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# THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND UNITED STATES ABORTION LAW\*

SANFORD J. FOX\*\*

## I. INTRODUCTION

The ratification of treaties governing human rights often raises the question of whether obligations imposed by the treaty are compatible with the existing domestic law of the ratifying state. One common way of resolving such conflicts is for the State to avoid undertaking the inconsistent legal obligation by qualifying its acceptance of the treaty with a reservation,<sup>1</sup>

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1. See e.g., the United States reservation to The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force for the United States Feb. 23, 1989 (“[N]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”) 92 CONG. REC. S.1377 (daily ed. Feb. 19, 1986). The Senate resolution of ratification for the Covenant on Civil and Political Rights included a similar reservation: “[A]rticle 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.” 102 CONG. REC. S.4781 (daily ed. Apr. 2, 1992).

Some States may reserve, in more general terms, in order to preserve the status quo in their societies. For example, the reservation by Indonesia to the Convention on the Rights of the Child stated: “The ratification of the Convention on the Rights of the Child by the Republic of Indonesia does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution. *United Nations, Secretary-General, Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child* at 19, U.N. Doc.

even when domestic law already provides for resolving such conflicts<sup>2</sup> Another measure that may be adopted, particularly where the treaty provision at issue is cast in general terms, is for the ratifying state to include a Declaration or an Understanding (RUD) with its acceptance that sets forth an interpretation of the general terms consistent with domestic law on the subject.<sup>3</sup>

The purpose of this paper is to examine whether any such RUDs are called for in the ratification by the United States of the 1989 United Nations Convention on the Rights of the Child<sup>4</sup> in order to avoid a conflict between the treaty and domestic U. S. law governing abortions.<sup>5</sup>

Several parts of the Convention raise the question of abortion law. These include the Preamble and several of the substantive provisions. Analysis of these relevant texts, their legislative history, and the manner in which existing States Parties have dealt with the question of the Convention's impact on their domestic law relating to termination of pregnancies, all lead to the conclusion that the abortion law of the United States would be unaffected by ratification of the Convention.

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CRC/C/2/Rev.2 (1993) [hereinafter *Reservations, Declarations, and Objections*]. This may evoke objections from other State parties who find it difficult to understand the scope of the accepted obligations and who believe that such sweeping reservations generally undermine the integrity of the treaty system. *See, e.g., Id.* at 31 (objection by Sweden).

2. Although the treaty making power under the federal Constitution is extensive, it is generally assumed not to include the power to diminish personal rights guaranteed by the Constitution. *See Reid v. Covert*, 354 U.S. 1 (1957) (opinion of Black, J.); RESTATEMENT (THIRD) OF THE LAW FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmt. b, at 153; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 137-40 (1972).

3. *See, e.g.,* The U.S. Understanding to the Civil and Political Covenant (to the effect that the right to assigned counsel does not include the right to choose such counsel). 13 CONG. REC. S.4781 (daily ed. Apr. 2, 1992).

4. G.A. Res. 44/25, U.N. GAOR 3d Comm., 44th Sess., Supp. No. 49, at 165, U.N. Doc. A/44/736 (1989).

5. *See, Roe v. Wade*, 410 U.S. 113 (1973), *reaff'd* in *Planned Parenthood v. Casey*, 505 U.S. 737, 112 S. Ct. 2791 (1992).

## II. THE TEXT OF THE CONVENTION

The Convention, approved by the UN General Assembly in 1989, quickly came into force.<sup>6</sup>

The document is composed of a Preamble and three Parts. Part I contains forty-one articles which identify and define the rights protected by the treaty. Many of these are elaborations of provisions found in earlier human rights treaties, tailored to the special situation of children.<sup>7</sup> Part II concerns the organization and work of the Committee on the Rights of the Child (CRC) to which States Parties submit periodic reports,<sup>8</sup> while Part III contains the “housekeeping” provisions dealing with such issues as the deposit of instruments of ratification and the time of the Convention would come into force.

Relevant to the question of the Convention’s possible effects on U.S. abortion law are paragraph 9 of the Preamble and two articles in Part I which provide:

### Preamble Paragraph

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”.

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6. United Nations, Committee on the Rights of the Child: *Report on the Sixth (Special) Session (Geneva, 5-22 Apr. 1994) Annex I; States which have Ratified or Acceded to the Convention on the Rights of the Child at 22, Apr. 1994 (158) Annex II; Membership of the Committee on the Rights of the Child, Annex III; Status of Submission Reports by States Parties Under Article 44 of the Convention on the Rights of the Child, Annex IV; List of Documents Issued for the 6th Session of the Committee at 6, U.N. Doc. CRC/C/29 (1994) [hereinafter *Report on the Sixth Session*]. As of 1995, the United States has neither signed nor ratified the Convention. *Id.**

7. See, e.g., Fox & Young, *International Protection of Children’s Right to Health: The Medical Screening of Newborns*, XI B.C. THIRD WORLD L.J. 1, 13-30 (1991) (tracing the evolution of the right to health in Article 24).

8. G.A. Res. 44/25, *supra* note 4. Articles 43-45 state that the CRC is a body of 10 independent experts elected by the States Parties. *Id.*

## Part I

## Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

## Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

The remainder of this paper is primarily a discussion of the implications of these provisions for U.S. abortion law, with particular emphasis on the *travaux préparatoires* of the Convention and the international sources from which these provisions were derived.

## III. THE PREAMBLE

It is common practice to examine the preamble in the process of interpreting a treaty.<sup>9</sup> The role of paragraph 9 of the Preamble in interpreting the substantive articles of the Convention is examined below<sup>10</sup>. At this point the issue to be addressed is whether preambular paragraph 9 creates a substantive right. This is a central question since its text includes language which appears to extend the protection of international law to a child before birth, thereby adopting a *pro life* orientation in conflict with the "choice" position of American abortion law. However, an analysis of the preambular text and of its legislative history indicates that this is not the case.

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9. Vienna Convention on the Law of Treaties, art. 31(1), (20 U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, entered into force Jan. 27, 1980 (hereinafter Vienna Convention). Article 31 provides that terms in a treaty are to be given their ordinary meaning in their context, and that "context" includes the preamble. Although the United States has not ratified the Vienna Convention, it has recognized it as an authoritative guide to treaty law and practice. See, S. EXEC. DOC. L., 92d Cong., 1st Sess., (1971).

10. See discussion *infra* part III. B.

## A. THE PREAMBULAR TEXT AS A WHOLE

The text of the Preamble makes plain that the legal rights and duties established by the Convention must be found *outside* the Preamble. As is common practice in international instruments, the Preamble of the Convention constitutes a catalogue of the reasons the States Parties enter into the multilateral agreement. The agreement — the statements of children's rights and of States Parties' duties — is contained in the text of Parts I, II and III, all *following* the Preamble. Thus, the Preamble opens with: "The States Parties to the present Convention." It then presents in thirteen separate paragraphs the motivating considerations and relevant doctrinal background.<sup>11</sup> The Preamble then concludes with "[the States Parties] have agreed as follows:"

The format of the Preamble, therefore, leaves little doubt that the *agreement*, the binding legal duties, is intended to appear in that part of the document *following* the Preamble. In addition, the preambular text does not purport to contain a legal right of a fetus to be born. Its wording is unambiguous in the sense that it would merely oblige States Parties to provide *appropriate* legal protection before birth, but it leaves to each State Party the determination of what is appropriate.<sup>12</sup> As a matter of syntax, the "*appropriate*" limitation applies only to the "legal protection" referred to in Paragraph 9. This perhaps implies that other actions - *special safeguards and care* - for

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11. These preambular paragraphs include, in addition to the Ninth discussed in the text, such motivating forces as:

*Bearing in mind* that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom. (Paragraph 2).

*Recalling* that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance. (Paragraph 4).

*Recognizing* the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries. (Paragraph 13).

12. See Philip Alston, *The Unborn Child and Abortion under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156 n.1 (1990).

the unborn cannot be limited to what a State deems appropriate. These latter actions, however, are phrased in sufficient generality and breadth so as to afford each State a degree of discretion that is at least as broad as that conveyed by the reference to what is *appropriate*.

## B. THE LEGISLATIVE HISTORY OF PREAMBULAR PARAGRAPH 9

The second compelling reason why the key reference in Paragraph 9 to legal protection before as well as after birth does not create any legal rights or duties relating to the unborn relates to understanding the derivation of the reference. The phrase appears within quotation marks in the Preamble because it is, as the text indicates, taken from the 1959 United Nations Declaration on the Rights of the Child.<sup>13</sup>

That Declaration had been drafted by the United Nations Human Rights Commission and submitted to the General Assembly's Third (Social, Humanitarian and Cultural) Committee for its approval prior to being put before the Assembly as a whole.<sup>14</sup> The Commission's draft included a paragraph in its Preamble affirming that "the child needs special safeguards, including special legal protection, by reason of his physical and mental immaturity." Consideration of this text included discussion of an amendment proposed by Italy that would have recognized a need for the legal protection at the earliest point in time in a pregnancy.<sup>15</sup> Italy would have added to the Commission's draft a phrase declaring that "child-required" safeguards and protection "from the moment of his conception."<sup>16</sup> The amendment was rejected, however, upon the objection by several delegations that it would be unacceptable in countries where abortion was permitted under certain circumstances<sup>17</sup>.

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13. G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959).

14. *Summary of deliberations and decisions in the Third Committee, 1959* U.N.Y.B. 193, U.N. Sales No. E.80.II.C.1 (1959).

15. *Id.*

16. *Id.*

17. *Id.*

This same issue was raised a second time in the Third Committee's consideration of the draft Declaration, but this time in a form that would have elevated the significance of pre-birth protection beyond what it would have had in the Preamble. Italy and five other countries proposed a new Principle be added to the body of the Declaration which would state that the child's right to life should be respected from the moment of conception. This too, however, was rejected. The Philippines offered a compromise that deleted reference to the time of conception. It contained the phrase "before as well as after birth" which Paragraph 9 of the Preamble to the Convention quoted and was accepted in the Third Committee, but not as one of the Principles of the Declaration. Instead it became the third paragraph of the Declaration's Preamble. As framed the text was approved by 70 votes to 0, with two abstentions. The General Assembly then adopted it unanimously.

It is thus clear that "appropriate legal protection, before as well as after birth," in its original incarnation in international instruments, was purposefully vague on the question of *when* before birth the legal protection arises. The legislative history of the Declaration on the Rights of the Child reveals a firm rejection of the idea that fetal protection from the time of conception was appropriate as an international aspiration.

It should be noted, moreover, that while the Declaration, in common with General Assembly resolutions generally, is a manifesto document, it does not, by its own force, constitute international law. The fact that the phrase in question occurs in the *Preamble* to the Declaration makes that phrase still further removed from an international legal obligation. It appears as one of the "whereas" paragraphs identifying considerations that subsequently moved the General Assembly in the document to call upon the world to recognize the ten stated Principles (not the Preamble) and to strive to observe them.

The anti-abortion nations had similarly failed to achieve international law protection for the unborn as early as the drafting of the 1948 Universal Declaration of Human Rights<sup>18</sup>

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18. See, Alston, *supra* note 12, at 159.



and again in the writing of the Covenant on Civil and Political Rights.<sup>19</sup>

The one possible exception to these developments is Article 4(1) of the American Convention on Human Rights which provides: "Every person has the right to have his life respected. This right shall be protected by law and, in general from the moment of conception."<sup>20</sup> Even Article 4(1) of the American Convention does not, however, rigidly proscribe abortions be-

19. See Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty, in THE INTERNATIONAL BILL OF RIGHTS* 114, 122 (Louis Henkin, ed., 1981).

The Human Rights Committee, established under Article 28 of the Covenant, has never considered the right to life protected by the Covenant's Article 6 to include protection of the unborn, even when it exhorted States Parties to broadly interpret the right:

[T]he Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

*General Comments Under Article 40, Paragraph 4, of the Covenant*, U.N. GAOR, International Covenant on Civil and Political Rights Hum. Rts. Comm., at 2, U.N. Doc. CCPR/C/21/Add.1 (1981).

A recent study of the work of the Human Rights Committee, the monitoring group established under the Covenant, concludes:

Abortion and euthanasia have only been spasmodically dealt with by HRC members. The ICCPR contains no express provision concerning the points in time at which life commences and terminates and thus the precise extent of a State's obligation is uncertain. Draft proposals that would have covered a right to life "from conception" were not adopted. A number of HRC members have commented that the question of abortion was peculiarly moral and controversial one and that it would therefore be difficult to achieve a Committee view on it. . . . When dealing with the question of abortion, the principal concern of the members has been to determine the circumstances in which abortions were authorized. This could be taken to suggest that abortions are not *per se* contrary to the ICCPR or at least that they might be compatible with the ICCPR in certain circumstances.

D. MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* 330 (1994).

20. O.A.S. Treaty Series No. 36, at 1, OEA/Ser. L/V/II.23 doc. rev. 2, entered into force July 18, 1978.

cause the reference to "in general" has been interpreted to provide a degree of discretion in States Parties to the American Convention,<sup>21</sup> one that is similar to that which is safeguarded by inclusion of the term "appropriate" in preambular paragraph 9 of the Convention.<sup>22</sup>

Human rights regimes established under other major regional instruments produce a similar result. Both the European<sup>23</sup> and African<sup>24</sup> conventions on human rights protect a right to life without any reference to the unborn.<sup>25</sup>

This being the posture of the international community on the issue, Poland submitted the original draft of a Convention on the Rights of the Child to the UN Human Rights Commission in 1978.<sup>26</sup> This submission included a preambular para-

21. The Baby Boy Case, Case 2141, Inter-Am. C.H.R. 25, OEA/ser. L/V/II.54, doc.9 re.1 (1981) *reprinted in* 2 HUM. RTS. L.J. 110 (1981).

22. See Alston, *supra* note 12, at 175-77, noting that:

The American Convention, and the interpretation which it has been given by the Inter-American Commission on Human Rights, are significant in the present context because they confirm the consistent refusal of international law, even in the case of a treaty which specifically recognizes the right to life, ". . . in general, from the moment of conception," to impinge significantly on the discretion of each state to adopt its own policy regulating access to abortion.

23. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953.

24. African [Banjul] Charter on Human and People's Rights, Article 4, OAU. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

25. In Austria, where the European Convention *supra* note 23, has constitutional status, the Constitutional Court has refused to interpret Article 2 as protecting unborn life. The case is discussed in Brenda, *The Impact of Constitutional Law on the Protection of Unborn Human Life: Some Comparative Remarks*, 6 HUM. RTS. L.J. 223, 234-35 (1977). Alston observes that, similarly, "the European Commission on Human Rights has consistently refused to accept that the right to life recognized in the European Convention of Human Rights can be translated into an absolute right for an unborn child." Alston, *supra* note 12, at 174.

26. U.N. ESCOR, 1978, Supp. No. 4, at 122-27, U.N. Doc. E/1978/34; E/CN.4/1292 (1978). (Literal reiteration of the 1959 Declaration on the Rights of the Child, *supra* note 13, at 19-20, with added clauses appropriate for a multilateral treaty). The Secretary General circulated this Declaration for comments and suggestions to member States. QUESTION OF A CONVENTION ON THE RIGHTS OF THE CHILD; REPORT OF THE SECRETARY-GENERAL [REPLIES RECEIVED FROM GOVERNMENTS AND ORGANIZATIONS], U.N. ESCOR, Commission on Hum. Rts., U.N. Doc. E/CN.4/1324; U.N. Doc. E/CN.4/1324/Corr.1; U.N. Doc. E/CN.4/1324/Add.1-5 (1978) [hereinafter REPLIES RECEIVED FROM GOVERNMENTS AND ORGANIZATIONS].

graph that repeated the reference in the preamble of the Declaration relating to protection of the child before as well as after birth, relying for support on reference to a number of international instruments.<sup>27</sup> The request for comments on the Polish draft<sup>28</sup> from the international community produced only a few responses to this part of the draft and "[t]he most striking feature of the initial responses then was the paucity of concern with the issue, which would seem to demonstrate a generally shared, but certainly unstated, consensus that the matter would be best left unaddressed or at least unresolved."<sup>29</sup> Poland then reformulated its draft, this time omitting any reference to the unborn in the revised preamble and vesting the protection of the Convention in a child defined as existing "from the moment of his birth."<sup>30</sup>

The issue of provision for fetal rights in the Preamble did arise, however, shortly after the Working Group organized by the Commission to produce a final draft of the Convention began its work.<sup>31</sup> By 1980, the Working Group had adopted a text of the first four preambular paragraphs. At its second

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In light of the strongly expressed views of responding states that the vague and general language of the Declaration was inappropriate for a legally binding treaty, Poland submitted a revised text which became the starting point for the Working Group's efforts for the next ten years. See, QUESTION OF A CONVENTION ON THE RIGHTS OF THE CHILD; NOTE VERBALE DATED 5 OCT. 1979 ADDRESSED TO THE DIVISION OF HUMAN RIGHTS BY THE PERMANENT REPRESENTATION OF THE POLISH PEOPLE'S REPUBLIC TO THE UNITED NATIONS IN GENEVA, U.N. ESCOR, COMMISSION ON HUM. RTS., U.N. Doc. E/CN.4/1349 (1980) [hereinafter POLISH DRAFT].

27. The 1978 Polish draft refers to the Geneva Declaration of the Rights of the Child of 1924; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and "the statutes of specialized agencies and international organizations concerned with the welfare of children." As Professor Alston's analysis of these instruments demonstrates, however, none of these texts supply authority for the Polish draft. Alston, *supra* note 12, at 158-59.

28. See REPLIES FROM GOVERNMENTS AND ORGANIZATIONS, *supra* note 26.

29. Alston, *supra* note 12, at 162.

30. POLISH DRAFT, *supra* note 26; See also discussion of Art. 1 *infra* part IV.

31. QUESTION OF A CONVENTION ON THE RIGHTS OF THE CHILD; REPORT OF THE WORKING GROUP ANNEX. PARAGRAPHS OF THE DRAFT CONVENTION ON THE RIGHTS OF THE CHILD ADOPTED BY THE WORKING GROUP, U.N. ESCOR, Commission on Hum. Rts. — Working Group, UN Doc. E/CN.4/L.1542 (1980) (summary of events at the 1980 meeting of the Working Group from that year's Working Group report).

meeting that year the Holy See and several other delegations proposed that the preambular paragraph to be considered next for adoption include a reference to the child's need for care and assistance "before as well as after birth," a phrase proponents of the amendment acknowledged they had taken from the Preamble to the 1959 Declaration on the Rights of the Child.<sup>32</sup> Supporters of this proposal argued that it was *not* designed to preclude the possibility of abortion<sup>33</sup> and that rights before birth were commonly protected in national legislation, citing inheritance rights of the unborn as an example of the need for pre-birth protection.<sup>34</sup> Opponents, on the other hand, insisted that it was important that the Convention be clearly neutral on the issue of abortion and that a tilt one way or the other would, in light of differing domestic policies on abortion, endanger widespread ratification.<sup>35</sup> The consensus of the delegations favored the opposition's view and the proposed reference to protection before birth was not accepted. These discussions in the 1980 Working Group retraced the controversy that had arisen in the course of adopting the original 1959 Declaration and reached the same result of rejecting a partisan position on the abortion issue.

In subsequent meetings of the Working Group the matter of referring to fetal rights in the Preamble remained dormant until near the completion of the drafting. From 1980 to 1989 the Working Group gradually adopted the full text of the draft Convention without the issue of a preambular mention of pre-birth rights again arising. The 1989 meeting of the Working Group was devoted to a second reading of the draft produced during this period. At that meeting, however, two proposed amendments concerning the existing sixth preambular paragraph<sup>36</sup> again sought to add the "before as well as after birth" phrase from the Preamble to the 1959 Declaration.<sup>37</sup> The rep-

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32. *Id.* at 2.

33. *Id.*

34. *Id.* at 3.

35. *Id.*

36. This was the same text that had been the fifth preambular paragraph in 1980 and which became the ninth paragraph in the final form of the Convention.

37. The Federal Republic of Germany submitted one amendment; U.N. Doc. E/CN.4/1989/WG.1/WP.6. The Philippines, Ireland, Malta and the Holy See jointly submitted the other. UN Doc. E/CN.4/1989/WG.1/WP.8. The latter was withdrawn by its sponsors in the course of the discussion of the former. *Report of the Work-*

representative of the Federal Republic of Germany introduced this amendment by explaining that in the Bundestag his government had been asked why the first draft of the Convention had not included protection for the unborn and that his government had no good reasons to present.<sup>38</sup> He added that without his amendment the draft would not be acceptable to his government.<sup>39</sup>

Discussions of the FRG proposal then largely repeated the 1959 and the 1980 deliberations concerning the Preamble. The representative of Poland pointed out that the existing draft did not preclude a State Party from protecting the unborn and that Article 21 of the draft convention invited a broad interpretation of the text.<sup>40</sup> This time, however, the proponents insisted on inclusion of their reference to the unborn. The West German delegate indicated that he would formally request a vote on his proposal if the text of the Preamble did not reflect it. Norway, with the on-the-record support of a number of other delegations,<sup>41</sup> opposed reopening the 1959 and 1980 debates.

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*ing Group on a Draft Convention on the Rights of the Child.* U.N. Doc. E/CN.4/1989/48 at 9 (hereinafter *Report of the Working Group*).

38. The remarks by the FRG delegate appear in the notes of the author who attended that meeting as a representative of one of the non-governmental organizations participating in the drafting sessions, Defense for Children International. The remarks do not appear in the official *Report of the Working Group*, *supra* note 37. At no point in the discussion that followed did the Federal Republic's representative indicate why his government had not responded to the parliamentary inquiries. He simply cited the 1980 failure to obtain inclusion of a preambular reference to the unborn and the similar failure in regard to the definition of "child". See discussion *infra* Part IV. For other curious aspects of the West German position, See, Alston, *supra* note 12, at 171-72.

39. *Report of the Working Group*, *supra* note 37.

40. *Id.* at 10. This caused some confusion because during the entire previous ten years of drafting, all provisions of the draft had been accepted by consensus and without the necessity of voting. The representative of the UN Secretariat indicated that it was unclear which delegations in the room were entitled to vote and that the UN headquarters in New York would have to be consulted. See *supra* text accompanying note 36.

41. The other delegations included those from the the Netherlands, India, France, China, the USSR, Denmark, Sweden, the German Democratic Republic and Canada. The Norwegian delegation was particularly reluctant to reopen a debate without there being anything new to discuss. The United States representative noted that a fetus is not a person under the federal constitution but that state laws offered some degree of protection. His opinion was that the West German proposal was flexible enough to comport with United States law but, like the Norwegian representative, he was afraid that reopening the issue would consume

Announcing that a vote would be taken the next day, the Chairman of the Working Group appointed a small drafting group to try to find a text that would command a consensus and thereby avoid the divisiveness of a recorded vote.<sup>42</sup> The appointed group accepted the proposal to include the reference to the unborn. Its recommendation became the ninth preambular paragraph of the Convention. It differed from the Federal Republic's proposal only in that the introductory phrase - "Bearing in mind" now in the Convention - was substituted for the "Recognizing" originally in the German text.<sup>43</sup>

The result of these events was to carry forward into the Preamble of the Convention the same indeterminacy and refusal to take a clear position on the abortion issue that had last appeared in 1959.

#### IV. ARTICLE 1: THE DEFINITION OF "CHILD"

In light of the long-standing global consensus, outlined in Part III *supra*, that it is inappropriate for international law, or even formal international aspiration, to take a position for or against fetal or abortion rights, it is no surprise that the substantive parts of the Convention, including the key definition of "child" in Article 1, reflect the same position of neutrality. The drafting history of Article 1 demonstrates this.

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more time than was available to the Working Group. There was no dissent from any source to the position that, as the text stood, States Parties could go their separate ways on the question of legal protection for the fetus. *Report of the Working Group, supra* note 37.

42. The drafting group was composed of the representatives of the Federal Republic of Germany, Ireland, the Netherlands, Italy, Poland, the United States and Sweden. *Report of the Working Group, supra* note 37, at 11.

43. The drafting group also proposed the addition of a text to the *travaux preparatoires* relating to the Convention's definition of "child". This was to insure that its modification of the Preamble did not implicitly create fetal rights in Part I of the Convention. See discussion *infra* part IV. There was also "corridor" talk that proponents of the adopted preambular amendment had also undertaken not to introduce any amendments to the text of Part I designed to insure substantive rights for the unborn. This is impossible to confirm, but no such amendments were, in fact, put forward. The two pending amendments that would have extended the Convention's protections from conception were withdrawn upon adoption of the preambular reference to the 1959 Declaration. See text to note 47 *infra*.

The 1979 revised Polish draft included a definition of "child" which would have had childhood commence "from the moment of his birth".<sup>44</sup> Two now familiar perspectives emerged in the Working Group's initial discussions of that definition in 1980. One asserted that the draft being considered was contrary to the legislation in many countries which extended the concept of childhood back to the moment of conception.<sup>45</sup> Opponents of this view argued that there should be no attempt to establish precisely when childhood begins in order that the definition be compatible with the heterogeneity of existing domestic legislation.<sup>46</sup> This latter result was accomplished by deleting the phrase "from the moment of his birth". In that form the definition was adopted.

At the second reading of the draft Convention in 1989 - the same meeting that produced Preambular Paragraph 9 - the definitional issue arose again. Two proposals for amending the definition of "child" were before the Working Group that would have had childhood begin at conception.<sup>47</sup> The FRG proposal for amending the Preamble in the same direction was pending at the same time and discussed first. Upon resolution of the preambular issue, the sponsors of the Article 1 amendments stated that, in light of the just-adopted text of preambular paragraph 6 referring to protection before as well as after birth, their amendments would be withdrawn. They added that they wished the report of the Working Group to show that their governments took the view that protection of the child began with conception.<sup>48</sup>

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44. POLISH DRAFT, *supra* note 26. (The 1959 Declaration of the Rights of the Child did not include a definition of "child".)

45. *Supra* note 26, at 5.

46. *Id.*

47. U.N. Doc. E/CN.4/1989/WG.1/WP.9 (submitted by Malta); U.N. Doc. E/CN.4/1989/WG.1/WP.17 (submitted by Senegal).

48. *Report of the Working Group, supra* note 37, at 15-16. This is also the view of Senator Jesse Helms, but it is not shared by the Senate as a whole. Senator Helms attempted to have the Senate resolution urging President Bush to sign the Convention amended to add a definition of child which included the unborn offspring of any human being at every stage of development, but the amendment was rejected by a vote of 63-36. 52 CONG. REC., S12787 (daily ed. Sept. 11, 1990).

The relationship between the existing preambular paragraph 6 and the definition of Child in Article 1 was a cause of concern to some delegations who feared that the preambular reference to the unborn would influence interpretation of the definition and other substantive provisions of the Convention. As an expression of this concern the Chairman's ad hoc drafting group which had written the text of preambular paragraph 9 urged that the Chairman include, on behalf of the entire Working Group, the following text in the *travaux préparatoires*.

In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States Parties.<sup>49</sup>

The Chairman then read this statement into the record. This maneuver needs to be understood in the context of Article 31 of the Vienna Convention on the Law of Treaties,<sup>50</sup> which provides that the terms of a treaty are to be interpreted in their context, and that "context" includes the preamble of the treaty.<sup>51</sup> The United Kingdom's representative requested that the U.N.'s Legal Counsel be formally asked to confirm that the Chairman's statement would be deemed relevant if there were any future doubts concerning the interpretation of the definition of "child".<sup>52</sup> One possible explanation for this was apprehension that the reference to protection for the unborn in preambular paragraph 9 would lead to the interpretation of the Article 1 definition of "child" as including the unborn. While awaiting the response of Legal Counsel, the U. K. delegate indicated that his government might have to lodge a reservation concerning Article 1 at the time of ratification.<sup>53</sup>

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49. *Report of the Working Group, supra* note 37, at 11.

50. *See supra* note 9.

51. The representative of Ireland questioned the appropriateness of including the statement in the official report, but neither he nor any other delegate lodged a formal objection. *Report of the Working Group, supra* note 37, at 143.

52. *Id.* at 11.

53. *Id.* at 7. The U.K. signed the Convention on April 19, 1990, reserving the right to formulate reservations or declarations upon ratification. *Reservations, Declarations, and Objections, supra* note 1, at 26. When the United Kingdom did ratify in December, 1991, it included among its reservations and declarations a statement that: "The United Kingdom interprets the Convention as applicable only following a live birth." *Id.*



Shortly after the Working Group concluded its first week of deliberations at the 1989 session, Legal Counsel sent a reply which made two points. He indicated that there was no prohibition in law or practice against including an interpretative statement in the *travaux préparatoires*.<sup>54</sup> He however also found it "strange" that the Working Group sought to deprive a preambular paragraph of its usual role in providing a basis for interpreting the terms of the treaty. This "deprivation" would make it difficult to determine which conclusions a State would later draw in seeking to interpret the treaty.<sup>55</sup>

Legal Counsel also reminded the Working Group that, in any event, under Article 32 of the Vienna Convention recourse could be had to the *travaux préparatoires* only if those interpreting the treaty found its relevant terms to be unclear<sup>56</sup>. On this point Counsel may have been suggesting that the statement inserted in the record at the request of the ad hoc working group would be of importance and accessible as an aid for interpretation only if other parts of the Convention were unclear. This view misconstrues what had occurred in Geneva. The purpose of the inserted statement was not to provide meaning for unclear terms. Its aim was precisely for the "strange" reason noted by Counsel, namely, to deprive the phrase in Preambular Paragraph 9 of its normal impact as a source for interpretation. Article 31 of the Vienna Convention confirms that it normally is such a source.<sup>57</sup> Moreover, Article 31 does not make the preamble available as an interpretive source only for unclear parts of the Convention. It is rather a part of the textual context out of which the ordinary meaning of *all* terms is primarily derived.

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54. *Response of the Legal Counsel to the Request for Confirmation by the Representative of the United Kingdom regarding Preambular Paragraph 6 (paragraph 9), Report of the Working Group, supra note 37, at 144.*

55. *Id.*. Alston points out that Legal Counsel misconstrued the purpose of the statement inserted in the *travaux* and failed to understand that it was part of the compromise in the ad hoc drafting group designed to prevent any effort to misrepresent the significance of the agreed to preambular paragraph. Alston, *supra* note 12, at 171.

56. *Response of the Legal Counsel, supra note 54.* The terms used in Article 32(a) of the Vienna Convention to identify the lack of clarity are "ambiguous or obscure."

57. *Supra* note 9.

That may be the ordinary role of the preamble assigned to it by the Vienna Convention, but ordinary agreement of States Parties to a treaty can modify it.<sup>58</sup> That modification is the result intended to be achieved by the statement inserted in the record.

Thus, in reviewing these developments one non-governmental organization present at the Working Group meeting appropriately concluded:

The unborn child is currently not protected as far as the draft convention on the rights of the child is concerned. The insertion of a reference to the child "before as well as after birth" in the sixth preambular paragraph is in fact negated by a statement which was placed in the record of the meeting (*travaux préparatoires*), indicating the intention of the working group which drafted the present text of the convention.<sup>59</sup>

This legislative history of Article 1 simply narrates once again the consensus of the international community that the legal protection of fetal rights is not an appropriate subject for international legislation.

## V. ARTICLE 6: THE RIGHT TO LIFE AND SURVIVAL

Since the debate in the United States on the abortion question is often framed in terms of a "right to life," the relevance of the Article 6(1) proclamation of an "inherent right to life" — reiterated and reinforced by an obligation to ensure "survival" imposed by the second paragraph of Article 6 — is readily apparent.

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58. There is no basis for suggesting that the rules relating to the role of a convention's preamble are of a *jus cogens* status and cannot, therefore, be modified by a normal agreement.

59. QUESTION OF A CONVENTION ON THE RIGHTS OF THE CHILD; WRITTEN STATEMENTS BY THE INTERNATIONAL RIGHT TO LIFE FEDERATION, U.N. ESCOR, Comm. on Hum. Rts. at 1, U.N. Doc. E/CN.4/1989/NGO/55 (1989).

Article 6 (then Article 1 *bis*) was adopted late in the ten year drafting process. It developed out of a proposal by India designed to ensure "the survival and healthy development of the child."<sup>60</sup> Amid expressions of concern that the idea of *survival* was not a common legal term, the observer for UNICEF at the Working Group explained what the term meant in that agency.<sup>61</sup> The record does not reflect the UNICEF explanation made at that time. The next year the representative of the World Health Organization placed into the record a meaning of the term. He informed the Working Group that:

[T]he term "survival" had a special meaning within the United Nations context, especially for [WHO] and UNICEF. "Survival" included growth monitoring, oral rehydration and disease control, breast feeding, immunization, child spacing, food and female literacy.<sup>62</sup>

In the context of a right to survival with such a meaning, the discussions developed the idea that the right to survival and a right to life were complementary and mutually supporting expressions.<sup>63</sup> It was also pointed out in the discussion of this part of the draft that the Working Group had agreed not to reopen the question of when life begins.<sup>64</sup> The Chairman suggested that the Indian proposal was designed to remedy the absence from the draft of a right to life, a right that was already enshrined in Article 6(1) of the International Covenant on Civil and Political Rights.<sup>65</sup> Perhaps he was then recalling that anti-abortion nations had failed in their efforts to have Article 6 of the Civil and Political Covenant include the phrase "from the moment of conception" in the proclamation of a right to life.<sup>66</sup> He did add that the Covenant's right was primarily negative. This apparently meant that it served to prohibit

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60. UN Doc. E/CN.4/1988/WG.1/WP.13 (1988).

61. *Question of A Convention on the Rights of the Child; Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. ESCOR, Comm. on Hum. Rts., at 6, U.N. Doc. E/CN.4/1988/28 (1988).

62. *Report of the Working Group*, *supra* note 37, at 17.

63. *Id.*

64. *Id.*

65. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

66. *See supra* text accompanying notes 14-17.

unlawful exaction of life by the state,<sup>67</sup> while the right to life that belonged in the Convention “should be positive and should take into account economic, social and cultural conditions.”<sup>68</sup> Writing a text that would express the themes of the discussion became the responsibility of a small drafting group appointed by the Chairman.<sup>69</sup> It produced a text adopted by the Working Group in what was later described as “a spirit of collaboration.”<sup>70</sup> The representative of Venezuela expressed a dissatisfaction with the second paragraph of the drafting group’s submission on the grounds that it “diminished” the right to life already conferred by international law.<sup>71</sup> The Holy See’s representative responded by declaring that the Holy See recognized the rights of a child from the moment of conception.<sup>72</sup> This latter observation elicited no comments from any other delegation, and throughout the Working Group’s further discussions of this draft article all the other delegates abided by the earlier noted agreement not to reopen the issue of rights for the unborn.

Despite the verbal similarity between the international right to life and the statements of anti-abortion groups, there is no reason to believe that the Working Group that adopted Article 6 in its draft Convention intended to recognize a right to life that had anything to do with protecting the unborn. There is much reason to believe that the delegations responsible for the drafting intentionally avoided having Article 6 address the abortion question. There is only a semantic similarity. The time when the life begins for which Article 6 provides a right was left in the same condition of indeterminacy as the question of whether a human being comes into existence at conception for purposes of the Article 1 definition of “child”.

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67. See *McGoldrick, op. cit. supra* note 19 at 328-61.

68. *Report of the Working Group, supra* note 37, at 7.

69. Composed of Argentina, Bulgaria, India, Italy, Norway, UNICEF and the United Kingdom. *Id.*

70. *Report of the Working Group, supra* note 37, at 17.

71. *Id.*

72. *Id.*

## VI. RECOURSE TO THE PREPARATORY WORK

As noted at the outset, an appreciation of the Convention's legislative history is critical to understanding its meaning. In international law, the Vienna Convention governs access to the history of a treaty.<sup>73</sup> It is important, therefore, to verify that it is permissible to rely on meanings that depend on recourse to the *travaux*.

In regard to the Preamble, its meaning and impact do not depend on reviewing the *travaux*. The fact that the Preamble does not create rights and duties follows from the plain and ordinary meaning of the preambular text and from its role in conventional law. The background material for the key phrase in Preambular Paragraph 9 was included in the text of Part III, *supra*, to demonstrate that its presence in the treaty bespeaks no international consensus either way on the abortion issue.

The Preamble does however generally provide a source for interpreting unclear parts of the Convention. It has earlier been suggested that this general effect has been negated concerning the reference to protection of the unborn in the Preamble. However, this particular conclusion has been achieved by an action reflected solely in the *travaux*, not by any express agreement included in the treaty. Thus, the question arises of whether the Vienna Convention permits recourse to the *travaux* for the purpose of altering the otherwise applicable impact of the Vienna Convention. The function of Articles 31 and 32 provides the answer. These articles serve to restrict altering the ordinary meaning of treaty terms by use of supplementary material such as the *travaux*. When ordinary meaning is not at issue, however, *e.g.* when the question relates to the role and impact of the Preamble rather than its semantic significance, the Vienna Convention erects no such barrier. In fact, there was little alternative to achieving the desired result in this fashion. If it appeared strange to withhold the impact of Preambular Paragraph 9 via a statement in the *travaux*, it

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73. *Supra* note 9.

would have been stranger still to seek the same objective via a formal agreement in the body of the treaty.

The matter of recourse to the *travaux* is a bit more complicated regarding Articles 1 and 6 of the Convention. Here the key inquiry is certainly a search for meaning. The limiting impact of Articles 31 and 32 of the Vienna Convention needs to be taken into account.

The two substantive provisions possibly affected by Preambular Paragraph 9 are the reference to a "human being" in the Article 1 definition of "child" and the absence of a specific time for when life begins in the Article 6 provision on right to life. The examination of the *travaux préparatoires* undertaken above in Parts IV and V indicates that the drafters of the Convention continuously and successfully resisted attempts to have these two articles reflect an affirmative response to the question of whether "human being" includes the unborn and to whether there is a right to life before birth. Does the Vienna Convention allow the *travaux* as an available source for discovering this?

The first step in arriving at an answer is to determine if, in regard to the definition of "human being," there is an ordinary meaning derived from an examination of the context in which it appears. If there is, the Vienna Convention dictates that this is the meaning it has in the treaty and that generally such an ordinary meaning cannot be modified by resort to the *travaux*. Although Article 31 of the Vienna Convention states that the context involved in seeking ordinary meaning includes the treaty's preamble, for reasons indicated *supra*, in this instance Preambular Paragraph 9 is not part of the context. It is the ordinary meaning of "human being" that must be sought without regard to the wording of the Preamble about protection for the unborn. Two possibilities present themselves.

One is that the ordinary meaning of "human being" does include the unborn. This alternative would then have the unborn protected by all the rights in the Convention, such as the

right to a free and compulsory education,<sup>74</sup> the right to be notified if his or her father is arrested,<sup>75</sup> and the right to express his or her opinion.<sup>76</sup> These are manifestly absurd and unreasonable results, a view contemplated by Article 32 of the Vienna Convention which permits recourse to the *travaux* in order to arrive at a more sensible meaning.<sup>77</sup>

This would suggest that interpretation is open unless there is no absurdity or unreasonableness because the Convention contemplates and invites a discriminating application of some rights to the unborn, *e.g.* the right to life or the right to health care, yet withholds others, such as those just mentioned. This is plainly not the case. There is nothing in the text to support this interpretation. It is not acceptable to believe that the document represents a gross violation of a cardinal rule of drafting, namely that a word should have a single consistent meaning each time it is used and that if a different meaning is intended, a different word must be used. This is especially true when the particular word is as crucial to the document as the word "child" is to the Convention. It is still more true when the word is the subject of a definitional section.

In addition, the text of the Convention indicates that when its application does depend on age or stage of development of the child, specific mention is made of that expectation.<sup>78</sup> Therefore, if "human being" includes the unborn, the results become manifestly absurd and unreasonable — the *travaux* becomes available, revealing an intention *not* to have the treaty include substantive rights for the unborn. The Convention does not oblige States Parties to accord those rights, although

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74. *Supra* note 4, Article 28.

75. *Id.* at Article 9(4).

76. *Id.* at Article 12(1).

77. Recourse may be had to supplementary means of interpretation. This includes the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of Article 31. Such recourse also covers determination of the meaning according to Article 31 when interpreting: (a) to leave the meaning ambiguous or obscure; or (b) *leads to a result which is manifestly absurd or unreasonable* (emphasis added). Vienna Convention, *supra* note 9, (Article 32).

78. *See, e.g.*, Articles 12 and 14.

there is nothing in the Convention that would prevent them from extending some or all of the conventional rights to the unborn, if they are so inclined.

The second alternative, ordinary meaning of “human being” is the opposite of the first. *i.e.* the term does not include the unborn. That meaning may conflict with an anti-abortion position, but it produces no manifestly absurd or unreasonable results anywhere in the rest of the treaty. The Vienna Convention requires therefore that this be the meaning of the term for purposes of the Convention. It cannot be altered by reference to supplementary material which, in any case, would simply confirm that the drafters of the Convention refused to provide substantive rights for the unborn.

Resolution of the question as it relates to the right to life in Article 6 of the Convention requires little further elaboration. This is a right that belongs to a “child” who, as suggested, is a human being under the age of 18 who *has been* born. In this Convention it cannot be a right *to be* born.

The issue would be resolved in a similar fashion under domestic law of the United States. The Supreme Court has made clear that when it is necessary to ascertain the meaning of a treaty, the preparatory work may be consulted.<sup>79</sup> In fact, it is difficult to anticipate that anyone interested in deriving an answer to the question examined in this paper would studiously ignore the *travaux*.

The response of courts at the international level has been to accept the *travaux* if the treaty itself is unclear, leading McNair to note, concerning the initial decision of whether the treaty is in fact unclear for these purposes, that: “[I]t is clear in numerous cases that before making such an announcement the court has in fact considered the preparatory work.”<sup>80</sup>

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79. Nielsen v. Johnson, 279 U.S. 47, 52 (1929) (“When their [treaties’] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it.” *Id.*).

80. LORD MCNAIR, THE LAW OF TREATIES 413 (1971).



## VII. THE RESERVATIONS AND DECLARATIONS

The lament of the right to life contingency that the Convention "would allow each State to decide at what point the protection afforded by the convention should begin to apply - even if that were to be from birth"<sup>81</sup> accurately described the effect of the Convention as leaving intact domestic law concerning whether and when pregnancies can be legally terminated by abortion. It would also appear from their silence on the issue that nearly all of the 158 States Parties have accepted the Convention as neutral on the abortion issue and, therefore, as creating no problems regarding their domestic law. They have seen no need to preserve their domestic law by accompanying their signature, ratification or accession with a formal preserving statement.

A few States Parties, however, have chosen to elucidate their international legal duties on the abortion issue. An examination of the Declarations and Reservations that have accompanied signatures and ratifications to July 21, 1993, further confirms the heterogeneity of views on the abortion issue. In addition, it indicates that some States Parties deem it important to put on the record the continuity of their relevant domestic law. France, for example, accompanied both its signature and its ratification with the following Declaration:

The Government of the French Republic declares that this Convention, particularly article 6, cannot be interpreted as constituting any obstacle to the implementation of the provisions of French legislation relating to the voluntary interruption of pregnancy.<sup>82</sup>

Argentina, Guatemala and Ecuador, on the other hand, included Declarations with their signatures that took the opposite view and would accord Convention rights from conception.<sup>83</sup> These statements were not repeated, however, when

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81. See *supra* text accompanying note 37.

82. *Report on the Sixth Session, supra* note 6, at 15. Tunisia's ratification on January 30, 1992, contains a declaration that is almost a verbatim copy of the French one. *Id.* at 25.

83. U.N. MULTILATERAL TREATIES 1995, at 191-95, U.N. Doc. ST/LEG/SER.E/13,

the latter two ratified. The following Declaration concerning the definition in Article 1 accompanied ratification by Argentina:

Concerning article 1 of the Convention, the Argentine Republic declares that the article must be interpreted to the effect that a child means every human being from the moment of conception up to the age of eighteen.<sup>84</sup>

The Holy See has continued to express its confidence that the position of Argentina will be broadly adopted,<sup>85</sup> an expectation that appears to have been partly frustrated by the ratifications of Ecuador and Guatemala.

None of these statements has provoked an objection from another State Party. The pro-choice States appear to accept that international law after the Convention permits restriction on abortion. Anti-abortion States appear to find pro-choice policies not legally objectionable.

Strong support has been expressed for having ratification by the United States qualified in terms similar to the French Declaration. At its 1994 mid-winter meeting the American Bar Association adopted a Resolution supporting ratification that would be accompanied by, *inter alia*, a Declaration that:

This Convention imposes no legal obligations on the United States regarding the voluntary interruption of pregnancy and that this Convention cannot be interpreted as affecting laws in the United States relating to such interruptions.<sup>86</sup>

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U.N. Sales No. E.95.V.5 (1995).

84. *Report on the Sixth Session, supra* note 6, at 10.

85. "The Holy See remains confident that the ninth preambular paragraph will serve as the perspective through which the rest of the Convention will be interpreted, in conformity with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969." *Id.* at 18.

86. AMERICAN BAR ASSOCIATION RESOLUTIONS, RECOMMENDED RUD FOR THE UN CONVENTION ON THE RIGHTS OF THE CHILD (Feb. 1994).

## VIII. CONCLUSION

The aim of this paper has been to examine whether the Convention on the Rights of the Child would require the United States to protect the rights of the unborn resulting in a conflict with a constitutional right to privacy permitting a woman to choose an abortion. Analysis of the drafting process, of previously expressed international perspectives on the question, of relevant doctrines of international law, and of the responses of countries as they record their approval of the Convention, all lead to the conclusion that the Convention does not pose any such conflict. Thus, the United States would be as free and sovereign to adopt policies on the abortion issue while a State Party to the Convention. A qualification similar to the one advanced by the American Bar Association easily resolves any residual doubt.