug. 10, 2010))] and Spanish [T.C., Apr. 11, 1985 (S.T.C., No. 53/1985) (Spain)], constitutional decisions on abortion,” and concluded that “only born persons can be bearers of the subjective right to life,” and that “unborn life is accorded a weaker degree of protection than born life.” Undurraga & Cook, *supra* note 6, at 232 (citing Corte Constitucional [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, (Colom.), para. 5).

Therefore, since the Corte found that “the rights of the pregnant woman . . . are in conflict with the duty to protect [unborn] life,” Undurraga & Cook, *supra* note 6, at 234–235 (citing Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, (Colom.), para. 6), the Corte relied on the UDHR, the International Covenant on Civil and Political Rights, (G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]), the International Covenant on Economic, Social and Cultural Rights, (G.A. Res. 2200A (XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR]), CEDAW, and the Belém do Pará Convention (Inter-American Commission on Human Rights, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, General Assembly to the Organization of American States, 24th Sess., A-61 (1994)) [hereinafter *Belém do Pará Convention*], as well as international bodies’ interpretations and recommendations, and the U.N. World Conferences on Women to hold that “the protection of prenatal life must be balanced with the state’s duty to ensure pregnant women’s dignity, autonomy[,] and their rights to life, health[,] and personal integrity,” Undurraga & Cook, *supra* note 6, at 235. Nonetheless, the decision has been criticized by some pro-abortion advocates as not going far enough. See Undurraga & Cook, *supra* note 6, at 236–37. For an interpretation of the Corte’s decision, see *id.* at 237–41.

9. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, (Colom.); C. PEN. arts. 32 no. 7, 122–24.

10. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, (Colom.), *supra* note 6. The Court further found that physician certification is adequate evidence of a risk to the mother’s life or health and of fetal non-viability; that a criminal complaint is adequate evidence

Court's finding that international human rights law could be applied in Colombia through the Court's "incorporat[ion of] regional and international human rights law within its judicial review of the abortion legislation."<sup>11</sup>

Similarly, in 2005 the U.N. Human Rights Committee relied on the International Covenant on Civil and Political Rights ("ICCPR")<sup>12</sup> in ordering Peru to

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of rape or incest; that conscientious objection is individual, not institutional, and that objecting individuals must defer; and that no social security or health regulations may create barriers to access, so legal abortions were to be covered by the social security system and no consent is required except for girls under fourteen years of age (however, even this consent requirement may be waived in cases of emergency.) Virginia Chambers, regional director of Latin America and Caribbean programs at Ipas, a non-profit organization that works around the world to enhance women's sexual and reproductive rights, has publicly stated that she believes this decision "will cause some countries to do some real soul-searching about why their laws are so punitive toward women." Ipas, *A Victory in Colombia: Court Ruling Decriminalizes Some Abortions*, IPAS (May 11, 2006), [http://www.ipas.org/Library/News/News\\_Items/A\\_victory\\_in\\_Colombia\\_Court\\_ruling\\_decriminalizes\\_some\\_abortions.aspx](http://www.ipas.org/Library/News/News_Items/A_victory_in_Colombia_Court_ruling_decriminalizes_some_abortions.aspx).

11. Undurruga & Cook, *supra* note 6, at 216, 220. Specifically, the Court first incorporated international human rights treaties into the "constitutional block": ICCPR art. 6 (on the "right to life"), as interpreted by the Human Rights Committee, General Comment No. 6, 30/04/82 (on a "require[ment] that States adopt positive measures" to ensure the "right to life"); CEDAW art. 12.1 (on "equality of . . . access to health care services, including those related to family planning"), as interpreted by the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 on Violence Against Women (on a "require[ment]" that States "ensure," *inter alia*, "equal access to health care" and "that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regards to fertility control . . ."); and ICESCR art. 12 (on the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health"), as interpreted by the ICESCR Committee, General Comment No. 14 (on "women and the right to health," including "sexual and reproductive health" and "full reproductive rights," E/C 12/2000/4). The Court then followed European cases—the German and Spanish constitutional decisions on abortion—in applying the proportionality principle. *See* Undurruga and Cook, *supra* note 6, at 237–41. Undurruga and Cook conclude that "[t]he Court made clear that gender equality of woman and girls promotes the dignity of all human beings, not only women, and is a step in humanity's advancement towards social justice," *id.*, and further, that:

[t]he Court enriched the meaning of the dignity of women by interpreting constitutional provisions in light of international human rights sources with a feminist perspective, and laid a foundation for protecting the reproductive rights of women in countries that are parties to the treaties on which the Court relies . . . . The Court thereby adds gender-sensitive meaning to human rights, generally, and the right of pregnant women to human dignity, in particular.

*Id.* at 247.

The Court did, however, note that "international jurisprudence is a relevant guide for the interpretation of international treaties provisions that are part of the constitutional block, *which is different than saying that those decisions are directly part of the constitutional block.*" Undurruga & Cook, *supra* note 6, at 227 n.40 (citing Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006 Sentencia C-355/06 (Colom.), para. 8.4) (emphasis added).

Regarding outcomes, the first legal abortion in Colombia took place in 2006. *See* Jeremy McDermott, *First Legal Abortion in Colombia*, BBC NEWS, Aug. 25, 2006, <http://news.bbc.co.uk/2/hi/americas/5284604.stm>. Since then, in 2010 and in the capital city of Bogota alone, at least three abortion clinics have been closed by officials, with the most recent due to "hiding illicit activity such as illegal abortions and trafficking of minors," the "employ[ment of] unlicensed medical personnel," and not being "equipped to provide ultrasounds." Catholic News Agency, *Abortion Clinic in Colombia Closed for Trafficking Children*, CATHOLIC NEWS AGENCY, July 16, 2010, <http://www.catholicnewsagency.com/news/abortion-clinic-in-colombia-closed-for-trafficking-children>.

12. The Human Rights Committee found the Peruvian national had a right to abortion based on the ICCPR, which provides for (a) the provision of a domestic remedy for violations of the Covenant,

guarantee access to legal abortion and to take measures to provide reparations to a young woman who was denied an abortion,<sup>13</sup> despite the fact that Peru's domestic law forbids abortion.<sup>14</sup>

This trend of courts being asked to rely upon international law, in one form or another, to decide cases arising under national law<sup>15</sup> is occurring with increasing frequency.<sup>16</sup> Likewise, abortion advocates are using human rights treaty bodies to press for changes in national laws. As Undurraga and Cook note, "[w]omen's rights advocates . . . are . . . relying more on the broader range of women's rights recognized by international treaties, and the comparatively stronger international enforcement mechanisms."<sup>17</sup>

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ICCPR art. 2; (b) the prohibition of "torture or [] cruel, inhuman or degrading treatment or punishment," ICCPR art. 7; (c) the prohibition of "arbitrary or unlawful interference with . . . privacy," ICCPR art. 17; and (d) "the right [of every child] to such measures of protection as are required by his status as a minor," ICCPR art. 24. This is absurd on its face—how could a provision like article 24 that "protect[s]" children provide a right to abortion, which takes the life of an unborn child? Further, ICCPR article 6 states: "Every human being has the inherent right to life. This right shall be protected by law."

13. Views of the Human Rights Committee, 85th Sess., Communication No. 1153/2003, CCPR/C/85/D/1153/2003 (Nov. 22, 2005) (discussing *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005) (also known as *Llantoy Huamán v. Peru*)); STEPHEN M. KRASON, *THE INTERNATIONAL PRO-ABORTION LITIGATION STRATEGY* 3–4 (2006); Sylva & Yoshihara, *supra* note 2, at 28–30 (addressing both the Peru and the Colombia cases).

14. C. PEN. art. 114–120 (Peru). Furthermore,

the very existence of laws making abortion illegal in Latin America rebuts any . . . allegation [that there is a right under customary international law to abortion], for they make it impossible for abortion proponents to satisfy the central requirement of proving customary international law—that is, a consensus among nations on the point in question.

William L. Saunders, Jr., *Washington Insider*, 6 THE NATIONAL CATHOLIC BIOETHICS QUARTERLY 216 (2006).

15. As Mattias Kumm has rightly declared, "One of the most pressing questions of contemporary constitutional law is how to think about the relationship between the national constitution and international law." Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 256–57, 293 (Sujit Choudhry ed., 2006); see also Krason, *supra* note 13, at 2 n.8 (expressing concern at the "possibility that national law might be changed without that nation's democratically constituted legislature having a say in the matter").

16. As Senator Bill Frist (R-TN) asserted in 2002, even in the United States,

policy norms, interpreted by . . . official bodies, have increasingly entered the U.S. judicial system as customary international law . . . . Some proponents of vaguely worded treaties have advanced the concept that modern interpretation of international law requires the incorporation of such interpretations into the U.S. legal system . . . . Such a development would create [] an unwarranted loophole through which purported customary international law—such as pronouncements by official UN committees—would be held binding under U.S. domestic law with little or no scrutiny by our nation's lawmakers.

S. REP. NO. 107–9, at 24 (2002).

17. Undurraga & Cook, *supra* note 6, at 225 (citing Ruth Rubio-Marín & Martha I. Morgan, *Constitutional Domestication of International Gender Norms: Categorizations, Illustrations and Reflections from the Nearsides of the Bridge*, in *GENDER AND HUMAN RIGHTS* 113–52 (Karen Knop ed., 2004)). Undurraga and Cook cheer this judicial activism, claiming that "[s]ociety's normative values on abortion usually reflect men's stance regarding abortion, and not women's," and that they are thus "in need of analysis for comparative inquiries." Undurraga & Cook, *supra* note 6, at 242.

This unprecedented push for abortion rights, however, has not gone unanswered. Pro-life advocates have worked to reassert the true nature of human rights and counter this push for abortion rights, both domestically and internationally.

The conflicting viewpoints on international law, sovereignty, and values warrant a reexamination of the nature of international law, the methods by which international law may be developed, and the application of international law in the human rights arena. This Article will first look at emerging trends in international law to clarify its various forms and examine two schools of thought on what constitutes international law. It will next consider the “pro-life” and “pro-traditional marriage” language of the foundational human rights documents, discuss the opposition mounted by “pro-choice” advocates who argue that customary international law is developing in such a way as to recognize a “human right” to abortion, and review a recent U.S. response to this push for a “right” to abortion. Finally, this Article will clarify developments in customary international law, analyzing the traditional understandings of human rights found in the 2004 Doha Declaration, which itself rebuts any argument that a right to abortion or same-sex marriage has developed under international law.

## I. EMERGING TRENDS IN PUBLIC INTERNATIONAL LAW

In recent years, international law has gained increasing importance in the landscape of the world’s jurisprudence. This is due in part to the reality that “international treaties now deal not only with the obligations of nations, but also with the rights of individuals.”<sup>18</sup>

The texts that comprise the body of international human rights documents fall into a variety of categories, each of which carries its own standard as to the extent to which courts may utilize the documents therein in reaching their decisions. In order to analyze differing points of view on international law and the framework of its possible uses, then, it is necessary first to review these categories and the two major approaches to their application.

### A. *Treaty and Custom*

Public international law (“international law”)<sup>19</sup> is comprised of (1) treaties, or “international agreements,” and (2) “customary law.” These distinct varieties of international law each carry a different weight in many domestic courts, as they do in the United States.

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18. Wilkins & Reynolds, *supra* note 3, at 127 (internal footnotes omitted).

19. “Public international law” is comprised of the “rules and principles of general application dealing with the conduct of states and international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987).

Since treaties are written agreements between or among nations,<sup>20</sup> each party is able to read the written terms and decide whether it wishes to be bound by them or, rather, to negotiate new ones. The two most fundamental, best-known international human rights treaties are the International Covenant on Civil and Political Rights ("ICCPR")<sup>21</sup> and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").<sup>22</sup>

The United States Constitution, Article VI, cl. 2 addresses the role that treaties may play in domestic courts; it provides in pertinent part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made . . . under the Authority of the United States, shall be the supreme law of the land."<sup>23</sup> This indicates the weight that the Founding Fathers explicitly and distinctly afforded to treaties.

Customary international law consists of customs among nations that, over time, have gained the consent of all the nations of the world;<sup>24</sup> it "results from a general and consistent practice of states followed by them from a sense of legal obligation."<sup>25</sup> Since customary international law is unwritten and lacks clear terms, it always requires that a court examine evidence to discern it. Article VI of the U.S. Constitution does not refer to "customary international law."<sup>26</sup>

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20. Wilkins and Reynolds address the origin of treaties and their role in the framework of international law:

Treaty law—beginning with the Treaty of Westphalia—began as the primary fount of international law. [Treaty of Westphalia, Holy Roman Emperor-King of Fr., Oct. 24, 1648.] For centuries, treaties dealt primarily with issues of war, peace, boundary disputes, navigation, and commerce—issues that were fundamental to the relationship of one nation with another. Indeed, the phrase "international law" reflects this reality: international law governed conduct between, or "inter," nations.

Wilkins & Reynolds, *supra* note 3, at 127–28 (footnotes omitted). International law defines a treaty as any "purposeful agreement among states." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 1 intro. note at 18. The term "treaties" as defined in the U.S. Constitution, however, is somewhat more limited and denotes the process by which the U.S. may agree to such a "purposeful agreement." See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 n.10 (1997). The modern U.N. system is "promoting the rapid growth of international treaties and conventions." Wilkins & Reynolds, *supra* note 3, at 128.

21. This treaty was ratified by the United States in 1992 under the Bush Administration, with a series of reservations, understandings and declarations.

22. This treaty was signed by the United States in 1979 under the Carter Administration; it has not been ratified by the United States.

23. The U.S. Constitution further states that treaties may be a basis for Article III federal court jurisdiction. U.S. CONST. art. III, § 2.

24. For a precise analysis of customary international law and its role in domestic courts, see generally Bradley & Goldsmith, *supra* note 21.

25. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). For more information, see Bradley & Goldsmith, *supra* note 21, at 818 n.11.

26. The only reference to customary international law in the U.S. Constitution is that the Congress may "define and punish . . . Offenses against the Law of Nations." U.S. CONST. art. I, § 8. Customary international law is part of the Law of Nations. Bradley & Goldsmith, *supra* note 21, at 818. Additionally, some nations expressly delineate the domestic legal status of customary international law in their constitutions. See *id.* at 819 n.21.



Though the matter is far from settled, the U.S. Supreme Court has indicated that customary international law is to be applied in the U.S. as federal common law.<sup>27</sup>

There is, too, a third body of documents that has been termed “soft law.”<sup>28</sup> This term is misleading, as these texts do not constitute *law* at all, but rather a set of documents that *at most* provide evidence of the norms of international customary law.<sup>29</sup> This type of nonbinding “law” is generally advisory or aspirational and is not to be directly relied upon by courts. Examples of soft “law” include nonbinding international human rights documents, nonratified treaties, and the opinions of committees.<sup>30</sup>

The committees created by international human rights documents, such as the

27. Bradley and Goldsmith refer to this as the “modern position” and note that “[d]uring the last twenty years, almost every federal court that has considered the modern position has endorsed it,” some even “referr[ing] to it as ‘settled,’” “albeit mostly in the limited context of the [Alien Tort Statute].” Bradley & Goldsmith, *supra* note 21, at 816–17, 837 (citing *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (referring to the “settled proposition that federal common law incorporates international law”), *cert. denied*, 116 S. Ct. 2524 (1996); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1473, 1475 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (“It is . . . well settled that the law of nations is part of federal common law.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (“[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law.”); *United States v. Schiffer*, 836 F. Supp. 1164, 1170 (E.D. Pa. 1993), *aff’d*, 31 F.3d 1175 (3d Cir. 1994); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987), *reh’g granted on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff’d on other grounds*, 654 F.2d 1382 (10th Cir. 1981)).

Bradley and Goldsmith further note that “[n]umerous additional lower court decisions recite, often with a citation to *The Paquete Habana*, 175 U.S. 677, 700 (1900), that [customary international law] is part of the ‘common law,’ the ‘law of the United States,’ or ‘our domestic law.’” Bradley & Goldsmith, *supra* note 21, at 837 n.150 (citing *Garcia-Mir v. Meese*, 788 F.2d 1466, 1453 (11th Cir. 1986) (“common law”); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (“law of the United States”); *United States v. Feld*, 514 F. Supp. 283, 288 (E.D.N.Y. 1981) (“our domestic law”)); *see also* *First Nat’l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (quoting *The Paquete Habana*, 175 U.S. at 700, and stating, “in dicta and without explanation,” Bradley & Goldsmith, *supra* note 21, at 837 n.150, that international law is “part of our law”).

Finally, as Bradley and Goldsmith note, many scholars support the “modern position.” Bradley & Goldsmith, *supra* note 21, at 817, 837 (citing numerous supporting articles).

28. Wilkins & Reynolds, *supra* note 3, at 127.

29. *See generally id.* at 130 (“[S]oft law’ is transmuted into ‘hard law’ . . . if and when soft law norms . . . come to be seen as evidence of customary international law.”).

30. These soft law norms are being “churn[ed] out . . . at an ever-increasing rate.” *Id.* at 128; *see also id.* at 128–29. “Not long ago, . . . soft law documents were considered little more than helpful—or, perhaps, even irrelevant—suggestions.” *Id.* at 129.

Just a decade ago, scholars suggested that the norms adopted at international negotiations might have little meaning because they are often adopted merely to reach a “consensus” or to “appease popular or ‘politically correct’ sentiment.” Neil H. Aftran, *International Human Rights Law in the Twenty-First Century: Effective Municipal Implementation or Paean to Platitudes*, 18 FORDHAM INT’L L.J. 1756, 1758 (1995). Even the “hard” law language of treaties was often disregarded in the recent past. One writer noted that, in a conversation with a Latin American lawyer-diplomat over a decade ago, he was told that treaties signed by the lawyer’s country were “negotiated by the Ministry of Foreign Affairs, and when approved . . . were ‘locked in a cabinet and almost never looked at thereafter.’” John H. Jackson, *Status of*

Human Rights Committee that pressured Peru to guarantee access to legal abortion and to provide reparations to the young woman who was denied an abortion,<sup>31</sup> can cause particular confusion due to the misperception that they are *courts* that can issue binding opinions interpreting the language of the relevant treaty. These committees are not, in fact, international courts like the International Court of Justice in The Hague, the International Criminal Court, or the international tribunals convened to consider war crimes and genocide in the Balkans and Rwanda. Rather, they are created by the international human rights documents themselves; each of the many human rights treaties resulted in the formation of a committee, or “treaty monitoring body.”<sup>32</sup>

For example, the Human Rights Committee was created by ICCPR.<sup>33</sup> Nations that have ratified the Covenant are obliged to submit periodic reports to the Committee.<sup>34</sup> Though the Committee has no enforcement or binding interpretive power, it does “study the reports submitted.”<sup>35</sup> Moreover, under the Op-

*Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 322 n.70 (1992).

*Id.* at 129 n.21. However, “[t]oday, they are more than mere words.” *Id.* at 129.

In the new Millennium, soft law norms generated at UN meetings can rapidly attain a status approximating hard law. As a result of constant negotiation, reexamination, and reformulation, various actors in the international legal system . . . develop expectations that these norms will be respected. If expectations related to enforcement are low, a norm is considered “soft.” But expectations grow and norms “harden.” Eventually, what begins as “soft law” is transmuted into “hard law.” This occurs if and when soft law norms—crafted and elaborated in UN conference negotiations—come to be seen as evidence of customary international law.

*Id.* at 129–30 (footnotes omitted).

For an overview of the basic structure of the United Nations, see generally Krason, *supra* note 13, at 2.

31. Human Rights Committee, Karen Noelia Llantoy Huamán v. Peru, para. 8, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005). Pressure by these committees:

can amount to more than mere harangues by internationalist nags; they can have serious and deadly impacts on countries trying to defend the sanctity of human life. The paramount example of this is Colombia, where abortion was legalized in certain cases by the country’s Constitutional Court, in part relying on a 1999 upbraiding by the CEDAW compliance committee. Unsurprisingly, the Colombian court’s activist accession to the opinions of “international authorities” was not enough for the CEDAW committee, which in 2007 again took aim at Colombia’s abortion laws for not being nearly liberal enough to provide for the “safety” of women.

CEDAW Committee, 37th Sess. (2007), “Report on Colombia,” para. 22–23; see also Patrick F. Fagan, William L. Saunders, & Michael A. Fragoso, *How U.N. Conventions on Women’s and Children’s Rights Undermine Family, Religion, and Sovereignty*, INSIGHT (Family Research Council, D.C.), May 2009, at 18–19.

32. See UN Office of the High Commissioner for Human Rights, *The United Nations Human Rights Treaty System: Showing the Treaties and the Mandates of the Treaty Systems (chart)*, in Sylva & Yoshihara, *supra* note 2, at 6.

33. ICCPR, *supra* note 8, art. 28; see also, e.g., CEDAW, art. 17 (establishing the CEDAW committee).

34. ICCPR, *supra* note 8, art. 40.

35. State Parties may complain to the Committee about the non-compliance of another State Party with its obligations so long as it has submitted itself to the jurisdiction of the Committee for others’ complaints. ICCPR, *supra* note 8, art. 41.

tional Protocol to the Covenant, the Committee may “receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by”<sup>36</sup> a nation that has ratified the Protocol (as Peru did).<sup>37</sup> “Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.”<sup>38</sup> This is the limited extent of the Committee power and jurisdiction, as defined in the very legal document (the ICCPR) by which it was created.

Committee recommendations are meant to be purely advisory; the committees are not empowered to make binding interpretations of their respective treaties.<sup>39</sup> Nonetheless, the U.N. committees charged with offering guidance on the obligations incumbent upon signatory nations are advancing a radical agenda under the cover of providing review and recommendations.<sup>40</sup>

#### *B. Two Views on Determining What Constitutes Customary International Law: The Classical and the Bold*

Determining the legal obligations imposed by a treaty—which is, again, accorded weight by the U.S. Constitution—should theoretically be easy: simply look to the express language of the document. In contrast, custom has not, by definition, been reduced to writing; there are no precise legal terms to apply, and so there is no universal consensus as to how courts are to determine what makes up customary international law.

There are two divergent views on ascertaining customary international law. The classical view is that customary international law is founded upon and established by the customs of nations in actual relations with one another, such as in the rules of war and dealings with diplomats; this view recognized only interactions between and among states (not between a state and its citizens) as being subject to development as customary international law.<sup>41</sup> The evolution of customary international law, according to this view, required decades of consistent practice, an extended period of time in which to establish its legitimacy as customary international law.<sup>42</sup>

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36. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR, Optional Protocol].

37. See Status of Optional Protocol to the International Covenant on Civil and Political Rights, UNITED NATIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en) (last visited Aug. 11, 2010).

38. ICCPR, Optional Protocol, *supra* note 36, art. 4.

39. See also KRASON, *supra* note 13, at 4 n.18.

40. William L. Saunders, Jr., *Committees Gone Wild: How U.N. Bureaucrats Are Turning ‘Human Rights’ Against the Family*, 24 THE FAMILY IN AMERICA 51, 59 (2010).

41. Bradley & Goldsmith, *supra* note 21, at 818.

42. Traditionally, this process took place over the course of centuries:

At one time, customary law was formed over the course of centuries because such law was developed through the uniform, consistent practice of nations over time. See Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN

Opposed to the classical view is a less disciplined position, which may be called the "bold" view. The bold position, much like the classical, does require unanimity among the nations.<sup>43</sup> However, rather than mandating that a practice emerge over decades, it would find custom developing much more quickly; under the bold view, consensus might even be found from a single international meeting at which all the nations of the world were represented.<sup>44</sup> Instead of restricting its purview to dealings between and among nations, the bold position would cover dealings between a nation and its own citizens.<sup>45</sup> Whereas the classical view, in order to establish custom, relied upon

the works of jurists and commentators, who by years of labor, research, and experience have made themselves peculiarly well-acquainted with the subjects of which they treat . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is,<sup>46</sup>

the bold view finds evidence of custom from, *inter alia*, unratified—and therefore nonbinding—treaties<sup>47</sup> and U.N. conferences, meetings, resolutions, and committee documents.<sup>48</sup>

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RIGHTS PRACTICE 10 (Hurst Hannum ed., 2d ed. 1992) (defining customary international law as a consistent practice in which states engage out of a sense of legal obligation). More recently, and largely because of the exploding number of international meetings, some legal scholars argue that binding international norms develop—at least in significant part—through the mere repetition of agreed language at UN conferences. As a leading international scholar has asserted, negotiated language "repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain[s] the status of law." R. Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System* in INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 21–23, 25–30 (W. Butler ed., 1987).

Wilkins & Reynolds, *supra* note 3, at 130–31; *see generally* Bradley & Goldsmith, *supra* note 21, at 818 (discussing the standards that must be met by customary international law).

43. *See* Bradley & Goldsmith, *supra* note 21, at 840.

44. *See id.*

45. This same trend is appearing in treaties, as well. Wilkins & Reynolds, *supra* note 3, at 127 ("international treaties now deal not only with the obligations of nations, but also with the rights of individuals"). *See id.* for an overview of developments in international law that affect its "growing prominence." *Id.* at 126.

46. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (citing *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)).

47. It is, of course, remarkable that any person or court would have the audacity to argue that an unratified treaty could bind a nation that had chosen not to ratify it.

48. U.N. committees, to reiterate, are not courts, and their interpretations of the terms of the treaty whereby they were formed are not binding "law" in any sense. However, if a nation does elect to sign onto an optional protocol, the committee in question can be converted into a kind of Grand Inquisitor, who can push but cannot punish, though the rest of the U.N. system might; soft law documents "are not formal treaties and bind nations only to the extent that UN agencies—and/or other donor nations and Non-Governmental Organizations—make compliance a condition of financial and other assistance, or to the extent that national officials voluntarily adopt and enforce the documents." Wilkins & Reynolds, *supra* note 3, at 154 (internal footnotes omitted) (for the point of compliance being a "condition of

Organizations committed to abortion rights or homosexual rights and that subscribe to the bold view of customary international law have used nonbinding documents, as in Colombia and Peru, either to argue for evidence of the development of a customary international law norm or to pressure the nation in question to change any of its laws that are not in accord with international “norms.” “Even in countries that are not signatories to a particular treaty, the radical views of the respective committees are nonetheless welcomed and cited by sympathetic jurists, government officials, and activists pushing the same agenda.”<sup>49</sup>

That this is indeed the strategy of the political and ideological Left can be demonstrated, for instance, from a document entitled “Summary of Strategic Planning,” from the Center for Reproductive Rights (“CRR”).<sup>50</sup> The report states:

The [International Legal Program]’s overarching goal is to ensure that governments worldwide guarantee reproductive rights *out of an understanding that they are legally bound to do so* . . . . Supplementing . . . treaty-based standards and often contributing to the development of future hard norms are a variety of “soft norms.” These norms result from interpretations of human rights treaty committees, rulings of international tribunals, resolutions of inter-governmental political bodies, agreed conclusions in international conferences[,] and reports of special rapporteurs. (Sources of soft norms include: the European Court of Human Rights, the CEDAW Committee, provisions from the Platform for Action of the Beijing Fourth World Conference on Women, and reports from the Special Rapporteur on the Right to Health.)<sup>51</sup>

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financial and other assistance,” citing RICHARD G. WILKINS, *THE IMPACT OF UN CONFERENCE DECLARATIONS ON INTERNATIONAL AND DOMESTIC LAW* 6–9 (2001), for the point of voluntary adoption, noting U.S. Supreme Court enforcement of international “soft law” norms).

49. Saunders, *supra* note 41, at 59.

50. This document was placed in the Congressional Record by Representative Chris Smith (R-NJ) in 2003.

51. 149 CONG. REC. E2534, E2535 (2003) (emphasis added). CRR realizes that “there is no binding hard norm that recognizes women’s right to terminate a pregnancy,” but then develops a plan “to argue that such a right exists.” *Id.* at E2536. Moreover, CRR is not pursuing a strategy of attempting to create a new, binding international legal instrument guaranteeing a right to abortion—even if it could:

Embarking on a campaign for a new legal instrument appears to concede that we do not have legal protections already, making failure potentially costly . . . . As a matter of public perception, does pursuing a new instrument—without any assurance of success—undermine current claims regarding the existence of reproductive rights?

SYLVA & YOSHIHARA, *supra* note 2, at 17; *see also* Center for Women’s Global Leadership, Beijing + 10 Review: A Feminist Strategy for 2004–05—A Working Paper for NGOs on How to Move Forward (March 2004), *available at* <http://www.cwgl.rutgers.edu/globalcenter/policy/csw04/B10strategy-CSW04.pdf> (“We are opposed to any negotiated text at the global level in the review process because of the current geo-political climate.”).

Rather, “CRR hopes that its customary law strategy will simply wrest power away from the United States [and, presumably, nations worldwide] to govern itself on issues relating to abortion.” SYLVA & YOSHIHARA, *supra* note 2, at 18. For more information on the pro-abortion strategy, *see* KRASON, *supra*

Another abortion rights NGO, the International Women's Health Coalition, further states:

The international conference and human rights documents . . . do not explicitly assert a woman's right to abortion, nor do they legally require safe abortion services as an element of reproductive health care. Moreover, the ICPD [UN International Conference on Population and Development, 1994] and FWCW [Fourth World Conference on Women, 1995] agreements recognize the wide diversity of national laws and the sovereignty of governments in determining national laws and policies. Despite these qualifications, however, the conference documents and human rights instruments—if broadly interpreted and skillfully argued—can be very useful tools in efforts to expand access to safe abortion.<sup>52</sup>

As the Ramsey Colloquium warned, this results in “human rights [being] threatened in the name of human rights”;<sup>53</sup> in the instant case, reproductive rights being championed at the expense of the personal right to life and the national right to sovereignty.

Leading international law scholars Thomas Buergenthal and Harold G. Maier have addressed this emerging, revolutionary bold view:

In recent decades, resolutions and similar acts of intergovernmental international organizations have acquired a very significant status both as *sources* and as evidence of international law . . . . Some of these resolutions (declarations, recommendations, etc.) can and do become authoritative evidence of international law.<sup>54</sup>

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note 13, at 7–12.

52. ADRIENNE GERMAIN AND THERESA KIM, INTERNATIONAL WOMEN'S HEALTH COALITION, EXPANDING ACCESS TO SAFE ABORTION: STRATEGIES FOR ACTION 6 (1998), [http://www.iwhc.org/docUploads/Expanding\\_Access\\_English.pdf?documentID=3](http://www.iwhc.org/docUploads/Expanding_Access_English.pdf?documentID=3).

53. Ramsey Colloquium, *On Human Rights: The Universal Declaration of Human Rights Fifty Years Later—A Statement of the Ramsey Colloquium*, 82 FIRST THINGS 18 (1998); see generally Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136 (1997). Mary Ann Glendon has further asserted:

[UDHR]'s ability to weather the turbulence ahead has been compromised by the practice of reading its integrated articles as a string of essentially separate guarantees. Nations and interest groups continue to use selected provisions as weapons or shields, wrenching them out of context and ignoring the rest . . . . Forgetfulness, neglect, and opportunism have thus obscured [UDHR's] message that rights have conditions—that everyone's rights are importantly dependent on respect for the rights of others, on the rule of law, and on a healthy civil society.

MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 239 (2001).

54. THOMAS BUERGENTHAL & HAROLD G. MAIER, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 31 (1985) (emphasis added). Buergenthal and Maier went on to explain:

[I]f a UN General Assembly resolution declares a given principle to be a rule of international law, that pronouncement does not make it the law, but it is some evidence on the subject. If

As these “soft law” documents are presented as sources of customary international law, it is evident that courts are under increasing pressure to adopt them, even in cases arising under domestic law.

The U.S. Supreme Court adopted an even bolder perspective in *Lawrence v. Texas*.<sup>55</sup> Therein, the Court did not find it necessary to ascertain international law; rather, it looked to “values shared with a wider civilization,”<sup>56</sup> specifically Europe.<sup>57</sup> While the Court was, ultimately, interpreting our Constitution and not applying customary international law, it was more than willing to look to foreign and international precedents to do so.<sup>58</sup>

It would seem from the bold push for the use of customary international law in domestic courts that international law firmly supports abortion rights and does not espouse traditional marriage and family structures. However, despite the frequent representations of pro-abortion, anti-family advocates, international law—customary or otherwise—does not actually support their claims or objectives.

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the resolution is adopted unanimously or by an overwhelming majority, which includes the major powers of the world, and if it is repeated in subsequent resolutions over a period of time, and relied upon by states in other contexts, it may well reach the stage where its character as being declaratory of international law becomes conclusive. When that stage is reached is difficult to determine, but that these resolutions play an important part in the international law-making process can no longer be doubted.

*Id.* at 32.

55. *Lawrence v. Texas*, 539 U.S. 558 (2003).

56. *Id.* at 560; *see generally* Wilkins & Reynolds, *supra* note 3, at 133.

57. Specific reference is made to a European Court of Human Rights Decision, *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 40, 52 (1981) (drawing particular attention to para. 52). *Lawrence*, 539 U.S. at 573 (further discussing other European Court of Human Rights and other nations’ cases at pp. 576–77, as well as an amicus brief by Mary Robinson, former U.N. High Commissioner for Human Rights). Curiously, Europe is likely the only part of the world whose standards were aligned with the majority’s sentiments. Wilkins and Reynolds further note that “[p]rior to their citation by the nation’s highest court, these materials would have been considered by most constitutional scholars as among the ‘softest’ of all possible soft law relevant to the meaning of the Due Process Clause.” Wilkins & Reynolds, *supra* note 3, at 133–134.

58. Although the usage of international law in deciding cases arising under domestic law was once controversial, *see, e.g.*, Marc-Olivier Herman, *Fighting Homelessness: Can International Human Rights Law Make a Difference?*, 2 GEO. J. ON FIGHTING POVERTY 59, 71, 81 n.157 (1994) (addressing the lack of reliance upon international norms by U.S. courts), there is no doubt that many Justices are willing to do so in the future; *see, e.g.*, Stephen Breyer, *The Supreme Court and the New International Law at The American Society of International Law* (Apr. 4, 2003) (also citing statements made by Ruth Bader Ginsburg et al.). Further examples of the U.S. Supreme Court using international and foreign jurisprudence to interpret cases arising under domestic law are *Roper v. Simmons*, 543 U.S. 551 (2005) (in which Justice Kennedy astonishingly cited CRC, which has *not* been ratified by the U.S. Senate, to support the conclusion that the execution of a minor is unconstitutional, *id.* at 575–78; *see also* Wilkins & Reynolds, *supra* note 3, at 132), and *Graham v. Florida*, 130 S. Ct. 2011, 2033–34 (noting that other nations’ and the international community’s judgments are not “control[ling]” or “dispositive” but “also ‘not irrelevant,’” *id.* at 2033). *See generally* Ken I. Kersch, *The ‘Globalized Judiciary’ and the Rule of Law*, 13 THE GOOD Soc’y 17 (2004). “[T]he meaning of the United States Constitution” is therefore being “altered by international norms that have been *rejected* by political processes both at the state level . . . and at the federal level . . .” Wilkins & Reynolds, *supra* note 3, at 132–33.

## II. INTERNATIONAL LAW AND LIFE, MARRIAGE, AND THE TRADITIONAL FAMILY

One objective of the construction of the international human rights system in the wake of World War II was “[b]road protection for the right to life.”<sup>59</sup> Indeed, many of the foundational human rights documents that are now being used to undermine fetal life and the traditional family structure are, if anything, pro-life rather than pro-abortion, and emphasize the central, irreplaceable role of life and the family.<sup>60</sup>

In recent decades, abortion rights advocates have continually pushed for language that contradicts the support in the foundational international human rights documents for life and traditional marriage; they have even seen some success.<sup>61</sup> However, their efforts to push for encroaching customary international law have not been unopposed.

### A. *The Language of the Foundational Human Rights Documents*

The General Assembly of the United Nations issued the Universal Declaration for Human Rights (“UDHR”)<sup>62</sup> on December 10, 1948.<sup>63</sup> This document, universally recognized as the most important of all human rights documents, is the bedrock of the U.N. system itself and forms the basis for all of the human rights treaties since then. With a goal of “prevention rather than punishment,” UDHR “is the single most important reference point for cross-national discussions of how to order our future together on our increasingly conflict-ridden and interdependent planet.”<sup>64</sup> If ever a statement from an international meeting can be said to attain to the status of customary international law, the Universal Declaration is it. If it has attained that status, then it is clear no right to abortion or same-sex marriage exists under customary international law because they are not found in the UDHR.

In the pages of this most fundamental human rights document, UDHR proclaims:

Article 3: Everyone has the right to life . . . .<sup>65</sup>

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59. Yuri Mantilla & William L. Saunders, Jr., *The Latin American Consensus: Human Life Must Be Protected*, INSIGHT 2 (Family Research Council) May 9, 2002. “The UN was founded to prevent the systematic disregard of fundamental values; the world should be reminded of the dangers that inhere in disregarding the intrinsic value of all human life.” Wilkins & Reynolds, *supra* note 3, at 164; *see also id.* at 165–66.

60. “[T]he idea [of human rights] is, if anything, conservative rather than liberal.” Saunders, *supra* note 41, at 51.

61. For example, the Yogyakarta Principles, though unofficial, nonbinding, and controversial, reinterpret twenty-nine existing human rights to introduce explicit homosexual rights in each. *See, e.g.*, Saunders, *supra* note 41, at 61–62; *see also* the case in Colombia, *supra* note 6.

62. UDHR, while it is extremely persuasive, is not a treaty and therefore is not international law; rather, as its name implies, it is a declaration of what are human rights.

63. *See* UDHR, *supra* note 1.

64. GLENDON, *supra* note 54, at xvi–xvii.

65. The Preamble notes that this right is “inalienable” and extends to “all members of the human family.” *See* UDHR, *supra* note 1, pmb. (“[R]ecognition of the inherent dignity and of the equal and



Article 16: Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family . . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>66</sup>

Article 25: Motherhood and childhood are entitled to special care and assistance.

The signatory nations did not leave the protection of human rights to uncertain development as customary international law. “A system of treaties was devised to make the principles of [UDHR] legally binding on nations that chose

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inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . .”). Since life begins at the moment of conception, this norm is thus applicable from that point forward. See, e.g., RITA JOSEPH, *HUMAN RIGHTS AND THE UNBORN CHILD* (2009) (providing a comprehensive perspective on international law and when life begins, and further demonstrating that there are good arguments that abortion is, in fact, precluded by the human rights documents, in accordance with their drafters’ intentions); Christopher M. Gacek, *Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of Conception and Pregnancy*, 9 NAT’L CATH. BIOETHICS Q. 543 (2009) (discussing the consensus on when life begins); American Convention on Human Rights (Pact of San Jose) art. 4, July 19, 1978, 1144 U.N.T.S. 123; International Conference on Population and Development, Sept. 5–13, 1994, *Report of the International Conference of Population and Development*, U.N. Doc A/CONF.171/13 (Oct. 18, 1994) (various reservations made by Latin American countries, noting that life begins at the moment of conception); UN. Human Rights Comm., General Comment No. 29: States of Emergency (Article 4), U.N. Doc CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (prohibiting any derogation of the right to life, though noting that limitations and/or restrictions may sometimes be justified). But see Rebecca J. Cook, *International Protection of Women’s Reproductive Rights*, 24 N.Y.U. J. INT’L L. & POL. 645, 690 (1992) (arguing that “it is not generally accepted that international human rights conventions are applicable before the birth of a human being”; “[a]ccording to traditional legal understanding, unborn life is not regarded as that of a ‘human being’ because, while ‘human[,] it is not ‘in being’”); Sarah Joseph, *United Nations Human Rights Committee: Recent Cases*, 6 HUMAN RTS. L. REV. 361, 364 (2006) (“it has long been clear that abortion does not per se breach human rights, for example the right to life of the foetus”); *id.* at 365–67 (generally discussing possible protections for preborn children in human rights documents and interpretations). Stephen M. Krason, Professor of Political Science and Legal Studies at the Franciscan University of Steubenville and co-founder and President of the Society of Catholic Social Scientists, attempted to draw practical value from this seeming impasse:

While it is true that the “right to life” is a very general phrase that has been interpreted differently by mankind throughout the ages, it is the case that for at least millions of people all around the world today, unborn children are entitled to this right to life. These people are amongst the billions whom the leaders of the UN seek to represent. It is therefore puzzling that many American lawyers seek to make both the UN and many of the proposed multilateral treaties that it has sponsored the creation of into promoters of abortion rights.

KRASON, *supra* note 13, at v.

66. UDHR further declares that “[p]arents have a prior right to choose the kind of education that shall be given to their children.” UDHR, *supra* note 1, art. 26. This further emphasizes the “recognition that the family is prior to the state.” Saunders, *supra* note 41, at 54; see also Jane Adolphe, *Securing a Future for Children: The International Custom of Protecting the Natural Family*, in 1 THE FAMILY IN THE NEW MILLENNIUM: WORLD VOICES SUPPORTING THE “NATURAL” CLAN 191–224 (A. Scott Loveless & Thomas B. Holman eds., 2007); Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family*, 4 AVE MARIA L. REV. 343 (2006) (discussing, inter alia, the development of UDHR); Jane Adolphe, *Securing a Future for Children: The International Custom to Protect the Natural Family*, 20 DÍKAION 391 (2006).

to ratify them.”<sup>67</sup> The fundamental human rights were, then, further articulated in two treaties: the International Covenant on Civil & Political Rights (“ICCPR”)<sup>68</sup> and the International Covenant on Economic, Social & Cultural Rights (“ICESCR”).<sup>69</sup>

ICCPR, which has 166 parties,<sup>70</sup> echoes the words of UDHR:

Article 6: Every human being has the inherent right to life.

Article 23: The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized.<sup>71</sup>

ICCPR clarifies the reference in the UDHR that “[e]veryone has the right to life,”<sup>72</sup> stating, “[e]very human being has the inherent right to life.”<sup>73</sup> This is significant because while “everyone” is a more general term that might be parsed and defined by lawyers, “human being” is a scientific term with a clear, established definition denoting *Homo sapiens* from the point of conception onward.<sup>74</sup>

However, note that what is essential for our purposes is not the possibility that ICCPR grants a right to life.<sup>75</sup> Rather it is this: a treaty with such a provision clearly cannot be fairly interpreted to grant a right to *abortion*.<sup>76</sup>

Finally, ICESCR,<sup>77</sup> the second treaty implementing the provisions of the

67. Saunders, *supra* note 41, at 55 (noting that “Eleanor Roosevelt, who played a key role in the formation of the Declaration, explained: ‘The Covenant [or treaty] would be a simpler document in one way [than the Universal Declaration is]. It will have to cover fewer rights. But in another way it will be more complicated because the way those rights are to be assured to people throughout the world, under law, must be spelled out, and every nation in ratifying the Covenant—which will have the weight of a treaty—must be prepared to change its domestic laws so that it will be able to live up to its undertakings in the Covenant.’

[citing GLENDON, *supra* note 54, at 121]”).

68. ICCPR, *supra* note 8, at 52.

69. ICESCR, *supra* note 8, at 49. ICCPR and ICESCR “are sometimes referred to as the ‘first generation’ of human rights treaties. A ‘second generation’ of treaties followed, derived from the rights recognized in [UDHR] as well as particularized specifications of rights in the first[-] generation treaties.” Saunders, *supra* note 41, at 57. These include CRC and CEDAW. *Id.* at 57–59.

70. As of Nov. 10, 2010. See Status of International Covenant on Civil and Political Rights, UNITED NATIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Nov. 10, 2010).

71. ICCPR, *supra* note 8, art. 6, § 1, art. 23 §§ 1–2.

72. UDHR, *supra* note 1, art. 3 (emphasis added).

73. ICCPR, *supra* note 8, art. 6 (emphasis added).

74. See, e.g., Gacek, *supra* note 66.

75. See *supra* note 66.

76. However, for a discussion of what the Human Rights Committee has nevertheless been doing, see *supra* note 12.

77. ICESCR was adopted by the U.N. General Assembly on Dec. 16, 1966.

Universal Declaration on Human Rights, has 69 signatories and 160 parties.<sup>78</sup> It states:

Article 10: The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children . . . . Special protection should be accorded to mothers during a reasonable period before and after childbirth.<sup>79</sup>

These three vital foundational documents of the international human rights system, the bedrock upon which all other human rights may be said to rest, clearly do not provide a right to abortion or same-sex marriage. If anything, through their clear language, they establish the primacy of life and traditional marriage and family structures, demanding that they be protected, respected, and assisted.

#### *B. Opposition: Developing Customary International Law by Stealth*

*"[I]t is . . . vital to advance feminist perspectives and not just be defending past gains or become tied down by UN documents."*<sup>80</sup>

Given that the foundational international human rights documents offer no right to abortion or same-sex marriage, it would seem impossible to use them to provide such rights. Nonetheless, abortion rights advocates are working to undermine these critical, foundational documents, claiming that customary international law has shifted since these documents were signed and that a right to abortion, for example, meets the standard for customary international law. They are attempting to create customary international law by stealth,<sup>81</sup> going even beyond the bold approach to customary international law in creating radical, unofficial, nonbinding documents such as the Yogyakarta Principles,<sup>82</sup>

78. As of Nov. 10, 2010. See Status of International Covenant on Economic, Social and Cultural Rights, UNITED NATIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtds\\_g\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtds_g_no=IV-3&chapter=4&lang=en) (last visited Nov. 10, 2010).

79. ICESCR, *supra* note 8, art. 10, §§ 1–2.

80. Center for Women's Global Leadership, Beijing + 10 Review: A Feminist Strategy for 2004–05—A Working Paper for NGOs on How to Move Forward, *available at* <http://www.cwgl.rutgers.edu/globalcenter/policy/csw04/B10strategy-CSW04.pdf>.

81. See 149 CONG. REC. E2534, E2538 (according to CRR, "[t]here is a stealth quality to the work"); see also Krason, *supra* note 13, at 10; *id.* at 11 (citing 149 CONG. REC. E2534, E2545) (discussing CRR's urging to its own staff to "fight harder" and "be a little dirtier," 149 CONG. REC. E2534, E2545); see generally Wilkins & Reynolds, *supra* note 3, at 165 n.148 (noting, *inter alia*, the steps taken by "[p]olicy-savvy professors" and a document suggesting "strategies" for a particular negotiation, including the "infiltration" of "conservative groups").

82. Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, <http://www.yogyakartaprinciples.org/principles.en.htm> (last accessed Aug. 21, 2010). These controversial principles, composed in 2007, reinterpret twenty-nine existing human rights to introduce explicit homosexual rights in each. See, e.g., Saunders, *supra* note 41, at 61–62. They further attempt to mandate constitutional, legislative, and policy change, including within individual "families." *Id.* at 62.

and inserting vague, often coded<sup>83</sup> language into new international human rights documents. Further, they are pushing for committees to interpret international human rights documents from a perspective supportive of abortion rights and alternate family structures that can then be used by proponents of the bold view for broad impact.

The second generation of international human rights documents has at some times been interpreted in such a way; various committees have made suggestions falling well outside the norm in their issued responses to State Party reports.<sup>84</sup> For example, CRC echoes much of the language of UDHR and the other foundational international human rights documents.<sup>85</sup> However, the CRC committee is adopting questionable interpretations of that language. In its General Comment No. 4, the CRC committee “expounded upon ‘adolescent health and development in the context of the Convention on the Rights of the Child’”;<sup>86</sup> it declared that minors have the right to confidentially “access appropriate information” relating to “family planning” and STDs and pushed for States to “take measures to remove all barriers hindering the access of adolescents to information, preventative measures such as condoms, and care.”<sup>87</sup>

Moreover, the CEDAW committee has pushed for countries to “decriminalize prostitution”<sup>88</sup> and promote employment over motherhood,<sup>89</sup> going so far as to

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83. See *infra* notes 104–112.

84. As the Ramsey Colloquium has noted, there is a

“powerful inclination to pick and choose among human rights, which results in favoring some (e.g., the right to privacy) at the expense of others (e.g., the rights of the family). Such selectivity undermines the necessary connections between rights . . . . Also in the name of human rights, the number of rights is multiplied to the point that the very idea of rights is dangerously diluted”

Ramsey Colloquium, *supra* note 54. Sponsored by the Institute on Religion and Public Life, the Ramsey Colloquium is composed of “Jewish and Christian theologians, ethicists, philosophers, and scholars” who “consider questions of morality, religion, and public life.” *Id.*

85. See, e.g., Mantilla & Saunders, *supra* note 60, at 8 (noting in particular the CRC preamble and article 6, both of which protect the right to life of children; the preamble, in particular, emphasizes that children need “special safeguards and care, including appropriate legal protection, before as well as after birth”). Further, in CRC art. 24, it discusses “appropriate pre-natal and post-natal health care for mothers,” thus recognizing that a woman becomes a mother before her child is born.

86. Saunders, *supra* note 41, at 61. Of note, the actual terms of CRC protect the rights of parents, see, e.g., arts. 5, 7, and 27, and make no mention of sexual or reproductive health in its provisions on health; see CRC, *supra* note 4, art. 24.

87. Comm. on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, §§ 9, 10–11, 28, and 30, U.N. Doc. CRC/GC/2003/4 (Jul. 1, 2003).

88. The CEDAW committee has suggested this for China. Office of the United Nations High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China*, paras. 251–336, 289, U.N. Doc. A/54/38 (Feb. 3 1999); see also S. REP. No. 107–9, at 22 (2002). Regarding Greece the CEDAW committee stated, “While noting positively the fact that prostitution is decriminalized and instead is dealt with in a regulatory manner, the Committee is concerned that inadequate structures exist to ensure compliance with regulatory framework.” Office of the United Nations High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Greece*, paras. 172–212, 197, U.N. Doc. A/54/38 (Feb. 1 1999).

suggest that Belarus eliminate Mother's Day. The CEDAW committee apparently interprets its text as including, to some extent, a right to abortion<sup>90</sup> that is not evident or apparent from the document.<sup>91</sup>

Criticism of such pronouncements and pressure is growing more widespread and recently has even come from within the CEDAW committee itself:

One CEDAW committee member, Krisztina Morvai from Hungary, has criticized publicly the way the treaty bodies regularly overstep their mandates in order to promote a litany of controversial social policies, such as the right to abortion, the legalization of prostitution, the promotion of sex education for young teenagers, the promotion of contraceptives for young girls, and the

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89. For instance, the CEDAW committee has urged Germany to "improve the availability of care places for school-age children to facilitate women's reentry into the labor market," Office of the United Nations High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Germany*, para. 30, U.N. Doc. CEDAW/C/2000/I/CRP.3/Add.7/Rev.1 (Feb. 2, 2000), and criticized Slovenia for only thirty percent of its children under age three being in day-care centers. Office of the United Nations High Commissioner for Human Rights, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Slovenia*, paras. 81–122, 104, U.N. Doc. A/52/38/Rev.1 (Jan. 23, 1997). The CEDAW committee had established a pattern of placing maternity at odds with women's fulfillment in the workforce; *see also* CEDAW, *Report of the Committee on the Elimination of Discrimination Against Women (Eighteenth and nineteenth sessions)*, para. 269, U.N. Doc. A/53/38/Rev.1 (1998) [hereinafter 1998 CEDAW Report] (with regards to New Zealand, "recommend[ing] that the Government recognize maternity as a social function which must not constitute a structural disadvantage for women with regard to their employment rights").

90. G.A. Res. 180, para. 31(c), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Sept. 18, 1979–Jan. 7, 1980) ("When possible, legislation criminalizing abortion should be amended in order to withdraw punitive measures imposed on women who undergo abortion."). The CEDAW committee has criticized Ireland for the "influence" of the Catholic Church in abortion policy. CEDAW, *Report of the Committee on the Elimination of Discrimination Against Women*, para. 180, U.N. Doc. A/54/38/Rev.1 (Jan. 1, 1999), and Colombia for "legal provisions on abortion [that] constitute a violation of the rights of women . . ." *Id.* para. 393.

The CEDAW Committee has even gone so far as to characterize a doctor's conscientious objection to conduct an abortion on demand as "an infringement of women's reproductive rights." [Committee on the Elimination of Discrimination [A]gainst Women, G.A. Res. 54/38, para. 109, 21st Sess., U.N. Doc. A/54/38/Rev.1 (Jan. 1, 1999).] As a result, the supposedly abortion-neutral CEDAW Committee "strongly recommend[ed] that the Government take steps to secure the enjoyment by women of their reproductive rights by, *inter alia*, guaranteeing them access to abortion services in public hospitals." *Id.* para. 117.]

Wilkins & Reynolds, *supra* note 3, at 163.

91. *See, e.g.*, Wilkins & Reynolds, *supra* note 3, at 154–57, 162–64; SYLVA & YOSHIHARA, *supra* note 2, at 21–23; *see also* Thomas W. Jacobson, CEDAW Committee Rulings Pressuring 83 Party Nations to Legalize Abortion, 1995–2010 (on file with author); United Nations Division for the Advancement of Women, *Women and Health: Mainstreaming the Gender Perspective into the Health Sector*, U.N. Doc. EGM/HEALTH/1998/Report (1998), available at <http://www.un.org/womenwatch/daw/csw/healthr.htm>.

These represent but a few of the egregious claims made by various U.N. committees; for a more exhaustive list, *see, e.g.*, Fagan, Saunders, & Fragoso, *supra* note 32; Saunders, *supra* note 41, at 59–63.

promotion of free condoms in the developing world to deal with the scourge of HIV/AIDS, to the exclusion of all other remedies.<sup>92</sup>

Perhaps the most ambitious encroachment, however, has come via international conferences. In the 1990s, the United Nations convened several such meetings. The most important ones, which set the agenda for all the following conferences, were the International Conference on Population and Development in Cairo, Egypt (1994)<sup>93</sup> and the Fourth World Conference on Women in Beijing, China (1995).<sup>94</sup> Each conference addressed many topics, the most contentious of which was abortion.<sup>95</sup> Abortion rights activists pushed for broad abortion language.<sup>96</sup> For example, at a preparatory meeting (Prepcom III) for the Cairo conference, the "Women's Caucus"<sup>97</sup> proposed that Section 7.1 of Chapter VII of the final report read in pertinent part: "[w]omen who wish to terminate their pregnancies should have ready access to reliable information and compassionate counselling and such abortion should be safe. In all cases, women should have access to services for the management of complications arising from unsafe abortions."<sup>98</sup>

However, at neither conference was a general right to abortion agreed upon by the national delegates,<sup>99</sup> and in fact, several countries added reservations to

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92. SYLVA & YOSHIHARA, *supra* note 2, at 34–35 (citing Krisztina Morvai, *Respecting National Sovereignty and Restoring International Law: The Need to Reform UN Treaty Monitoring Committees at UN Headquarters* (Sept. 6, 2006)).

93. See International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, U.N. Doc A/CONF.171/13 (Oct. 18, 1994) [hereinafter ICPD Report]. For an excellent description of the events and maneuverings at this Cairo conference, see George Weigel, *What Really Happened at Cairo*, 50 FIRST THINGS 24 (1995); see also Wilkins & Reynolds, *supra* note 3, at 150–51.

94. See World Conference of Women, Beijing, P.R.C., Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, U.N. Doc A/CONF.177/20/Rev.1 (1996) [hereinafter Fourth World Conference of Women Report]; see also Wilkins & Reynolds, *supra* note 3, at 151–53. Both the Cairo and the Beijing conferences adopted a "Platform for Action"; implementation of these was to be reviewed at U.N. conferences every five years afterwards. See ICPD Report, *supra* note 96, para. 16.21; Fourth World Conference of Women Report, *supra*, at 8.

95. See, e.g., Diana D.M. Babor, *Population Growth and Reproductive Rights in International Human Rights Law*, 14 CONN. J. INT'L L. 83, 96 (1999) ("[d]issension over abortion almost overshadowed the Cairo Conference . . .").

96. See, e.g., Sarah A. Ramage, *Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response*, 27 CAL. W. INT'L L.J. 1, 78 (1996).

97. The Women's Caucus is tied to CRR through the Women's Environment and Development Organization ("WEDO"). See KRASON, *supra* note 13, at 11–12.

98. The Women's Caucus at Prepcom III, Draft Compilation of Proposed Revisions of the Draft ICPD Programme of Action (1994) (on file with author).

99. See, e.g., SYLVA & YOSHIHARA, *supra* note 2, at 8–10; Wilkins & Reynolds, *supra* note 3, at 150–53 ("[n]othing in the Cairo Platform for Action establishes abortion as a human right. On the contrary, the plain language of the document provides that abortion lies clearly within the sovereign prerogative [sic] of national governments"); KRASON, *supra* note 13, at 8 ("[T]he final work product of the Cairo Conference conceded that abortion is not an international human right."); 149 CONG. REC. E2534, E2536 (2003) (noting that the Cairo outcome document

Cairo's outcome document explicitly stating that abortion was not included in the document.<sup>100</sup>

Abortion rights advocates and same-sex marriage advocates tried to rally support for more explicit language at the five-year reviews of Cairo and Beijing and failed; the nations of the world would not agree to express language in favor of abortion or homosexual marriage at either of these conferences.<sup>101</sup>

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reaffirmed that under "no circumstances should abortion be considered a method of family planning," but further noting that "CRR claims that reproductive rights (including the right to abortion) gained international momentum as a soft norm at the . . . Cairo Conference" (citing 149 CONG. REC. E2534, E2535 (2003)); Babor, *supra* note 99, at 111 ("the Cairo Conference was dominated by a strong anti-abortion stance . . .").

100. The countries that took express reservations on abortion included Argentina, Dominican Republic, Ecuador, El Salvador, Guatemala, Holy See, Honduras, Libyan Arab Jamahiriya, Malta, Nicaragua, Peru, United Arab Emirates, and Yemen. ICPD Report, *supra* note 96, at 16. The continued existence in most of these countries, and other countries like Ireland, of pro-life laws demonstrates that no customary international law right to abortion either existed at the time of the Cairo Conference or developed afterwards, since many countries have laws to the contrary.

101. See, e.g., Five-year Review of the implementation of the Beijing Declaration and Platform for Action (Beijing + 5) held in the General Assembly, June 5–9, 2000, <http://www.un.org/womenwatch/daw/followup/beijing+5.htm> (last visited Nov. 11, 2010); Wilkins & Reynolds, *supra* note 3, at 144 n.74 (on the machinations at Cairo, noting that "[t]hough children were not the assigned topic of the meeting, the movement for children's reproductive and sexual rights was spotlighted at the Cairo+5 meetings, sponsored by the United Nations Fund for Population Activities (UNFPA)"). The World Youth Alliance reported:

In March through June of 1999 the United Nations Fund for Population Activities (UNFPA) hosted the five-year follow-up meetings to the 1994 Cairo conference on Population and Development. During these meetings . . . the UNFPA introduced a youth caucus . . . to push an extremely radical agenda of personal autonomy and sexual freedom at the Cairo+5 conference. This small group claimed to speak on behalf of all three billion of the world's youth. Their demands included sexual and reproductive health rights and services for all young people, currently defined as those ten years old and up, which included access to contraceptives, abortion, and emergency contraception without parental knowledge or consent. They demanded mandatory comprehensive sexual education courses at all levels in the schools, which would cover, as appropriate, sexual pleasure, confidence, and freedom of sexual expression and orientation. Moreover, they declared that youth must receive information that would allow them to make their sexual decisions in a guilt-free way. In order to reach this goal, mandatory education of religious leaders was necessary to enlighten, educate, and sensitise them to the rights of young people.

Wilkins & Reynolds, *supra* note 3, at 144 n.74 (citations omitted). However, the pro-abortion advocates' push for controversial language is not restricted to Cairo, Beijing, and their successors; in fact, it is "not an uncommon occurrence at all":

At the Rome conference on establishing the International Criminal Court (ICC) in 1998, CRR-allied non-governmental organizations vigorously pushed including "enforced pregnancy" as a "crime against humanity" in the proposed ICC treaty. These groups were using the opportunity presented by the conference's declaring "forced pregnancy" (that is, women being impregnated as a result of forcible rape by hostile soldiers) to be a human rights violation, to twist the meaning of those words and to effectively establish *abortion* as an international human right as well.

KRASON, *supra* note 13, at 12 (footnotes omitted) (citing Wilkins & Reynolds, *supra* note 3, at 135–43 (emphasis added)); see also Wilkins & Reynolds, *supra* note 3, at 145–49 (on the "single-mindedness of the international abortion rights lobby" and the "predictable routine" that has thus developed at U.N. conference negotiations). Wilkins and Reynolds go on to discuss the unscrupulous tactics employed by

Therefore, following the Cairo and Beijing conferences, those favoring homosexual rights and abortion rights have been obligated to engage in delicate maneuvering, relying upon a novel concept: the evolution of “agreed language” or “consensus language”<sup>102</sup> from those conference outcome documents, such as the terms “reproductive health”<sup>103</sup> and “various forms of the family.”<sup>104</sup> In effect, they have argued that these terms changed their meaning, over time, by repetition.<sup>105</sup>

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some activists at this conference, including a secret “consensus” meeting. Wilkins & Reynolds, *supra* note 3, at 139–40, 143. Sometimes, however, their lobbying efforts were successful; the Committee on the Elimination of Discrimination Against Women has “welcomed” some “suggestion[s] made at the ‘Round table of Human Rights Treaty bodies’ Approaches to Women’s Health, with a Focus on Reproductive and Sexual Health Rights’, held at Glen Cove, New York in December 1996.” 1998 CEDAW Report, *supra* note 92, at 37–38 (1998). The Glen Cove roundtable was radical and controversial, outlining a strategy to force an international right to abortion. See SYLVA & YOSHIHARA, *supra* note 2, at 4–14. Despite these efforts, no

[n]egotiated document . . . expressly and unequivocally recognizes an international right to abortion. Indeed, because of consistent pro-life efforts, the final documents generally include language preserving national sovereignty on questions of human fertility and limiting the potentially expansive sweep of any reproductive rights language. In addition, negotiations usually conclude with several nations issuing statements explaining that the final document . . . does not alter national or international law related to the regulation of abortion.

Wilkins & Reynolds, *supra* note 3, at 149 (footnotes omitted).

102. All documents from U.N. conferences are adopted by consensus. Thus, language in them is by definition “consensus language.”

103. This language appears in a variety of documents. For example, a 2008 report by Paul Hunt, U.N. Special Rapporteur for Health and member of the Center for Reproductive Rights Expert Litigation Team, and Gunilla Backman states, “[A] State has a core obligation to ensure a minimum “basket” of health-related services and facilities, including . . . sexual and reproductive health services, including information, family planning, pre-natal and post-natal services, and emergency obstetric care.” Paul Hunt, *Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. A/HRC/7/11 (2008), reprinted in Paul Hunt & Gunilla Backman, *Health Systems and the Right to the Highest Attainable Standard of Health*, 10 HEALTH & HUM. RTS. 81 (2008). Here, the authors are attempting to place abortion in the “basket” of basic health services through their use of the term “reproductive health services.”

104. “These and similar phrases are often designed to operate like magic mirrors: providing onlookers with the visions they desire most.” Wilkins & Reynolds, *supra* note 3, at 147. “[T]he ubiquitous words “reproductive health” . . . may sometimes appear to encompass abortion even though, as defined, they do not.” Wilkins & Reynolds, *supra* note 3, at 148.

Further, the term “various forms of the family,” introduced in the Beijing Platform for Action and the Cairo Programme of Action, was followed in the latter document by the sentence, “Marriage must be entered into with the free consent of the intending spouses, and husband and wife should be equal partners.” ICPD Report, *supra* note 96, at 16. However, for a contrasting emphasis on the debate and outcome at Beijing, see Dianne Otto, *Holding Up Half the Sky, But for Whose Benefit: A Critical Analysis of the Fourth World Conference on Women*, 6 AUSTR. FEMINIST L.J. 7, 26 (1996).

105. Every UN meeting issues an outcome document, but the meetings themselves are rarely long enough for such documents to be negotiated *ab initio*. Rather when the documents are being negotiated among the delegates, “previous language” or consensus language” from prior meetings is simply repeated. This saves time since, presumably, the nations accepted such linguistic formulations previously and will do so again. The Left’s tactic was to save the repetition over several years in various outcome documents of their pet phrases (discussed in the text) gave rise to an agreement among all the nations to rights to same-sex marriage and to abortion, though without those words (abortion and



Further, they have argued—in law review articles<sup>106</sup> and in the courts<sup>107</sup>—that such language actually means what they allege it means.<sup>108</sup> At the U.N. Special Session on Children in 2001–2002, a colloquy among delegates negotiating the final statement elicited an admission on this point: In a June 2001 preparatory meeting, the U.S. delegate asked Andras Vamos-Goldman, Counselor (Political Affairs) from the permanent Canadian mission, what was meant by the phrase “equal access to services . . . including sexual and reproductive health care,” to which the Canadian delegate replied, “of course—and I hate to use the word—but in ‘services’ is included abortion.”<sup>109</sup> Those countries that do not consider abortion to be a female child’s “right” reacted quickly, and a number of countries that had previously supported the inclusion of that language “agree[d] to its deletion.”<sup>110</sup> In other words, delegates would not affirm language that was meant to include abortion.

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same-sex marriage) ever being mentioned. While this may seem absurd on its face, one must always remember there are judicial activists ready to remake national social policy in accordance with “international law.”

106. Coded terms such as these have been utilized in numerous law review articles:

Numerous reports have taken the position that women’s reproductive rights are protected under already-existing treaties . . . . However, in order for states to take their responsibilities to women seriously, it is essential to establish a free-standing right to abortion. As one commentator put it, ‘[if the protection of women’s reproductive rights is not reinforced under international human rights law, then] systemic and egregious discrimination against women will persist.’ Establishing abortion as a human right within the universal human rights treaty system is crucial . . . .

Tatyana A. Margolin, *Abortion as a Human Right*, 29 WOMEN’S RTS. L. REP. 77, 78 (2007–2008) (footnotes omitted); see also *id.* at 78 (on women “lack[ing] access to safe abortion and other reproductive care”); Babor, *supra* note 99, at 110–13 (section on “abortion and reproductive rights”); see generally Dina Bogecho, *Putting It to Good Use: The International Covenant on Civil and Political Rights and Women’s Right to Reproductive Health*, 13 S. CAL. L. & WOMEN’S STUD. 229 (2003–2004).

107. This occurred, inter alia, in Colombia, Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (discussed in note 6).

108. “There seems to be a nearly inexhaustible supply of language which encompasses the possibility of [a right to] abortion, but without any express reference to the practice.” Wilkins & Reynolds, *supra* note 3, at 147; see also *id.* at 148 n.82 (Cairo conference’s definition of “reproductive health”). For example, CRR has asserted that the “Bèijing Platform, in Paragraph 106(k), reaffirms the language relating to abortion adopted at the International Conference on Population and Development in 2004,” CENTER FOR REPRODUCTIVE RIGHTS, BEIJING AND INTERNATIONAL LAW: UN TREATY MONITORING BODIES UPHOLD REPRODUCTIVE RIGHTS 3(2005), [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_bp\\_beijingtmb.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_beijingtmb.pdf) (briefing paper); another CRR paper specifically includes abortion as a “reproductive right.” CENTER FOR REPRODUCTIVE RIGHTS & AVANI MEHTA SOOD, LITIGATING REPRODUCTIVE RIGHTS: USING PUBLIC INTEREST LITIGATION AND INTERNATIONAL LAW TO PROMOTE GENDER JUSTICE IN INDIA (2006), [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/media\\_bo\\_India1215.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/media_bo_India1215.pdf); see also Undurraga & Cook, *supra* note 6, at 243 (“International human rights law has given broader recognition for gender-specific needs and rights of women than most domestic . . . legal systems. This is one reason why women’s advocates resort to international law to legitimate their demands.”).

109. The author was present at the meeting as a private sector member of the U.S. delegation. Vamos-Goldman’s statement was widely reported at the time. See, e.g., LifeSite U.N. Correspondents, *Canada Shocks U.N. Delegates*, LIFESITENEWS, June 14, 2001, <http://www.lifesitenews.com/ldn/2001/june/010614a.html>.

110. *Id.*

However, large international lending institutions, such as the World Bank and the International Monetary Fund, often tie their loans to the Platform or other outcome documents; therefore, even if debtor nations do not expressly intend to promote abortion access or homosexual marriage, lawyers and other advocates will argue to these states that this is included in the language.<sup>111</sup> Further, there have been widespread reports of individual donor nations or national blocs that support abortion rights and/or homosexual rights putting pressure on smaller nations<sup>112</sup> to change their laws as a condition for receiving loans. The supposition that this occurs seems reasonable when one considers the disparity in wealth between the countries.

This strategy of developing customary international law by stealth, while in most respects implausible, had a chance of success so long as it went unchallenged by the most economically, politically, and militarily powerful nation in the world, the United States. A challenge to that strategy came in earnest, however, from the United States under the administration of President George W. Bush.<sup>113</sup>

### *C. The United States Resists the Expansion of Customary International Law*

In 2002, the United Nations convened its Special Session on Children;<sup>114</sup> the main purpose<sup>115</sup> was to negotiate a “consensus” statement, “platform for action,” or “outcome document,” that the heads of state could sign. The U.S. delegation to this Special Session, the first under President Bush, no longer supported the advancement of abortion or altering traditional notions of the family structure. Thus, in the final statement of the Special Session on Children,<sup>116</sup> the U.S. stated expressly that it did not accept that the affirmation of either the Cairo Programme of Action or Beijing Platform for Action in the

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111. See generally Memorandum from Svein Aass, Executive Dir., The World Bank, et al., to Joy Phumaphi, Vice President & Head of Network, The World Bank (Apr. 19, 2007) (on file with author). Yet another issue at play is the arguably pro-population control stance of the World Bank. See, e.g., ANDREW M. ESSIG, CATHOLIC FAMILY & HUMAN RIGHTS INSTITUTE, *THE WORLD BANK: HOW IT COMPROMISES ECONOMIC DEVELOPMENT BY PROMOTING A POPULATION CONTROL AGENDA* (2007), [https://www.c-fam.org/docLib/20080425\\_Number\\_7\\_World\\_Bank\\_2007.pdf](https://www.c-fam.org/docLib/20080425_Number_7_World_Bank_2007.pdf).

112. See generally MACIEJ GOLUBIEWSKI, CATHOLIC FAMILY & HUMAN RIGHTS INSTITUTE, *EUROPE'S SOCIAL AGENDA: WHY IS THE EUROPEAN UNION REGULATING MORALITY?* (2008), [http://www.c-fam.org/docLib/20080425\\_Europe\\_Social\\_Agenda\\_7.pdf](http://www.c-fam.org/docLib/20080425_Europe_Social_Agenda_7.pdf) (discussing the expanding scope of moral regulation in Europe); Piero A. Tozzi & Katharina Rothweiler, *EU Intervenes in Internal Philippines "Reproductive Health" Debate*, FRIDAY FAX, May 14, 2009, [http://www.c-fam.org/publications/id.1159/pub\\_detail.asp](http://www.c-fam.org/publications/id.1159/pub_detail.asp) (regarding pressure in the Philippines).

113. Under the Clinton Administration, the U.S. had, at Cairo and Beijing, pushed for a right to abortion and had supported the development of customary international law on abortion in the subsequent years. For a discussion of the leading role of the Clinton Administration in promoting abortion at Cairo, see Weigel, *supra* note 97.

114. See generally World Leaders 'Say Yes' for Children, <http://www.unicef.org/specialsession/> (last visited Aug. 13, 2010) (discussing the Special Session).

115. This is consistent with all U.N. meetings.

116. Like all such statements of U.N. members, this final statement is part of the official U.N. consensus document.

outcome document constituted an endorsement of abortion, nor did it accept that any of a host of terms used in the outcome document (including those related to “reproductive health”) included abortion. Further, the U.S. pro-claimed:

As regards the phrase, ‘various forms of the family exist,’ the United States understands this to include single parent and extended families. It reaffirms that governments can support families by promoting the institution of marriage and help parents rear their children in positive and healthy environments.<sup>117</sup>

The Center for Reproductive Rights,<sup>118</sup> perhaps fearing its long-term strategy was going to fail in the U.S., filed a lawsuit in July 2001 in the Southern District of New York against President George W. Bush, alleging that customary international law had developed to include a right to abortion:

Customary international law also pre-empts inconsistent state statutes and policies. Thus, by working to establish the right to abortion as a human right in customary international law, CRLP fulfills its mission of protecting women’s access to abortion from interference or prohibition by the States. Customary international law is embodied, *inter alia*, in treaties (even if not ratified . . . ), the writings of international law jurists, and documents produced by United Nations international conferences.<sup>119</sup>

This suit was dismissed for failure to demonstrate standing; on appeal to the Second Circuit, the judgment was affirmed on different grounds.<sup>120</sup> However, this complaint clearly denotes the mission and strategy of abortion rights

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117. General Reservation of the United States of America, U.N. Special Session on Children. The United States made a similar statement upon the adoption of the Disabilities Convention by the General Assembly Ad Hoc Committee on August 25, 2006: “The U.S. understands that the phrase reproductive health does not include abortion, and its use in paragraph 25(a) does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion.” See *Pro-Life Forces Had Significant Impact at UN Disabilities Conference*, LIFE SITE NEWS, Aug. 31, 2006, <http://www.lifesite.net/ldn/2006/aug/06083102.html>; see also SYLVA & YOSHIHARA, *supra* note 2, at 23 n.58.

118. CRR was originally known as the Center for Reproductive Law and Policy (“CRLP”).

119. Amended Complaint at ¶ 79, *Ctr. for Reprod. Law & Policy v. Bush*, No. 01 Civ. 4986 (S.D.N.Y. Jul. 16, 2001). Interestingly, CRLP referenced the Cairo and Beijing platforms in this complaint, as well, *id.* ¶ 99, adding that “[a]mong other issues, a variety of reproductive health and rights issues were addressed at these conferences, including abortion,” *id.*, but “wisely stopped short of asserting that international discussions have already produced an international abortion right.” Wilkins & Reynolds, *supra* note 3, at 158.

120. See *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002) (holding that the Mexico City Policy in question (as reinstated by President George W. Bush, see Memorandum of March 28, 2001: Restoration of the Mexico City Policy, 66 Fed. Reg. 17,303 (Mar. 19, 2001)) did not violate CRLP’s First Amendment or equal protection rights, and that CRLP lacked standing regarding its Fourteenth Amendment claims). The judge in the Second Circuit now sits on the U.S. Supreme Court: Justice Sonia Sotomayor.

activists.<sup>121</sup>

Proponents of each view of the proper role of international law claim, then, that the precedent weighs in their favor. It is in this context of conflict that the Doha Declaration assumes its importance.<sup>122</sup>

### III. THE SECOND INTERNATIONAL YEAR OF THE FAMILY AND THE DOHA DECLARATION

The Doha International Conference for the Family and its outcome document, the Doha Declaration, are arguably the most significant developments to emerge from the second International Year of the Family, and among the most important developments affecting customary international law in recent years. Negotiated in Doha, Qatar, by distinguished representatives from nations worldwide, the Doha Declaration claimed a broad base of support and thus represents a general consensus.

In the Doha Declaration, the world affirmed the traditional human rights understandings of the family and marriage while rejecting a right to abortion. In so doing, this document marked a high point in the long struggle against efforts to undermine the traditional notions of family and human life at the United Nations. Moreover, when put in the context of long-existing pro-life national laws and statements, the Doha Declaration stands as a decisive refutation of the argument that customary international law has evolved to recognize a right to either abortion or homosexual marriage, thus proving that abortion rights advocates are unable to meet the standards for a customary international law right to abortion.

#### A. *The Genesis of the Doha Declaration*

On Dec. 8, 1989, the United Nations General Assembly “[p]roclaim[ed] 1994 as International Year of the Family,”<sup>123</sup> “[d]ecid[ing] that the major activities for the observance of the Year should be concentrated at the local, regional[,] and national levels”<sup>124</sup> and “[e]ndors[ing] the main recommendations, objectives[,] and principles for the observance of the Year, as contained in the comprehensive

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121. See S. REP. NO. 107-9, at 22 (2002).

122. In the following discussion of the Doha Declaration, it must be kept in mind that the promotion of abortion and the undermining of the family are intertwined aims of radical feminists. See *supra* note 2. From their perspective, pursuing one promotes the other.

123. G.A. Res. 44/82, para. 1, U.N. Doc. A/RES/44/82, at 205 (Dec. 8, 1989). The General Assembly noted, *inter alia*, that the body was “[g]uided by the resolve of the peoples of the United Nations to promote social progress and better standards of life in larger freedom, with a view to the creation of conditions of stability and well-being,” A/RES/44/82, and “by the relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights[,] and the Declaration on Social Progress and Development, according to which the widest possible protection and assistance should be accorded to the family,” *id.* (citations omitted), and taking note of U.N. resolutions calling for the “protection of and assistance to the family,” *id.*, as well as of the report prepared by the Secretary-General in pursuance of U.N. resolution 43/135. *Id.*

124. *Id.* para. 2.

outline of a possible programme for the Year.”<sup>125</sup> In introducing the October 1994 three-day International Conference on Families, U.N. Secretary-General Boutros Boutros-Ghali noted that in 1989 “there was no consensus. Some did not see the point of an International Year of the Family. Opinions were divided as to what the Year was about.”<sup>126</sup> Indeed, Cardinal Alfonso López Trujillo, President of the Pontifical Council on the Family, noted that “ever since the beginning stages of the preparation for the Year of the Family [in 1994] was the attempt to consider families, in the plural, and to avoid the use of the singular, the family” by those seeking to undermine the traditional family.<sup>127</sup>

However, though he referenced the developing notion of non-traditional family structures,<sup>128</sup> the Secretary-General indicated that recognition of the utmost vitality of the family is universal:

The International Year of the Family has stimulated a worldwide debate. Many political notions have been clarified . . . Today, a new realism prevails. It is accepted that the family is a fundamental institution of human society. Indeed, it is established that society is a structure made up of families and individuals related to society, in the first instance, through families.<sup>129</sup>

In order to commemorate the tenth anniversary of that first International Year of the Family, the United Nations declared 2004 to be a second International

<sup>125.</sup> *Id.* para. 3.

<sup>126.</sup> The Secretary-General, Remarks to the General Assembly, U.N. GAOR, 49th Sess., 35th mtg. (Oct. 18, 1994), *available at* [http://www.undemocracy.com/generalassembly\\_49/meeting\\_35](http://www.undemocracy.com/generalassembly_49/meeting_35).

<sup>127.</sup> Cardinal Alfonso López Trujillo, President of the Pontifical Council on the Family, Proclaiming the Splendid Truth of the Family at the Fellowship of Catholic Scholars 27th Anniversary Convention (Sept. 24, 2004), in *L'Osservatore Romano*, Weekly Edition in English, Nov. 2, 2004, at 8, *available at* <http://www.ewtn.com/library/curia/pcftruth.htm>.

<sup>128.</sup> “Some people argued that support for the family discriminates against those who prefer to live outside family units.” The Secretary-General, Remarks to the General Assembly, U.N. GAOR, 49th Sess., 35th mtg. (Oct. 18, 1994), *available at* [http://www.undemocracy.com/generalassembly\\_49/meeting\\_35/](http://www.undemocracy.com/generalassembly_49/meeting_35/). The representative of Uruguay, too, referenced the changing family, but seemed to reference relational models rather than structural alterations:

If we continue to accept the present discrepancy between the actual and the ideal, we shall be sending a mixed message to children and adolescents, as well as to adults, that will only reinforce stereotypes, impose rigid models and, therefore, undermine the accepted concept of the family.

If families today continue to aspire to unrealistic goals, it will gradually destroy the basic structure of social relations, the family; it would clearly be a step backwards. The stereotype of the traditional family—in which the man is the breadwinner, or at least the principal provider—is being eroded by the growing acceptance of unconventional, more open and, therefore, less stable relationships. That instability often results in the absence of an adequate role model for the children.

*Id.*

The representative of Tunisia explicitly clarified Tunisia’s perspective on family structures, referencing a “basis of mutual respect between man and wife” and mentioning the Tunisian “prohibition of polygamy.” *Id.*

<sup>129.</sup> *Id.*

Year of the Family.<sup>130</sup> The objectives of this event were as follows:

- a. Increasing knowledge regarding family issues among governments as well as the private sector;
- b. Strengthening the capacity of national institutions to formulate, implement and monitor effective family policies;
- c. Stimulating efforts to respond to problems affecting (and affected by) the situation of the family;
- d. Undertaking reviews and assessments at all levels of the situation and needs of the family, including the identification of specific issues and problems;
- e. Enhancing the effectiveness of local, national and regional efforts to carry out specific programs concerning the family, generate new activities and strengthen existing ones; and
- f. Improving collaboration among national and international non-governmental organizations supporting the family.<sup>131</sup>

As the Secretary-General noted, the family has “often untapped potential to contribute to national development and to the achievement of major objectives of every society [including] . . . the eradication of poverty and the creation of just, stable and secure societies.”<sup>132</sup>

However, perhaps because of the advances by “pro-life” and traditional family views in international negotiations during the Bush Administration, the U.N. called for few activities in 2004 to commemorate the tenth anniversary of the Cairo conference<sup>133</sup> and the first “International Year of the Family.”<sup>134</sup> Nonetheless, the government of Qatar, serving as the chair of the Group of 77,<sup>135</sup> decided to sponsor an international conference that would affirm the

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130. See Follow-Up to the International Year of the Family, G.A. Res. 54/124, U.N. Doc. A/RES/54/124 (Jan. 20, 2000); Preparations for and Observance of the Tenth Anniversary of the International Year of the Family, G.A. Res. 56/113, para. 1, U.N. Doc. A/RES/56/113 (Jan. 18, 2002); Preparations for and Observance of the Tenth Anniversary of the International Year of the Family, G.A. Res. 57/164, para. 2, U.N. Doc. A/RES/57/164 (Jan. 16, 2003); Preparations for and Observance of the Tenth Anniversary of the International Year of the Family, G.A. Res. 58/15, para. 3, U.N. Doc. A/RES/58/15 (Dec. 15, 2003).

131. The Secretary-General, *Preparations for and Observance of the Tenth Anniversary of the International Year of the Family in 2004*, para. 1, delivered to the General Assembly, U.N. Doc. A/59/176 (July 23, 2004).

132. *Id.* para. 4.

133. 2004 also marked the ten-year review of the implementation of the Cairo Programme for Action.

134. This was quite unusual, particularly in comparison to the events that marked the fifth anniversaries of the Cairo and Beijing Programmes for Action. See, e.g., Fourth World Conference on Women, <http://www.un.org/womenwatch/daw/beijing/fwcwn.html> (last visited Aug. 13, 2010) (on the anniversaries of the Beijing conference).

135. Established on June 15, 1964, the Group of 77 [G-77] is the largest intergovernmental organization of developing states in the United Nations. For information about the Group of 77, see

importance of the family and marriage and that would focus international attention on the problems and pressures they face, forging a renewed commitment to support and promote the family.<sup>136</sup> The express aim of the Doha International Conference for the Family was to explore and analyze the implications of UDHR Article 16(3),<sup>137</sup> which proclaims that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”<sup>138</sup>

The United Nations welcomed the State of Qatar’s decision to mark this important anniversary;<sup>139</sup> thus was born the idea for the “Doha International Conference for the Family.”

Therefore, during this second Year and the year-long preparatory process for the Doha International Conference for the Family, governmental events, regional dialogues—including major meetings in Mexico City, Mexico and Kuala Lumpur, Malaysia—and hundreds of locally organized civil society discussions were held throughout the world. These conferences resulted in a multitude of reports on the status of the family in each region.<sup>140</sup>

During the final meeting in Doha, Qatar on November 29–30, 2004, represen-

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<http://www.g77.org/doc/> (last visited July 19, 2010). Though it is now composed of 130 nations, the historical significance of the original name led to its retention. *Id.*

136. “[O]ne of the major objectives” of the 2004 International Year of the Family was “to revitalize public attention . . . toward the family and to renew support for family policies and programmes.” The Secretary-General, *Preparations for and Observance of the Tenth Anniversary of the International Year of the Family in 2004*, para. 32, delivered to the General Assembly, U.N. Doc. A/59/176 (July 23, 2004).

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

138. *Id.*

139. G.A. Res. 58/15, para. 2, U.N. GAOR, 58th Sess., 68th plen. mtg., U.N. Doc. A/RES/58/15 (Dec. 15, 2003).

140. See *Doha Report*, *supra* note 141. Numerous academic, non-governmental, and intergovernmental discussions were held during that year. Government meetings took place in Cotonou, Benin (July 2004), Baku, Azerbaijan (Oct. 2004), and Riga, Latvia (Oct. 2004). Regional dialogues were held in Mexico City, Mexico (World Congress of Families III, Mar. 2004), Kuala Lumpur, Malaysia (Asia Pacific Family Dialogue, Oct. 2004), Stockholm, Sweden (Scandinavian Dialogue, May 2004), and Geneva, Switzerland (Aug. 2004). Finally, local community groups organized civil society meetings in more than 134 cities worldwide. Report on the Doha International Conference for the Family (2004).

Declarations, papers, essays, personal statements, findings[,] and proposals for action developed at these events were collected[,] and two significant reports were prepared. The first, entitled *The World Unites to Protect the Family*, reports the results of over two hundred community meetings. The second, entitled *The Family in the Third Millennium*, provides an initial look at the “voluminous” global scholarship. Doha International Conference for the Family, Nov. 29–30, 2004, *Report*, *Id.* at 4–5, U.N. Doc. A/59/599.

Wilkins & Reynolds, *supra* note 3, at 167 n.154. “This evidence collectively demonstrates that the family is not only “the natural and fundamental group unit of society,” (UDHR, *supra* note 1, at art. 16(3)), but is also the fundamental agent for sustainable development. The purpose of the Doha International Conference for the Family was to reaffirm international norms, and establish proposals for action, that can inform an agenda for cooperative research, discussion, and policy development related to family life for the next decade.” *Doha Report*, *supra* note 141, at 4.

tatives from the governments of seventy nations, civil society, the private sector, non-governmental organizations, religious groups, and academia came together to evaluate the outcomes of the preparatory events, review findings and documentation, and negotiate and develop their own recommendations.<sup>141</sup> They compiled these recommendations in their outcome document: the Doha Declaration.<sup>142</sup>

All of these conferences, both the preparatory conferences and the Doha International Conference for the Family, culminated on December 6, 2004, when the U.N. General Assembly officially received the reports of the family conferences.<sup>143</sup>

During the resulting discussion, representatives of many nations spoke to affirm the foundational principles of human rights: proclaiming the fundamental right to life of all individuals and that “marriage is the foundation of families, families are the foundation of societies, and the role of government is to protect and support families.”<sup>144</sup> The United States joined in this consensus, with Assistant Secretary of Health and Human Services Wade Horn noting, “the state’s foremost obligation is to respect, defend, and protect the family.”<sup>145</sup> Similarly strong endorsements came from Africa, Latin America, Asia, and the Middle East.<sup>146</sup>

The U.N. General Assembly then adopted a consensus resolution that “welcome[d] the hosting of the Doha International Conference for the Family on 29 and 30 November 2004 by the State of Qatar and t[ook] note of [its] outcome,”<sup>147</sup> the Doha Declaration.<sup>148</sup>

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141. *Id.*

142. Doha International Conference for the Family, Doha, Qatar, Nov. 29–30, 2004, *The Doha Declaration*, U.N. Doc. A/59/592 (Dec. 3, 2004) [hereinafter *Doha Declaration*]. Additional work products from the Doha International Conference for the Family include the report *The World United to Protect the Family*, the volume of collected papers *The Family in the Third Millennium*, and compiled and indexed materials submitted to the conference secretariat.

143. The Doha Declaration was noted at this point in Draft Resolution G.A. Res. 59/L.29, U.N. Doc. A/59/L.29 (Nov. 15, 2004) (draft resolution). When it went to the floor of the General Assembly, it was cosponsored by Armenia, Azerbaijan, Belarus, Kazakhstan, Qatar, the Russian Federation, the United States, China, and the 130-nation membership of the G-77. *See id.*; Member States of the Group of 77, <http://www.g77.org/doc/members.html> (last visited Nov. 14, 2010).

144. WILLIAM L. SAUNDERS, FAMILY RESEARCH COUNCIL, *THE DOHA DECLARATION: AN INTERNATIONAL CONSENSUS IN FAVOR OF MARRIAGE AND THE TRADITIONAL FAMILY I* (2004).

145. *See id.*

146. *Id.*

147. After passage, G.A. Res. 59/L.29, U.N. Doc. A/59/L.29 (Nov. 15, 2004) (draft resolution) (as orally amended) became G.A. Res. 59/111, para. 4, U.N. Doc. A/RES/59/111 (Dec. 6, 2004) (further “[e]ncourag[ing] governments to make every possible effort . . . to integrate a family perspective in the planning process” and recommending that governments, nongovernmental organizations, academic institutions, and other groups “contribute to developing strategies and programs aimed at strengthening the livelihood of families”).

148. SAUNDERS, *supra* note 148, at 1. The resolution was then adopted by voice-vote consensus. *Id.* Though there is conflicting evidence regarding which nations cosponsored the resolution and supported the Doha Declaration (during the debate, the representative of Qatar noted that the Republic of Moldova was a cosponsor [though Moldova is not listed on the resolution as orally amended, which



The recommendations contained in this declaration reaffirmed the commitments of the international community contained in UDHR, ICCPR, ICESCR, the Second United Nations Conference on Human Settlements, and other U.N. documents. International law, whether in the “customary” form of UDHR or in either of the two basic human rights treaties, gives little support to the notion that a right to abortion or homosexual marriage has developed since UDHR was issued in 1948. The Doha Declaration affirms this conclusion by using the precise language of UDHR, ICCPR, and other basic human rights documents and relying upon the words and their meanings as originally understood when these documents were adopted by the international community.

*B. The Doha Declaration: The Nations of the World Unite to Reaffirm Traditional Understandings of Human Rights*

The Doha Declaration, the outcome document of the Doha International Conference for the Family, acknowledging the close link between life and family issues, proclaims:

**Reaffirmation of commitments to the family**

We reaffirm international commitments to strengthen the family, in particular:

2. We recognize the inherent dignity of the human person and note that the child, by reason of his physical and mental immaturity, needs special safeguards and care before as well as after birth. Motherhood and childhood are entitled to special care and assistance. Everyone has the right to life, liberty and security of person;

3. We reaffirm that the family is the natural and fundamental group unit of society and is entitled to the widest possible protection and assistance by society and the State;

4. We emphasize that marriage shall be entered into only with the free and full consent of the intending spouses and that the right of men and women of marriageable age to marry and to found a family shall be recognized and that husband and wife should be equal partners[.]<sup>149</sup>

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was eventually printed as the final resolution], and the President of the General Assembly, just before adopting the resolution, provided yet another—shorter—list of cosponsors), the best evidence points to the cosponsors being those listed on the resolution as orally amended: Armenia, Azerbaijan, Belarus, Kazakhstan, Qatar, the Russian Federation, the United States, China, and the G-77. *See supra* note 137.

149. Other portions of the Doha Declaration’s “reaffirmation of commitments to the family” read:

1. We commit ourselves to recognizing and strengthening the family’s supporting, educating and nurturing roles, with full respect for the world’s diverse cultural, religious, ethical and social values;

5. We further emphasize that the family has the primary responsibility for the nurturing and protection of children from infancy to adolescence. For the full and harmonious development of their personality, children should grow up in a family environment, in an atmosphere of happiness, love and understanding. All institutions of society should respect and support the efforts of parents to nurture and care for children in a family environment. Parents have a prior right to choose the kind of education that shall be given to their children and the liberty to

### **Call for action**

Taking into account the above commitments, we call upon all Governments, international organizations and members of civil society at all levels to:

#### **Cultural, religious and social values**

1. Develop programmes to stimulate and encourage dialogue among countries, religions, cultures and civilizations on questions related to family life, including measures to preserve and defend the institution of marriage;

3. Evaluate and reassess the extent to which international law and policies conform to the principles and provisions related to the family contained in the Universal Declaration of Human Rights and other international commitments;

#### **Human dignity**

5. Evaluate and reassess government policies to ensure that the inherent dignity of human beings is recognized and protected throughout all stages of life;

#### **Family**

6. Develop indicators to evaluate the impact of all programmes on family stability;

8. Evaluate and reassess government population policies, particularly in countries with below replacement birth rates;

#### **Marriage**

12. Uphold, preserve and defend the institution of marriage;

#### **Parents and children**

17. Reaffirm that parents have a prior right to choose the kind of education that shall be given to their children[.]<sup>150</sup>

As can be seen, the Doha Declaration addresses many traditional values under assault by the Left. Rather than acknowledging any “right” to abortion, the Declaration reiterates the fundamental nature of the right to life, as it belongs to “everyone.” Notably, the Declaration demands the recognition and protection of the inherent dignity of human beings “throughout all stages of life.”

When Qatar and the other original seventy national signatories brought the Doha Declaration to the U.N. in December 2004,<sup>151</sup> only one group of nations opposed it: the E.U. The delegate from the Netherlands, speaking on behalf of the E.U., stated, “Although the family is the basic unit of society, its concept and composition have changed over the course of time . . . . It is not up to the State to impose limitations . . . on the basis of race, nationality, religion, *sexual*

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ensure the religious and moral education of their children in conformity with their own convictions.

*Doha Declaration*, *supra* note 146, at 3. The full text of the Doha Declaration may be found at Doha International Conference for the Family, Doha, Qatar, Nov. 29–30, 2004, *The Doha Declaration*, U.N. Doc. A/59/592 (Dec. 3, 2004).

150. *Id.* at 3–5.

151. The U.N. General Assembly adopted a consensus resolution on Monday, Dec. 6, 2004, welcoming the Doha International Conference for the Family and noting the Doha Declaration. G.A. Res. 59/111, at 3, U.N. Doc. A/RES/59/111 (Dec. 6, 2004).

orientation[,] or any other status.”<sup>152</sup> His assertion was rejected from inclusion in the final declaration.<sup>153</sup> Because a custom must be the universal practice of the nations of the world in order to meet the first requirement of customary international law, this rejection alone proves no customary international law right to same-sex marriage has developed.

The series of interlocking events concluding in Doha “revitalized public support for reinforcing family programmes as an essential element in creating a just, stable and secure world,”<sup>154</sup> as called for by the U.N. Secretary General in his report on the celebration of the tenth anniversary of the International Year of the Family. As the President of the General Assembly noted, “I particularly welcome the Doha Declaration . . . , which reaffirmed international commitments to the family, including United Nations resolutions and declarations, and called upon all Governments, international organizations and members of civil society to take effective measures to support the family in times of peace and in times of war.”<sup>155</sup>

The Doha Declaration, then, resonates as a reaffirmation of the position taken by the founding documents of the international human rights regime. Adopted by overwhelming consensus, it demonstrates that no customary international law has developed to undermine traditional marriage and family structures or to create a right to abortion.

#### CONCLUSION

Despite the clear language of the foundational international human rights documents and the reluctance of states to endorse the abortion-rights and same-sex marriage agendas, advocates of these agendas continue to argue that “international law” recognizes their causes as “rights.” They have had to argue that terminology, not originally interpreted to include abortion or same sex marriage rights, evolved by repetition at U.N. conferences into just those rights. They continue to participate in cases in national courts, attempting to convince courts to rely on their version of “customary international law” in deciding cases under national constitutions. Likewise, since no treaty provides such rights, they have sought to influence U.N. treaty committees to interpret treaty-language as if these were internationally accepted rights. They have claimed such interpretations are “soft norms.” Then they take two steps: first, along with the treaty committee’s, they pressure signatory states to change their laws to provide abortion or same-sex marriage. Second, they combine the “soft norm” from the treaty body with other soft norms—such as statements from U.N.

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152. U.N. GAOR, 59th Sess., 67th mtg. at 6, U.N. Doc. A/59/PV.67 (Dec. 6, 2004) (emphasis added).

153. This is not surprising, given that UDHR prohibits limitations on marriage only on the basis of race, nationality, or religion.

154. The Secretary-General, *Preparations for and Observance of the Tenth Anniversary of the International Year of the Family in 2004*, para. 4, delivered to the General Assembly, U.N. Doc. A/59/176 (July 23, 2004).

155. U.N. GAOR, 59th Sess., 67th mtg. at 2, U.N. Doc. A/59/PV.67 (Dec. 6, 2004).

meetings or by U.N. special rapporteurs (neither of which will likely mention “abortion” or “same-sex marriage”)—and claim the development of the “soft norm” into “hard law” (i.e., customary international law) that binds every country, whether they ratified a treaty or not.

Since the Cairo and Beijing conferences in the mid-1990s, this effort has been a project of the rich, Western nations. It has always been opposed by the “developing” nations, as indeed is demonstrated by the Doha Declaration, which was a project of such nations. However it is important that the United States, the richest of the Western nations, broke ranks with the other Western nations under the presidency of George W. Bush and joined with the “developing” world in reaffirming the original and fundamental human rights understandings about life and the family.

One must remember that the burden of proof regarding new human rights rests squarely upon their proponents. Thus, abortion or same-sex marriage advocates must convince the world that such rights have developed. Since the rights are nowhere written down in agreed-upon and binding documents, advocates must demonstrate that such rights have “evolved” or “developed” under customary international law. However, since customary international law must be, essentially, the unanimous practice of the nations, the fact that most of the world endorsed the Doha Declaration—which simply affirmed the original understandings from the foundational human rights documents—decisively rebuts the argument that such rights have developed by “universal practice.”

The Doha Declaration gained its strength and legitimacy from the number of cosponsoring nations, from its acceptance by the U.N. General Assembly, and from its use of previously accepted language. The terms of the Doha Declaration precisely track international consensus language stretching back to the Universal Declaration of Human Rights from 1948. That language means today what it meant at the U.N. in New York in 2004, and what it meant when originally adopted at the outset of the formalized international human rights system. It includes neither a right to abortion nor a right to same-sex marriage. Even more, the reiteration of the exact language of the UDHR, the ICCPR, and other human rights documents in the Doha Declaration, endorsed and supported by well over 100 nations, demonstrates that no customary international law standards have developed to create such rights. The Doha Declaration, rather, “demonstrates the resolve of the world community to reaffirm its fundamental commitments to the family and to marriage [that] were made in the foundational human rights documents . . . , and it offers a firm foundation for future cooperation among the nations of the world.”<sup>156</sup> Likewise, the Doha Declaration “provides an important counter to the academic and legal rhetoric that has been invoked to undermine the value of unborn human life for the past three decades.”<sup>157</sup>

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156. SAUNDERS, *supra* note 148, at 2.

157. Wilkins & Reynolds, *supra* note 3, at 168.