A. INTRODUCTION

The scope of the argument for a right to abortion begins anywhere with the limited argument for abortion to save a woman’s life to the broadest argument for abortion based on socio-economic reasons or upon request. The most liberal of right to abortion arguments supports itself by a “right to voluntary motherhood;” thus, the right to decide to obtain an abortion is “arguably integral to a constellation of other fundamental human rights such as women’s right of equality, life, health, security of person, private and family life, freedom of religion, conscience and opinion, and freedom from slavery, torture and cruel, and inhuman and/or degrading treatment.”\(^1\) Furthermore, “women’s right to self determination falls under the overarching freedom in decision-making about private matters. Such provisions include protections of the right to physical integrity, the right to decide freely and responsibly the number and spacing of one’s children and the right to privacy.”\(^2\)

Although there are a number of different arguments that may be raised to warrant a right to abortion, the right to abortion is most strongly buttressed when it is argued under three different circumstances. First, the right to life is probably the strongest, yet most controversial right. The controversy arises from competing notions of a right to life. The competing rights are those of the woman’s right to life and the right to life of the unborn child. The second set of circumstances is where a mother invokes her abortion rights on the preservation of her health. Once again, there is the competing interest of her well-being and the right to life interest of the unborn child. The third situation in which abortion rights have their strongest hold in international law is where the woman seeks an

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\(^2\) Id.
abortion when she has suffered rape or incest. The underlying interest here is usually one of voluntary motherhood and the right to reproductive health.

This paper proposes that outside of these three situations, any legal notion that access to abortion ought to be a human right is mostly unfounded and, perhaps, wishful thinking. Furthermore, although these three situations would hold the best argumentative grounds for a right to abortion, it remains difficult to claim that these situations would qualify to the extent of a right under international law.

Part I of this paper will discuss the current state of legal affairs on the so-called right to abortion and will be divided into two sections. The first section will discuss the current state of affairs in regards to the international system of human rights, namely, the United Nations (UN). The paper will analyze the various relevant UN materials to come to a conclusion on the state of international law on a right to abortion. The paper concludes that although there is ample discussion on a so-called right to abortion, there is not yet such a right under international law. At best, there are certain situations in which the UN has repeatedly urged Member States to recognize exceptions to their general abortion prohibitions. On the other hand, however, the UN has not stated that there is not a right to abortion, though UN organs have urged that abortion not be used as a method of family planning.

The second section will discuss the current state of affairs concerning the regional systems of human rights, namely, the European Convention on Human Rights and the Organization of American States. The paper will analyze the various relevant materials to reach a conclusion on the state of law at the regional level. Under the European system, the European Court of Human Rights has noted that there is much controversy as to when
the legal right to life ought to begin. On account of this discrepancy, the European Court of Human Rights has taken a “hands-off” approach on the issue as will be discussed more extensively later on in the paper. It has left that question open to be interpreted by individual States Parties to the Convention in the context of their politics, culture, and tradition. However, it has acknowledged that the same exceptional cases for access to abortion seem to exist as in the UN. Under the American system, the situation is somewhat different. The American system has a formal protection on the right to life from conception. However, it has not functionally met this protection, allowing for similar exceptions as provided by the European system and the UN. Nonetheless, under both the European and American system, allowing for abortion in exceptional cases might ultimately be seen as a compromise or middle-ground for both sides of the issue.

Part II of this paper will discuss the role of the Holy See within the international human rights world. The Roman Catholic Church has been one of the leading developers of a human rights system within the Western world, in part due to its long institutional history and its mission to love as Christ loved. However, the Catholic Church has not existed for two-thousand years-plus without its own faults. The paper will analyze the Catholic Church in three ways. First, it will give a general overview of the Catholic Church’s cohesive and immutable teaching on abortion according to its magisterial power based on Scripture and Sacred Tradition. Second, it will provide a brief overview of the history of the Church and human rights by highlighting the influence of the late-Middle Ages based on the work of Bartolomé de las Cases, Francisco Suárez, and Francisco de Vittoria; noting the involvement of Vatican City, as a sovereign nation, in the early organized human rights dialogue and discussing the influences of Jacques Maritain, a
prominent Catholic and French philosopher; also, by providing a background of current involvement. Finally, the paper will provide an analysis of what the Holy See, as a Permanent Observer to the United Nations, can offer human rights discourse concerning the issue of abortion.

B. ABORTION: CURRENT STATE OF LEGAL AFFAIRS

1. International System of Human Rights

*Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in December 1948. The UDHR was the “first comprehensive human rights instrument to be proclaimed by a global international organization.”\(^3\) The document can be categorized into two broad categories of rights, namely, civil and political rights and social and cultural rights. Examples of civil and political rights consists of “the right to life, liberty, and security of person; the prohibition of slavery, of torture and cruel, inhuman or degrading treatment…freedom of speech, religion, assembly and freedom of movement.”\(^4\) Examples of cultural and economic rights consists of “the individual’s right to social security, to work, and to ‘protection against unemployment,’ to ‘equal pay for work,’ and to ‘just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection,”…’right ‘to rest and

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\(^3\) THOMAS BUERGENTHAL & DINAH SHELTON, INTERNATIONAL HUMAN RIGHTS: IN A NUTSHELL 35 (3rd ed. 2002)

\(^4\) Id. at 36.
‘leisure’...right ‘to a standard of living adequate for the health and well-being of himself and of his family.”

Although the UDHR is not a treaty, whereby it lacks binding legal force, “few international lawyers would deny that the Declaration is a normative instrument that creates or at least reflects some legal obligations for the Member States of the UN.” In other words, the legal effect of the document is not questioned and it is assumed that, at minimum, some of its provisions have international law force. The dispute concerning its legal effect lies on what provisions are binding and under what circumstances they are said to be binding. There is also dispute as to whether the document derives its binding effect from its “authoritative interpretation of human rights obligations contained in the UN Charter, its status as customary international law, or its status as a general principle of law.”

Within the UDHR, there is no explicit reference whatsoever of a right to abortion. However, many scholars have argued for the existence of a right to abortion as being contained within the purview of the document. They argue its existence through an interpretation which integrates the various articles of the document.

The articles that are pertinent to a dialogue on this issue are: Article 1 (born free and equal in dignity and rights), Article 2 (prohibits discrimination by sex), Article 3 (right to life), Article 5 (freedom from torture or cruel, inhuman, or degrading treatment or punishment), Article 12 (right to privacy), Article 18 (freedom of thought, conscience, and religion), Article 19 (freedom of opinion and expression), Article 25 (special care of

5 Id. at 37.
6 Id. at 39.
7 Id. at 39-40; see also id. at 41-43 (treatment of the three different arguments on the UDHR’s binding legal effect).
motherhood and childhood), Article 29 (prohibits exercise of the rights and freedoms listed contrary to the purpose and principles of the UN), and Article 30 (no activity or performance can aim at the destruction of the rights or freedoms listed). Each one of these UDHR provisions applies in a different way. Some would seem to apply in favor of protecting the unborn child, such as Article 1 or Article 10. Still others seem to apply directly in favor of the mother, such as Article 2 or Article 12. Yet there are those that might cut both ways, such as Article 25. In addition, Article 19 could be read as prohibiting the enforcement of a right on another where it is contrary to that person’s belief, conscience, or religion.

Thus, a quick glance at the many different human rights provisions that are implemented into the debate concerning a right to abortion is a clear example of the diverse views in which the rights may be used pro and contra the arguments on a right to abortion. Insofar as most of these rights contained in the UDHR exist in other UN documents either explicitly or by implication, this paper will mostly analyze these rights under other human rights documents.

*International Covenant on Civil and Political Rights*

As an international treaty, the International Covenant on Civil and Political Rights (ICCPR) has binding legal force for the states parties that have signed and ratified the Covenant. Issues that pertain to “compliance with and the enjoyment of the rights guaranteed by the Covenant are matters of international concern and thus no longer exclusively within their domestic jurisdiction.”\(^8\) It is even arguable that compliance with this treaty may be binding on states that are not parties to it by virtue of the force that international law treaties may have. The ICCPR itself establishes the Human Rights

\(^8\) *Id.* at 44.
Committee (HRC) through Article 28. The HRC was created to ensure that States Parties to the treaty meet their obligations. The HRC’s main function is to review the reports of States Parties; in return, the HRC provides general comments on the state of human rights within that State. The effect of these reports and general comments can have different degrees of authority or no authority at all. In more recent years, the evolution of the reporting system has transformed the ICCPR into a much more effective document. An important degree of authority that will be analyzed further on in this paper will be the effect of Committee reports as “soft law” and what this can potentially do to human rights.

_Covenant on the Elimination of All Forms of Discrimination against Women_

The Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW) is yet another document that does not speak in any specific terms about abortion. However, the Covenant’s Committee has approached the issue of abortion and its affect on women’s health and equality.

To this extent, the Committee has mostly focused on the correlation between restrictive abortion laws and the high rate of unsafe abortions that can lead to the endangerment of a woman’s life and her health. The Committee, in its General Recommendations, has also approached the issue of abortion in regards to women who have suffered physical or sexual violence. This was addressed under Article 12, which deals with a woman and her right to health and well-being. Overall, this call for access to abortion, by the Committee, must be narrowly read to exist or pertain to certain situations.

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9 See International Covenant on Civil and Political Rights, Article 40.
10 BUERGENTHAL & SHELTON, _supra_ note 3, at 51.
11 Zampas & Gher, _supra_ note 1, at 259.
12 Id. at 281-82.
that have been addressed. To suggest that this international document could be used to create a right to abortion on demand or for socio-economic reasons would be a great stretch. Furthermore, access to abortion, under the circumstances that have bee recommended, should not be misunderstood as a method of family planning.

1994 Cairo Conference and the 1995 Beijing Conference

The 1994 International Conference on Population and Development in Cairo, Egypt is another instance where an international right to abortion was denounced. The Conference reaffirmed the existence of an international right to reproductive choice, but one would be remiss to think that this term ‘reproductive choice’ somehow includes an international right to abortion. The 1994 Conference confirmed that abortion should not be a method of family planning and that unwanted pregnancies should be avoided in order to eliminate the need for abortion. In fact, many countries stated reservations on the issue of abortion, including the Holy See, who was a key player and driving force on this issue. The Holy See’s main advocacy was seeking consensus at the theoretical level.

The 1994 Conference itself was not intended to create any new international rights, but to “affirm the application of universally recognized human rights standards to all aspect of population programmes.” Thus, to this extent, the document that came out of the Conference is non-binding, but the “statements contained in document are persuasive and indicative of the world community’s growing support for reproductive

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13 Id. at 287.
14 Id. at 272.
16 Id. at 228-232.
rights, and are often used to support legislative and policy reform, as well as interpretations of national and international law.”¹⁹ With this understanding of the 1994 Conference, it would be difficult to surmise an international right to abortion.

Similar issues arose in the 1995 World Conference on Women. This Conference contained a bit more ambiguity in its theoretical concerns on reproductive health.²⁰ However, even thought these ambiguities might create a basis for arguing a right to abortion, nothing in the Conference’s “Platform for Action” establishes such an international right.²¹ In fact, the Platform used language similar to the language used in the 1994 Conference concerning abortion and national governments. It stated that “any measure or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process.”²²

Overall, these two Conferences are prime examples that the issue of abortion as an international right is a hotly contested issue. Nonetheless, they produce evidence that strongly suggests that such a right, at the international level, is non-existent.

A. Current State of Law

The current state of the law, although disputed, nuanced, and complex because of the interrelation that exists between the various human rights documents (binding and non-binding) and the lack of definitiveness on the part of the courts, can basically be categorized into three different views on abortion. First, there is the view that a complete ban on abortion is permissible and necessary in order to protect the life of the unborn child. This protection of the unborn child ensures that the most important of all rights is

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¹⁹ Zampas & Gher, supra note 1, at 253.
²¹ Id. at 152-53.
²² Id. at 153.
not violated, i.e., the right to life. Under this view of the law, the human person ought to be protected from conception to natural death. Any attempt to take the life an unborn child is a grave crime against the human person, and a threat to its inherent dignity and human rights.

Second, there is the moderate view, which is arguably the current state of international law. This understanding of the law is ambiguous by its very nature. It refrains from definitively answering the question of whether an unborn child has the right to life. This view is predominantly concerned with protecting the mother’s interests in cases where carrying to term might result in death, bodily injury, or when the pregnancy is a result of rape or incest. Under these circumstances, the mother’s right to life often prevails over any possible right to life of the unborn child. Outside of these circumstances, however, the right to life of an unborn child has largely gone unanswered. Furthermore, this understanding of the law permits for more state deference on issues of the right to life of mothers and/or unborn children.

The third view is that the current state of the law ought to do what is necessary to knock down any barriers to unfettered access to abortion. This understanding of the law sees an evolutionary process of the right to life, which will inevitably lead to a mother having a free license to seek an abortion at any time she desires; whether it is because of life or health interests or purely a personal request based on self-interests.

*Complete Ban on Abortion*

Under the international system of human rights, countries that maintain or have established a complete ban on abortion, out of interests in life from conception to natural death, have been largely unpopular and challenged based on violations of women’s
human rights. Many of these countries will be analyzed below in the various HRC Committee Reports that have come out within the last twenty years.²³ Basically, the criticism is that states which have formal laws banning abortion on all grounds violate a woman’s human right to life, health, and they force her into unwanted pregnancies when it is the result of rape or incest. Furthermore, while there do remain states that allow for certain exceptions to abortion prohibitions, they function at the equivalent level of having complete bans on abortion. The UN has been fairly harsh on these countries. For example, as will be discussed below, Poland is highly criticized for its minimal access to abortion and the alleged abuse of conscience clauses by doctors.²⁴ The combination of these factors virtually creates a de facto prohibition on abortion. Certain South American countries (e.g., Venezuela and Paraguay), as will be discussed later on, have also been criticized for their restrictive views towards abortion.²⁵ Overall, the international system of human rights does not condone such prohibitions and speaks out even more so when criminal sanctions are placed on illegal abortions.

*Middle-of-the-Road: Maternal Interests v. Fetal Interests*

Although the law itself is quite ambiguous, this section will attempt to analyze what is arguably the current state of law under the international human rights system. To begin this analysis, it would be best to understand how the right to life of an unborn child has been defined or not defined under the United Nations and its relevant documents. Christina Zampas and Jaime Gher argue that assertions made that the right to life within international human rights law extends to an unborn child are “incompatible with women’s fundamental human rights to life, health, and autonomy” and “such contentions

²³ See *infra* pp. 17-25.
²⁴ See *infra* p. 18.
²⁵ See *infra* p. 19.
[of a right to life for an unborn child] have been defeated on various occasions within the international human rights forums."\(^{26}\)

Zampas and Gher support this argument with an historical analysis of the UDHR, ICCPR and the CRC. Under Article 3 of the UDHR, they state the document specifically limits right to those who have been ‘born.’ This reading is further affirmed by the rejection of a proposed amendment that would have protected the right to life from the moment of conception. Along similar lines, the ICCPR’s Article 6 negotiation history reveals that a similar proposed amendment suggesting that life should be protected from the moment of conception was rejected.\(^{27}\) As an aside, Manfred Nowak affirms that “life in the making was not (or not from the point of conception) to be protected” under the ICCPR.\(^{28}\) However, Nowak also states that protection “was not to begin at the moment of conception does not permit one to draw the conclusion that the unborn child is not protected whatsoever by Art. 6.”\(^{29}\) Furthermore, as will be presented below, the HRC has called upon a number of States Parties to the Covenant to reform abortion laws to conform to the current state of human rights law. Finally, Zampas and Gher refer to the traxaux préparatoires of the CRC. They point to Paragraph 9 of the Preamble, which states that “[b]earing in mind that, as indicated in the Declaration of the Child, ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’” They state that, “at most, this language recognizes a state’s duty to promote a child’s capacity to survive and thrive after birth, by targeting the pregnant woman’s nutrition and health.” This “pre-

\(^{26}\) Zampas & Gher, supra note 1, at 262.
\(^{27}\) Id. at 262-63.
\(^{29}\) Id.; See also generally Id. at 153-55.
natal language” is not meant “to infringe on any women’s right to access abortion.” They point to two final reasons as to why the CRC is not intended to cover the right to life beginning at conception. The first is a failed Amendment by the Holy See which attempted to protect life “before as well as after birth.” However, as is readily apparent from the text, language is contained in the preamble which grants “legal protection before as well as after birth.” Second, Zampas and Gher point to the Concluding Observations of the CRC that the definition of child does not include a fetus.  

Regarding the CRC, Abby Janoff also points out the ambiguity that exists within this document. She cures this ambiguity by making a textual argument, without pointing to any historical evidence or negotiation history. She states that any right to life interest of a fetus “conflicts directly with the rights guaranteed to a pregnant girl under the Convention which safeguard her right to health, to life, and to consideration of her best interests if the pregnancy threatens her physical or mental health. However true such an argument may be, this only alleviates part of the definitional problem. This argument only has the force to remedy those interests where the pregnant child may run a risk to her life or physical or mental health. This utilitarian-balancing act between maternal rights and unborn child rights fails to answer the remaining question of whether, in circumstances outside of this one, an unborn child has a right to life interests from conception.

Amidst the textual ambiguity of whether an unborn child has the right to life from conception, it may be relevant to turn to methods of treaty interpretation contained within the Vienna Convention. This method involves conceding to the fact that a preamble, such

30 Zampas & Gher, supra note 1, at 263-64.
as that contained in the CRC, has no binding effect. However, under the Vienna Convention, preambles may provide a context for interpretation.\(^{32}\) In this case, Preamble Paragraph 9 of the CRC states “the child…needs special safeguards and care, including appropriate legal protection, before as well as after birth.” Such a provision provides reasonable grounds for extending the right to life for an unborn child. At the bare minimum, such a reading should at least afford the unborn child a right to life under certain circumstances. It would be most reasonable, at the bare minimum, to understand this right to life as beginning absolutely where the conflicting right of a pregnant child’s right to health, to life, and to consideration of her best interest if the pregnancy threatens her physical or mental health ends. This understanding, however, still maintains quite a bit of ambiguity.

Another option, as stated by the International Committee on the Red Cross during the drafting process of the CRC, is that while “the notion of ‘child’ has not…been made clear…this silence seems wise and will facilitate universal application of the Convention irrespective of local peculiarities.”\(^{33}\) In other words, by not defining the term ‘child,’ individual States Parties will have room to adopt a meaning of the term that best fits their cultural circumstances. There is no doubt, however, that such a case-by-case interpretation of ‘child’ would still be under the scrutiny of international human rights standards. But this type of reading, at minimum, allows for countries to define these terms within their cultural traditions and history. The problem with this approach is that, although a floor would be created in which States Parties would not be able to diminish women’s rights below a certain point, there would be no ceiling which would require at


\(^{33}\) Janoff, supra note 30, at 170.
least some provisional protections for the life of an unborn child. Thus, such an
understanding of international human rights would still not prevent a potential grave
abuse to the dignity of human life from occurring.

The ambiguity that would remain under such a reading can be best understood by
comments made by Austria during drafting of Article 1 of the CRC. Austria noted that
“[t]here is a possible inconsistency between ‘the child’s’ right to adequate pre-natal care
and the possibilities for legal abortion provided in some countries.” 34 Additionally,
Barbados posed the questions, “How far should [the child’s right to life] go? Does the
child include the unborn child, or the fetus?” Furthermore, New Zealand asked similar
questions stating, “does the definition [of a child] begin at conception, at birth, or at some
point in between?” 35 Janoff suggests that the “silence on the controversial issue of when
childhood begins likely facilitated its widespread ratification, as the Red Cross predicted,
since the laws of the States Parties incorporate vastly differing notions regarding the legal
status of the unborn.” 36

Therefore, as it can be seen, at least according to the CRC, the definition of when
the legal right to life begins is fairly ambiguous. Janoff concludes her article by stating
that “it is unclear whether a child’s right to life begins at birth, at conception, or at some
point in between.” She also concludes by observing that “international law that has
emerged from the Convention’s ambiguity might be used…to strike down laws
restricting legality of and access to abortions…when abortion would protect a girl’s life,
health, or best interest.” 37 The ambiguity that remains, however, hints to a fact

34 Id. at 171.
35 Id.
36 Id. at 174-75.
37 Id. at 187-88.
concerning abortion legality, namely, that there is some play in the joints when issuing abortion legislation between the rights of the mother and the rights of the unborn child.

Another avenue for understanding the legal context of abortion is the General Comments of the HRC on the ICCPR. The comments of the HRC on abortion from 1987 to 1998 were fairly sparse. In 1987, comments regarding abortion initially pertained to the criminalization of assisting and performing abortions.\textsuperscript{38} This was similarly the case in the 1988 report concerning Colombian laws; this comment also noted that Colombian views on abortion were due to the cultural traditions of Catholicism.\textsuperscript{39} A 1992 report on Austria stated a bolder, yet ambiguous statement, asking the country “when it was planned to legalize abortion.”\textsuperscript{40} The same report referred to Ecuador’s policy of prosecuting women for having abortions.\textsuperscript{41} Also, it briefly stated its concerns with the “legality of abortion” in Peru.\textsuperscript{42} In 1996, the Committee was concerned with the maternal death rate in Zambia as a result of abortion.\textsuperscript{43}

The comments from 1999-2008 have been much more prevalent, with the exception of no comments during the 2002 period. In a 1999 report, the Committee for the first time issued its recommendation on maternal death rates. The Committee recommends to the Chilean government that the “law be amended so as to introduce exceptions to the general prohibition of all abortions and to protect the confidentiality of medical information.”\textsuperscript{44} In the same report to the government of Lesotho, the Committee noted that Lesotho makes abortion illegal except where the woman is of unsound mind or

\textsuperscript{41} \textit{Id.} at 54.
\textsuperscript{42} \textit{Id.} at 72.
the pregnancy is the result of rape or incest. The Committee recommended to the State party to “review the abortion law in order to provide for situations where the life of the woman is in danger.”

Referencing Costa Rica, the Committee also continued to note the criminalization of all abortions, “including the danger to life involved in clandestine abortions.” The Committee recommended that the law be “amended to introduce exceptions to the general prohibition of all abortion.”

Reporting on Poland, the Committee noted concerns with “strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to the life and health of women.” The Committee stated that “the State party should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning.”

A 2000 report concerning Morocco noted the strict prohibition on abortion which resulted in clandestine, unsafe abortions. The response of the Committee was that the “State party should ensure that women have full and equal access to family planning services and to contraception.” The Committee also noted Ireland’s practice which allowed for lawful abortions when the woman’s life was in danger, but not when the pregnancy was the result of rape. Furthermore, the Committee stated that Kuwaiti law, which made abortion a crime, should make “exceptions on humanitarian grounds.”

The 2000 report also contained General Comment 28 on Article 3 (equality of men and women). The comment noted one point of particular interest, namely, that “State Parties should give information on any measures taken by the State to help women prevent

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45 Id. at 52.  
46 Id. at 55 (emphasis added).  
47 Id. at 66.  
49 Id. at 64.  
50 Id. at 67 (emphasis added).
unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.  \(^{51}\)

In 2001, the Committee noted that abortion practices in Trinidad and Tobago should be reappraised and that risks that violate women’s rights should be “removed from the law, by legislation if necessary (arts. 3, 6.1 and 7).”  \(^{52}\) The Committee also noted criminalization practices in Argentina which deterred medical professionals from providing abortion services when the women’s life was in danger or the pregnancy resulted from rape.  \(^{53}\) The Committee recommended that “in cases where abortion procedures may lawfully be performed, all obstacles to obtaining them should be removed.”  \(^{54}\) Reporting on Peru, the Committee stated its disdain that they once again had to note the fact that abortion continues to be “subject to criminal penalties, even when pregnancy is the result of rape” and it recommended that such provisions are “incompatible with articles 3, 5, and 7 of the Covenant and recommends that the legislation should be amended to establish exceptions to the prohibition and punishment of abortion.”  \(^{55}\) Pertaining to Venezuela, the Committee once again noted that exceptions ought to be created on general prohibition of non-therapeutic abortions.  \(^{56}\)

In 2003, the Committee noted the practice of clandestine abortions as a violation of Article 6. The Committee recommended that the State Party “should help women avoid unwanted pregnancies, including by strengthening its family planning and sex

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51 Id. at 134
53 Id. at 40.
54 Id. at 41.
55 Id. at 48.
56 Id. at 52.
education programmes, and ensure that they are not forced to undergo clandestine abortions, which endanger their lives.”

In 2004, the Committee noted its concern with Sri Lanka policy that made abortion a criminal offence, except where it is performed to save the life of the mother. They also noted its concern with “high number of abortions in unsafe conditions, imperiling the life and health of the women concerned, in violation of articles 6 and 7.” The Committee recommended that “the State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant (article 7 and general comment No. 28), and repeal the provisions criminalizing abortion.” It also stated that, in Colombia, “legislation applicable to abortion [should be] revised so that no criminal offences are involved [in cases of rape or incest or whose lives are in danger].” In its report for Equatorial Guinea, the Committee noted its “concern that legal restrictions on the availability of family planning services gives rise to high rates of pregnancy and illegal abortions, which are one of the principal causes of maternal mortality.” The Committee recommends that “the State party should do away with the legal restrictions on family planning so as to reduce maternal mortality (articles 23, 24 and 6 of the Covenant).”

In 2005, the Committee made a remarkable statement concerning Albania’s report. The Committee noted its concern with the “high rate of infant mortality and of abortion and the apparent lack of family planning and social care in some parts of the State party.” It recommended that “the State party should take steps to ensure that

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59 Id. at 37.
60 Id. at 81.
abortion is not used as a method of family planning and take appropriate measures to reduce infant mortality.”⁶¹ It noted, once again, another country’s criminalization of abortion, unless it is carried out to save the mother’s life. The recommendation made to Morocco was that “the State party should ensure that women are not forced to carry a pregnancy to full term where that would be incompatible with its obligations under the Covenant (arts. 6 and 7) and should relax the legislation relating to abortion.”⁶² In its report on Poland, the Committee was chiefly concerned with the “unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions.” The Committee recommended that the State party should “provide further information on the use of conscientious objection clause by doctors” as well as liberalizing its legislation.⁶³

In 2006, the Committee noted the restrictive laws in Paraguay which lead women to seek unsafe, illegal abortions, at potential risk of their life and health. The recommendation was, as usual, the revision of legislation concerning abortion to “bring them into line with the Covenant.”⁶⁴

In 2007, the Committee noted the practices of both Honduras and Madagascar where abortion was limited, especially in cases where the life of the mother is in danger. The recommendation was the usual call for compatibility of abortion laws to the Covenant.⁶⁵ The same was said of Chile.⁶⁶ Reporting on Zambia, the Committee was

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⁶² Id. at 39.
⁶³ Id. at 41.
⁶⁶ Id. at 44.
concerned with the “requirement that three physicians must consent to an abortion may constitute a significant obstacle for women wishing to undergo legal and therefore safe abortions.”

In 2008, the Committee pointed out its concern with Panama law, which placed a limitation on access to abortion within the first two months of pregnancy where the conception resulted from rape. The Committee recommended that “the State party should amend its legislation so that it effectively helps women avoid unwanted pregnancies and so that they do not have to resort to illegal abortions that could endanger their lives.”

In its *Complicación de observaciones finales del Comité de Derechos Humanos sobre países de América Latina y el Caribe (1977-2004)* [Compilation on the Final Observances of the Committee of Human Rights concerning States of Latin America and the Caribbean], the compilation basically provided for the same types of concerns that were brought forth in the HRC Reports previously stated. However, one interesting notation was the Committee’s awareness of Uruguay’s policy that “not all abortions are considered of the same criminal degree and there exists different gradations of punishment for the respective crime.”

Although the above analysis of the Committee Reports proved long, certain key elements can be extrapolated from these reports. First, there seems to be an emphasis on making “exceptions” to general prohibitions of abortion laws. These exceptions are to be carved out for circumstances where the mother’s life or health is in danger and when the

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67 Id. at 53.
69 OFICINA DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LAS DERECHOS HUMANOS REPRESENTACIÓN REGIONAL PARA AMÉRICA LATINA Y EL CARIBE, *COMPLICACIÓN DE OBSERVACIONES FINALES DEL COMITÉ DE DERECHOS HUMANOS SOBRE PAÍSES DE AMÉRICA LATINA Y EL CARIBE* 516 (translation by author).
pregnancy is the result of rape or incest. This type of “exceptions-talk” points to a general acknowledgement that States Parties are able to remain steadfast in their conviction towards protection of human life from conception. It is arguable whether these exceptions might rise to the level of customary international law. In order for that to occur, two elements would be necessary. First, there would need to be a uniform state practice.

Second, there would need to be a sense of legal obligation (otherwise known as opinio iuris). The excessive encouragement by the HRC that countries find exceptions on general abortion prohibitions could create the impetus for finding a sense of uniform state practice. Although it is not necessary that every state have this practice for it to rise to the level of customary international law, it could still be applied erga omnes. However, it is the sense of legal obligation that is probably lacking on most of these exceptions that inhibits them from rising to such a level. The HRC repeatedly discourages and somewhat castigates the countries for their restrictive laws on abortion, but it is not altogether conclusive this has any legal binding force on these countries. Nonetheless, the existence of this “exceptions-talk” provides an avenue for states to continue protecting human life from conception, with a few exceptions.

Second, two distinct shifts can be identified in the language that is used by the Committee throughout the years. The first shift occurs in the 1999-2000 Committee Reports. In these reports, remedies to abortion begin to be discussed alongside family planning programs and increased accessibility to contraception. However, the Committee refrains from stating whether such family planning programs and accessibility to contraception involve greater access to abortion. This problem is potentially alleviated in

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71 See generally id.
light of the 2005 recommendation to Albania that abortion should never be used as a family planning method. The second shift occurs in 2003-2004 where language discussing liberalization of abortion policies becomes much stronger, yet highly ambiguous. For example, the Committee uses such language as helping pregnant women avoid “unwanted pregnancies” or that States Parties must revise laws because they are “incompatible with obligations arising under the Covenant” (usually in reference to Articles 6 & 7). However, this type of language does not offer any definitive guidance. If compatibility with Articles 6 & 7 requires a state to allow for the exceptions it has previously referenced, namely, when the mother’s life or health is in danger and when conception is the result of rape or incest, then it seems that the Committee recommendations are fairly narrow. On the other hand, if the nebulous language of the Committee is intended to broaden the scope of abortion rights, then the use of such ambiguous language could potentially do what it is intended to do by providing avenues of textual support for those who advocate an unfettered access to abortion.

Additionally, there is ambiguity between Committee Recommendations and General Comment 28. For example, one of the Committee Reports from 2004 recommends that “the State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant.” General Comment 28 states that “State parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.” Once again, if “unwanted pregnancies” is meant to refer to those which

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72 See supra note 57.
73 See supra note 50.
arise from rape and incest, then there seems to be consistent application of Committee Report recommendations. However, if this term (“unwanted pregnancies”) is meant to have a more liberal application, then it can be argued that there exists some greater right to abortion than has previously been warranted by the exceptions. This ambiguity is a disservice to both sides of the issue, but more lethal towards those who advocate legislation that protects human life from conception because it grounds a potential human right in the unfettered access and right to abortion.

Finally, there are situations where conclusions are reached, but lack a foundation upon which they are reached. For example, in a 2007 Committee Report it was suggested that if abortion is legal, it is therefore safe. This claim amounts to an unwarranted axiomatic truth claim. Because an abortion is legal, it is not therefore safe – this cannot be accepted as such an axiomatic truth. In fact, certain countries (most likely those that protect human life from conception) could reasonably assert that abortions can and do have a detrimental affect on the woman’s physical, mental, and even spiritual well-being. Thus, safeness is not necessarily a logical sequitur of legality. This is a conclusion that could merit highly reasonable arguments on both sides of the debate, yet the Committee adopts its “legal, therefore safe” view as a type of axiom.

*Unfettered Access to Abortions*

Once again, this understanding of the law sees an evolutionary process of the right to life which will inevitably lead to a mother having a free license to seek an abortion at any time she desires whether it is because of health interests or it is purely a personal request based on self-interests.
Professor Richard Wilkins sees this evolutionary process of the unfettered right to abortion as a product of the rapid change of “soft law” into “hard law.” Prof. Wilkins states that the “modern UN system churns out soft law norms at an ever-increasing rate.” This “soft law” can come in the form of various UN meetings or documents (for example, the Committee Reports that were analyzed above). Prof. Wilkins notes that every year the UN examines questions on practically every possible social issue. “As a result…various reports, platforms, agendas, and declarations are issued, updated, and expanded.” He goes on to further states that “not long ago, these soft law documents were considered little more than helpful – or, perhaps, even irrelevant – suggestion. Today, they are more than mere words.”

In fact, many of these soft law norms “generated at UN meetings can rapidly attain a status approximating hard law.” He states that this generation is derived from the high expectations that are placed upon these soft law norms by various national governments, non-governmental organizations, and legal scholars. Prof. Wilkins also points out that “at one time, customary law was formed over the course of centuries because such law developed through the uniform, consistent practice of nations over time. 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.”

The speed at which these documents come out and the silence on the part of many countries may be enough for some of these “soft laws” to gain the momentum to be

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74 Wilkins, supra note 20, at 128.
75 Id. at 128-29.
76 Id. at 129.
77 Id.
78 Id. at 130-31.
posited as “hard law.” Prof. Wilkins states that because of these factors, namely, “the growing reach of international treaties, the explosive growth of international soft law norms, and the willingness of judges and others to enforce international pronouncements” those who are interested in protecting human life from conception must pay particular attention not only to the development of national law, but also to “international treaties, UN conference declarations, and the opinions of jurists” from other legal systems.\textsuperscript{79} For example, it is stated that the General Comments have “evolved into a type of quasi-judicial instrument in which the Committee spells out its interpretation of different provisions of the Covenant.” These Comments are “relied upon by the Committee in evaluating compliance by States with their obligations under the Covenant.”\textsuperscript{80} In other words, the General Comments have a potential binding effect on what should be considered as obligatory for States Parties. In this regard, it is of utmost importance for legal scholars interested in the protection of human life from conception to pay particular attention to these malleable “soft law” norms.

Prof. Wilkins, speaking from personal experience, finds that the talk of those who argue for unfettered access to abortion is done covertly. He states that these diplomats and scholars rarely use the term “abortion” to advocate for this right. Rather, they resort to such language as “environmental preservation,” “empowerment of women,” “access to health care,” “elimination of violence against women,” and “promotion of human dignity.”\textsuperscript{81} He argues that they also use “ambiguous and potentially expansive terms” to broaden the horizon for access to this so-called right to abortion. However, he also states that, at least to date, such language has not “expressly and unequivocally recognize[d] an

\textsuperscript{79} Id. at 133.
\textsuperscript{80} Buergenthal & Shelton, supra note 3, at 55.
\textsuperscript{81} Wilkins, supra note 20, at 146.
international right to abortion.”\textsuperscript{82} Nonetheless, “the impact of broad wording of [a document] might have on the unborn life is unknown.”\textsuperscript{83}

Unfettered access to abortion might be most easily refuted by Article 18 of the ICCPR, which states that “[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching.”\textsuperscript{84} In other words, those doctors or medical practitioners who would wish not to participate or assist in an abortion would be able to refuse based on conscience. There is one limitation to this, however, under the ICCPR Article 18, §3, which states that “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Professor Bernard Dickens states that such conscientious objections should be read narrowly so as to protect the patient. He states that some legislation “protects religious, moral, or ethical preferences” at the cost of depriving patients of their “reproductive and other rights, and often empowers health service providers and institutions in effect to impose their will at patients’ cost, including the cost their health.”\textsuperscript{85} However much this statement may be true within the realm of current international law, the great ambiguity still exists as to what constitutes a “fundamental right” or “freedom of others” under the ICCPR. In other words, there still exists that

\textsuperscript{82} Id. at 149.
\textsuperscript{83} Id. at 157.
\textsuperscript{84} ICCPR Article 18.
\textsuperscript{85} Bernard M. Dickens, Legal Protections and Limits of Conscientious Objection: When Conscientious Objection is Unethical, 28 MED. & L. 337, 340 (2009).
question of the hierarchy of rights. Do certain rights (i.e., freedom of conscience and religion) trump other rights (i.e., so-called right to abortion)? Under current law, as has been previously analyzed, it is clear that the only exceptions that must necessarily exist for compliance with the Covenant are when the mother’s life or health is in danger or the pregnancy is the result of rape or incest. Outside of this context, it is unclear whether conscientious objections by doctors or medical practitioners would not prevail over other so-called unfettered rights to abortion that have not been defined clearly by the international human rights system.

2. Regional Systems of Human Rights

A. European Convention on Human Rights

The European Convention on Human Rights (ECHR) entered into force on September 3, 1953.\(^{86}\) Its Member States are limited to those who have already become parties to the European Convention.\(^{87}\) As stated earlier, the ECHR does not provide for an explicit protection of life from conception, much like the UDHR. In fact, the mission and goal of the ECHR is to carry out the enforcement of the UDHR.\(^{88}\) The ECHR has created two institutions to carry out its mission: the European Commission of Human Rights and the European Court of Human Rights (ECtHR). The most efficient overview of the European system’s outlook on abortion is best enshrined in a case entitled Tysiąc v. Poland, which was decided in 2007.\(^{89}\)

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86 Buergenthal & Shelton, supra note 3, at 136.
87 Id.
88 Id. at 139.
89 ECtHR 20 March 2007, Tysiąc v. Poland, no. 5410/03. The overview of this case is intended only as a broad overview and not intended to exhaust the case as that would be, at least, a paper in itself.
In its decision, the ECtHR began its assessment by noting that it was not the “Court’s task in the present case to examine whether the Convention guarantees a right to have an abortion.” This reading avoided any necessary requirement to interpret the Convention’s right to life provision. Instead, the ECtHR focused on Article 8’s provision concerning privacy. The ECtHR stated that the “essential object of Article 8 is to protect the individual against arbitrary interference by public authorities.” The ECtHR initially deferred to the State’s traditional balancing of privacy and public interests concerning abortion. However, in a case of therapeutic abortion, the ECtHR stated “the positive obligations of the State to secure the physical integrity of the mothers-to-be” must also be balanced. In this case, the ECtHR found that the State’s refusal to allow an abortion “amounted to an interference with [the mother’s] rights guaranteed by Article 8.” However, it should be noted, once again, the primary concern of ECtHR was primarily with Article 8 and the denial of which could have led to “possible negative consequences of [the mother’s] pregnancy and upcoming delivery for her health.” Thus, on the one hand, it is difficult to see abortion per se at the forefront of this case. On the other hand, however, abortion was certainly the pivotal fact of the case.

Interestingly, in his dissenting opinion, Judge Borrego stated that “[a]ccording to [the ECtHR’s] reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention.” This outlook on the case proposes a very mind-boggling dichotomy. It could be said that the reasoning of the majority, taken to it logical

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90 Id. at § 104.
91 Id. at § 106.
92 Id. at § 109.
93 Id. at § 107.
94 Id. at § 108.
95 Id. at § 124.
96 Id. at § 15 (dissenting).
conclusion, ultimately has to affirm the statement by Judge Borrego. If a mother should not have been inhibited from an abortion, then it follows that the unborn child never had a legitimate right to be born. Nonetheless, this case presents the line that is often walked in discussing the issue of abortion in the legal setting.

B. Organization of American States

The Organization of American States (OAS) dates back to 1889 and its Charter was adopted in 1948. The Organization currently contains 35 Member States, while it has grant Permanent Observer status to over 65 states, along with the European Union.\footnote{http://www.oas.org/en/about/default.asp.}

In 1969, the OAS adopted the American Convention on Human Rights. Article 4 of this document explicitly states in “Article 4. Right to Life” that “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

The Inter-American Commission ruled on the scope of this provision in 1981. The ruling pertained to a denunciation by various groups stating that the United States abortion law was “incompatible with U.S. human rights obligations as a member of the Organization of American States.”\footnote{Brian J. Leslie, \textit{Poland, Abortion, and the Roman Catholic Church}, 17 B.C. INT’L & COMP. L. REV. 453, 471 (1994).} The Commission stated that this did not violate the American Declaration. Furthermore, the Commission stated that the right to life did not extend to a fetus “partially because a number of U.S. states allowed abortion rights at the time the American Declaration was drafted.”\footnote{\textit{Id.}}

\footnotesize{97} http://www.oas.org/en/about/default.asp.  
United States only signed the American Declaration, without ever ratifying that document.\footnote{http://www.cidh.oas.org/Basicos/English/BASIC4.AMER.Conv.Ratif.htm.}

In the Commission’s discussion of Article 4, they also concluded that the provision protecting life from conception was, in essence, a “compromise between pro-and anti-abortion factions.”\footnote{Leslie, supra note 98, at 471-72.} However, it is somewhat difficult to comprehend how an explicit right to protection of life from conception can in any way be equivalent to a compromise between factions. The Commission also stated that protecting life from conception or at any time before birth was to be a determination of domestic law.\footnote{Id. at 472.} This argument, as opposed to the compromise argument, makes more sense, especially in light of the reservation made by Mexico, at the time of their ratification, that Article 4, paragraph 1, “does not constitute an obligation to adopt, or keep in force, legislation to protect life ‘from the moment of conception,’ since this matter falls within the domain reserved to the States.”\footnote{Supra note 100.}

Overall, it is of much interest that the only human rights document that purports to protect life from conception, in theory, does not actually do so as a practical matter, finding various ways to defer a reading of the Article 4 provision as a matter to be dealt with by the individual nations.

**C. Abortion: Holy See Intervention**

1. **Overview of Catholic Teaching on Abortion**

A simple overview of the Catechism of the Catholic Church (CCC) will provide the necessary groundwork for building a foundation upon which the Church exclaims Her

\begin{footnotes}
\footnote{http://www.cidh.oas.org/Basicos/English/BASIC4.AMER.Conv.Ratif.htm.}
\footnote{Leslie, supra note 98, at 471-72.}
\footnote{Id. at 472.}
\footnote{Supra note 100.}
\end{footnotes}
human rights position on issues of right to life. In its opening words about abortion, CCC 2270 states that “[h]uman life must be respected and protected absolutely from the moment of conception. From the first moment of conception, a human being must be recognized as having the right of a person – among which is the inviolable right of every innocent being to life.”¹⁰⁴ One of the earliest written proclamations of this teaching for the Catholic Church exists in the *Didache*, which was written in approximately A.D. 140. This early teaching document stated that “you shall not procure abortion, nor destroy a new-born child.”¹⁰⁵ Although some dissent by academic scholars, the secular media, and even Catholic United States politicians have attempted to state that this teaching on abortion has not been consistent throughout the years, the CCC states that this “teaching has not changed and remains unchangeable.” Furthermore, CCC 2273 states that an “inalienable right to life of every innocent human individual is a constitutive element of a civil society and its legislation.”¹⁰⁶ Citing another ecclesial document, entitled *Donum Vitae* (Gift of Life) issued in 1987, the CCC 2273 states that the human right to life from conception “depends neither on a single individual nor on parents; nor do they represent a concession made by society and the state; they belong to human nature and are inherent in the person by virtue of the creative act from which the person took his origin.”¹⁰⁷ In this sense, the language of the UDHR Preamble closely resembles that of the Catholic Church. Furthermore, this statement of *Donum Vitae* emphasizes a point that is at the center of all Catholic social teaching, namely, that a person has dignity by virtue of the creative act. In other words, the person has inherent dignity because they are created in

¹⁰⁴ *Catechism of the Catholic Church* [CCC] 605 (Doubleday 1995).
¹⁰⁶ *CCC, supra* note 104, at 606. (emphasis original).
¹⁰⁷ *Id.* at 607.
the image of God, their Creator. This is also referred to as the *imago Dei* (the image of God). One last important point of the Church’s teaching is its reference that the law should provide penal sanctions for “every deliberate violation of the child’s rights.”

### 2. Roman Catholic Involvement in Human Rights

#### A. Historical Development

Professor William Wagner argues that “on the level of theory, the concept of human rights enjoys a demonstrable relationship with Catholicism, viewed as a tradition of intellectual and moral reflection.” He further states that from its earliest days, the Church championed the rescue of abandoned infants, prostitutes, and slaves – Catholic clergy officiated at marriages between slaves and free individuals in violation of state prohibition.” Prof. Wagner also notes the historical roots that international law and human rights have taken from early canon law, St. Augustine, and St. Thomas Aquinas. However, Wagner notes the influence of three particular men on contemporary international law and human rights: Francisco Suárez, Francisco de Vittoria and Bartolomé de las Casas. The two former individuals are arguably fathers of international law.

Prof. Wagner points out briefly the role each one played for international law and human rights development. Starting with Suárez, Prof. Wagner points out that Suárez advanced the cause of international law by his insight into the positive character of international-law norms and also the role he played in arguing for natural rights of life, liberty, and property. De Vittoria defended the rights of indigenous people to property,

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108 *Id.*
110 *Id.*
self-rule, and free consent in the choice of religion. His voice on this matter was one of
great moral authority in a time when Native Americans were facing grave violations of
human rights by those who had arrived in the New World. On a similar note, de las Casas
advocated on behalf of indigenous people of the Caribbean, in front of the Spanish
Crown. Although he ultimately lost on the issue of slavery, his stance on behalf of human
rights had a great influence on the development of human rights.\textsuperscript{111}

Within this historical context, Prof. Wagner states that the Church has been an
“undeniable force in the historical dialectic by which human rights came, over time, to be acknowledged.”\textsuperscript{112} Furthermore, the Church’s “original witness in favor of the dignity of
the person…must be considered [an element] helping to explain subsequent progress
within respect to human rights under Western institutions.”\textsuperscript{113}

However, amidst all the positive influences the Church has had, it has not been
afraid to acknowledge its failures, both within the historical context and
contemporaneously. Prof. Wagner points to a speech of Pope John Paul II, on March 12,
2000, where he called for repentance by Catholics for the sins of the Catholic Church
against human rights, specifically against ‘the service of truth,’ ‘members of other
Christian denominations,’ ‘the people of Israel,’ ‘the peoples of other cultures and
religions,’ ‘the dignity of women,’ and ‘the fundamental rights of the person.’”

Additionally, Prof. Wagner states that “such a critique must itself be tempered by
awareness of the polemical influence on popular impressions of counter religious,
political, and intellectual movements, which are themselves no less fair game for moral

\textsuperscript{111} Id. at 265.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 266.
critique.” In other words, the Church itself acknowledges Her own failings and shortcoming but Prof. Wagner warns against those who use popular anti-religious rhetoric to denigrate the achievements of the Church. He also highlights a master theologian of the Church, Hans Ur von Balthasar, who pointed to the “unparalleled ‘weight of history’ that rests upon the Catholic Church with its unequaled continuity, ensuring that it alone among contemporary institutions must account for practices that were once contemporaneous with institutions that vanished a millennium ago.” Thus, certain criticisms attached to the Church must be properly understood in their historical context, lest those flaws be used arbitrarily within the human rights dialogue.

Another significant point for the Catholic Church within the development of human rights has been its involvement in international human rights. Professor Robert John Araujo notes that although the Holy See did not become a Permanent Observer of the United Nations until 1964, “its role and participation in the work of this international organization began shortly after the United Nations was founded in 1945.” He notes that initially the UN was intended to limit itself to larger states, whereby the Holy See could not enter into the organization. Nonetheless, the “Holy See was invited to participate in UN activities shortly thereafter.” Prof. Araujo also points out induction of the Holy See as a Permanent Observer and the basis of this qualification on involvement with matters of international law.

\[\text{\[114\] Id. at 268.} \]
\[\text{\[115\] Id.} \]
\[\text{\[117\] Id.} \]
\[\text{\[118\] Id. at 347-53.} \]
One last important point of Catholic influence within the human rights context was the prominent role that Jacques Maritain, a Catholic and French philosopher, played in the early development of the U.N. and the UDHR. Maritain’s main objective in his role in helping shape and draft the UDHR was how to make the document one of universal applicability. Maritain’s answer to universal applicability was the notion that people can agree on practical conclusions while disagreeing on the theoretical means for justifying those conclusions.  

Renato Raffaele Cardinal Martino, Permanent Observer of the Holy See to the United Nations from 1986 to 2002, states that the work of Maritain can provide a catalyst to understanding the nature of human rights and the UDHR. Cardinal Martino begins with emphasizing this notion of Maritain that the creation of such a universally applicable document had to sacrifice the investigation of independent philosophical notions in attaining general principles. In Maritain’s own words, the agreement was possible “on the condition that no one asks…why?” Rather than attempt to agree on “philosophical principles or speculative ideals,” it was more important to “achieve a consensus on common practical ideals that would apply to all.”

Furthermore, Maritain saw two differing schools of thought when it came to fundamental human rights. First, human beings have “certain fundamental and inalienable rights antecedent in nature, and superior to society.” Second, “rights are relative to the historical development of society, and are themselves constantly variable

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121 Id. at 58.
122 Id.
and in the state of flux.” Cardinal Martino notes that although this might have been the case as to different philosophical notions of the existence of rights, this did not deter Maritain from “presenting his own views that strongly reflected a Christian perspective on fundamental rights.” Additionally, Maritain recognized the “positive contribution of the diversity of views about human rights.” However, because of this diversity, Maritain recognized that “humanity should not expect too much from the Declaration.”

Overall, Maritain was able to recognize the diversity of views, without abolishing his own views on rights – his views which were deeply seated in the natural law tradition of St. Thomas Aquinas. Maritain was concerned with views that over-emphasized the rights of the individual, which would tend to “deify” him. This type of rights-talk would inevitably place human rights “outside the social and relationship context which was so essential so that ‘universal norms of right and duty’ could be properly understood and practiced.” Liberty was not to be severed from the common good.

B. Current Involvement

Every Pope since the inception of the United Nations and its work on international human rights have commented on the need of such an organization to guard over those rights that are most fundamental to human life, including life itself. Perhaps one of the clearest and authoritative ecclesial statements is that of Dignitatis Humanae (Dignity of the Human Person) from the Second Vatican Council: “The movement towards the identification and proclamation of human rights is one of the most significant

123 Id. at 58-59.
124 Id. at 59.
125 Id.
126 Id.
127 Id. at 59-60.
128 See generally WAGNER, supra note 109, at 260-63.
attempts to respond effectively to the inescapable demands of human dignity”\textsuperscript{129}.

However rich and insightful these authoritative texts of the Church may be, they are not the most relevant to the Church’s involvement with the current human rights debate. Thus, the interventions of the Holy See by the Permanent Observers to the UN will be the focus of this sub-section.

An analysis of the interventions by the Holy See since 2004 would prove to be vain, if one was in search of explicit references to abortion. Rather, language pertaining to abortion would have to be implied from other general statements, with the exception of a few explicit references. The language of the Holy See in most of these interventions has been strongly tinged, leaving little room for ambiguity on the stance it takes in matters of human life.

At a more philosophical level, the Holy See has stated that “[a]mong the fundamental rights, or rather foremost among them, as the Universal Declaration explicitly states, is the right to life of every individual.”\textsuperscript{130} Another prime example of the Holy See’s more philosophical approach states: “The recognition of the existence of fundamental human rights necessarily presupposes a universal and transcendent truth about man that is not only prior to all human activity, but also determines it. Respect for the right to life at every stage, from conception to natural death, firmly establishes the principle that life is not at anyone’s disposal”,\textsuperscript{131}

The Holy See has also stated its stance concerning health and women by stating: “The Holy See continues to advocate a holistic approach to the health of women which does not exclusively focus on a single aspect of a woman but on her overall and comprehensive health care needs.”

However, the Holy See’s language has not always been pleasant and, in fact, has been quite hostile, especially towards instances where the United Nations is contradictory in what it claims to do and what it actually intends to do: “[T]he Holy See understands access to reproductive health as being a holistic concept that does not consider abortion or access to abortion as a dimension of those terms.... It is surely tragic that…the same Convention created to protect persons with disabilities from all discrimination in the exercise of their rights, may be used to deny the very basic right to life of disabled unborn persons”,

Also, the Holy See has intervened by stating its teleological vision on man and the way in which the goal of human rights might be fulfilled: “The UN will be appreciated in its own right whenever the rule of law is translated from discussions of norms and values into tangible results for those who seek justice. The rights to life and freedom of thought, conscience and religion remain the core of the human rights system…. Only by respecting the right to life, from the moment of conception until natural death, and the consciences of all believers, will we promote a world cognizant and respectful of a deeper sense of meaning and purpose”,

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ethical imperatives that are the necessary precondition for freedom…. Human rights, in fact, are not a rhetorical remembrance, but the result of the responsible deeds of everyone.”

3. What Can the Holy See Offer Human Rights Discourse in the Future?

Amidst all of the various arguments, the Church cannot make the sacrifice of silence. In fact, the very documents and dialogue of human rights calls for a plurality of voices. This plurality is not a sacrifice of the truth or the common good, but rather is a catalyst to attaining that common good which subsists and relies on the truth. Under the circumstances of the current law, this paper concludes with four approaches that the Holy See would benefit from in their continual attempts at establishing a human rights system that recognizes the right to life from conception. First, the Holy See should promote a call for legal scholarship on the topic of the right to life from conception. Second, the Holy See should continue to promote true religious freedom over merely religious tolerance. Additionally, the Holy See must maintain its tenacious stance, even if this view on abortion happens to be in the minority. Finally, the Holy See should continue to reiterate exactly where the true battlefield is on this issue.

Prof. Wilkins calls for the “need for an academic pro-life response.” He states that the “pro-life academic – efforts particularly in comparison with those made by scholars and academic organizations that support abortion rights – have been timid and restrained.” Prof. Wilkins points to the major influence of academia because it is “highly prized in the formulation of international law.” In fact, the American Institute of Law’s

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136 Wilkins & Reynolds, supra note 20, at 164.
137 Id.
Restatement (Third) of Foreign Relations Law points to Article 38(1) of the International Court of Justice which states that “judicial decisions and the *teachings of the most highly qualified publicists of the various nations*” may be used in ascertaining the state of the law as a source of international law. Prof. Wilkins states that “[t]he redefinition and reconstruction of international norms related to the value of human life have been planned and executed, in large measures, by members of the academy” and states that “[t]he pro-life academic community can hardly expect to make significant progress itself until it undertakes similarly active and focused efforts.” Thus, it would do the Holy See well to advocate not only to its own community of believers, but those of other faiths and non-faiths, who hold similar views, that a groundswell is needed at the academic level to make the voice of those who cannot be heard more prominent in the human rights context, so that an holistic approach to fundamental human rights might be adopted.

Furthermore, this academic groundswell can assist the legal field in eradicating ignorance of the Holy See’s position on abortion and point out the logical flaws in their arguments. For example, one journal article points to the permissive state of abortion within the Catholic Church by stating the stance of an 18th century theologian and some exceptional circumstances stances allotted by Pope Gregory XIII. However, the fact that a couple individuals stated there should be abortions, under whatever circumstances they argued for, does not persuasively overturn the explicit stance that Church has had on abortion over the last 2000+ years. Furthermore, this alleged scholar attempts to link strong anti-abortion advocacy and the proclamation of the Immaculate Conception of

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138 Supra note 70, §102 (emphasis added).
Mary as being equivalent to the Church’s elevation of the “status of women – particularly the ‘sacredness’ of their child-bearing role in church dogma.”

Although the Church certainly places a high esteem on Mary and the role of women as child-bearers, the use of this dogma is highly misplaced, not to mention ludicrous in its attempt to find a connection with the Church’s anti-abortion advocacy. The Immaculate Conception of Mary is a dogma, but only insofar as it states that Mary, the Mother of Jesus, was conceived without sin. To the “scholar’s” credit, the dogma is often misunderstood to be a proclamation pertaining to Mary’s conception of the Christ-child. Nonetheless, it remains interesting how the “scholar” could make such unwarranted claims. It is precisely this type of ignorance that should not be permitted to be the logical step in a conclusion stating that the Church ought to look at Her teaching from various angles. This type of ignorance can only breed further ignorance when it is not verified by other scholars who are educated in the faith, or at least by those who take the effort to verify their theology. Although this is just one example of many that could have been listed, such errors should not go unchecked in an arena that should be promoting an arrival to the common good.

The second step for the Holy See is the promotion of religious freedom. In a statement by Archbishop Celestino Migliore, Apostolic Nuncio and Permanent Observer of the Holy See to the United Nations, His Excellency stated that “the time has come to move beyond....religious tolerance, and to apply instead the principles of authentic religious freedom.”

Archbishop Migliore states there exists a “recurring state of intolerance when group interests or power struggles seek to prevent religious...

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141 Id.
142 27 October 2006, Statement by H.E. Archbishop Celestino Migliore
communities from enlightening consciences and thus enabling them to act freely and responsibly, according to the true demands of justice.”\textsuperscript{143} The height of intolerance is to exclude these religions from “public debate and cooperation because they do not agree with options nor conform to practices that are contrary to human dignity.”\textsuperscript{144} Such a statement as this can be understood to contain the concerns that have been exhibited in the abortion debate. His answer to this problem is that “[n]ational and global decision making, legal and political systems, and all people of good will must cooperate to ensure that diverse religious expressions are not restricted or silenced.”\textsuperscript{145} This approach outlined by the Archbishop would allow for the diversity that is called for within the human rights dialogue. The human rights dialogue, by its nature, calls for the participation of all peoples, entities, and governments. When certain governments call for the total exclusions or claim certain groups to be an “obstacle” to their agenda, this liberalizing call for dialogue turns into a form of totalitarian where only those with the “correct” voice are welcomed to enter the human rights forum.

Along these lines, the Holy See should additionally continue to proclaim its stance and maintain its path on the issue of life beginning at conception. As a reality, the Catholic Church has maintained this stance since its inception. In this respect, it cannot be reasonably assumed that the Catholic Church will begin arguing a different position any time soon. However, this does not mean that the Catholic Church is unaware that its beliefs are not the norm or in sync with the majority. In fact, as Professor Wagner states, the Church acknowledges its role as “one intermediate social organization among others,

\begin{itemize}
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id.
\end{itemize}
devoted to charity and voluntary giving.” This acknowledgement, however, that it is one among many in no way should inhibit the Holy See from continuing to defend its position. The Holy See must maintain its position that life is a fundamental human right that should begin at conception and such a right is not relative or eligible to subordination to other inferior rights that are often posited against a right to life at conception.

Finally, the Holy See must continue to identify properly where the battlefield in this war truly lies. The battle is not exclusively a legal one. In fact, it is a cultural battle and, even more so for the Catholic Church, a spiritual battle. In a statement by Archbishop Migliore, he states that “[t]he rights of persons are not simply a set of legal norms but represent, above all, fundamental values. Such values must be fostered by society, otherwise they risk disappearing even from legislative text. The dignity of persons must be safeguarded in culture, in the public mentality and in the conduct of society, as a precondition and in order to be protected by the law.” In other words, rule of law is a mechanism by which the state can come to recognize the dignity of persons. The law is not an end in itself – in fact, the law if often incorrect and imperfect. Thus, the advice of Jacques Maritain that the human community should not expect too much from the Declaration was not so much words of prophecy as much as it was a basic truth about the ability of the law to ensure total justice.

However, the fact that the law itself might fall short, even in the most fundamental of rights, is not reason for its abrogation – such a throwing of the “baby with the bathwater” would eliminate those very mechanisms which can provide for justice in a variety of ways. The fact that the law will fall short points all the more that it is the

146 WAGNER, supra note 109, at 270.
culture that must be transformed, more so than the law. Archbishop Migliore used the words the current pontiff, Pope Benedict XVI, when issuing a statement concerning social integration by stating that what the fight really needs is “men and women who live in a profoundly fraternal way and are able to accompany individuals, families and communities on journeys of authentic human development.”

This cultural battle also involves reshaping the understanding of what it means to have rights. The *Compendium of the Social Doctrine of the Church* (“Compendium”) states that “[i]nextricably connected to the topic of rights is the issue of duties falling to men and women.” Quoting Pope John XXIII from his encyclical, *Pacem in Terris* (Peace on Earth), the Compendium states: “Those, therefore, who claim their own rights, yet altogether forget or neglect to carry out their respective duties, are people who build with one hand and destroy with the other.” Thus, to talk about a so-called unfettered right to abortion, or any right to abortion for that matter, severs the duty that is owed to the innocent child that was conceived, a child who should have been afforded a right to life.

**D. Conclusion**

In conclusion, it should be stated emphatically that the current state of the law should not be read as elevating abortion to the level of an international human right. However, the reality that it could attain such status is not unperceivable with the large movement of those who urge that it should be recognized as a right. At most, the current state of law only speaks of a woman’s ability to have an abortion under certain

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150 Id. at 67.
exceptional circumstances. These exceptional circumstances are when her life is in
danger, her health is in danger, or the pregnancy is the result of rape or incest.

To date, the Holy See, as a Permanent Observer to the United Nations, has done a
great amount of work in protecting the life of the unborn child. Although the rights of an
unborn child are scant under international human rights law, it is reasonably arguable,
and perhaps demanded by justice, that some type of right to life exists for an unborn child
where there is no prevailing exception as has been defined by international law. Because
there remains ambiguity within all of this legal discussion, it is important that the Holy
See remain a prominent figure in this heated and passionate dialogue. The Holy See must
remain steadfast and continue fighting the battle it fights at the various levels of social
interaction. Its voice, although one amongst many, is important to an authentic human
rights dialogue and is an invaluable resource to the many unborn children who go without
a voice.