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"the right to sexual and reproductive health"
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A CHILDREN'S RIGHTS PERSPECTIVE ON SEXUAL AND REPRODUCTIVE HEALTH

by

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Introduction

Sexual and reproductive health, as aspects of the right to health in the ICESCR, raise a number of cross-cutting legal and practical questions with regards to children and adolescents.

In the first place, every human being under the age of 18 years holds the right to health under the Convention on the Rights of the Child, in addition to holding a corresponding right to health under the ICESCR.

In the second place, while enjoyment of the right to health is intimately linked to enjoying the right to life, the ICESCR does not recognize a right to life. The Covenant is therefore not a truly holistic human rights treaty. For a holistic approach to any aspect of

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the right to health, one must take into account other human rights treaties, such as the Convention on the Rights of the Child, and the American Convention on Human Rights.

And third, rights can conflict: there can be conflicts between right holders, and there can be conflicts when a right-holder wants to enjoy two or more rights simultaneously, or at different points in time.

To give a few examples of the complexity of these cross-cutting questions: Girls who grow up in home where a parent smokes have higher rates of cancer of the uterus; males in a number of countries in Europe are having an increasing problem with infertility, which researchers attribute to environmental pollution; when mothers smoke, drink alcohol to excess, or take certain drugs during pregnancy, the children can have higher rates of pre-natal mortality, disabilities, and post-natal illnesses; both boys and girls are subjected to genital mutilation in many countries of the world[1]; and the most dramatic conflict of all, the lives of numerous children are intentionally terminated during the pre-natal period of life, or immediately afterwards, for reasons other than to save the life of the mother.

1. Confusions surrounding the meaning of "sexual and reproductive health," and "abortion"

There appears to be a lot of confusion in terminology when people speak of a right to "sexual and reproductive health."

"sexual and reproductive health"

To begin with, there is confusion about the expression itself. Going by the ordinary meanings of the words, "sexual and reproductive health" would refer, at a minimum, to all aspects of the health of the primary and secondary sexual organs, along with all of the ways that these organs interact with other parts of the body, such as the endocrine system, and areas of the brain. However, in the literature on the right to sexual and reproductive health, one does not see authors identifying the parts of the human body that are of concern; as a result, the discussions are too abstract, and very limited in scope. In addition, authors do not explain the difference, if any, between "sexual" and "reproductive."

"abortion"

In the submissions for this Day of Discussion, the topic that has received the most attention is abortion: some submissions assert the existence of a right to an abortion under international law, and some deny the validity of that claim.

[1] Another submission stated: "[B]ecause FGM [female genital mutilation] results in the removal of healthy bodily tissue in the absence of medical necessity and generally without full informed consent, it should be viewed as a violation of the right to health." Center for Reproductive Rights, "Background Paper to Support the Development of a General Comment on the Right to Sexual and Reproductive Health […]" (October 2010), p. 31. That position applies equally well to genital mutilation of males, whether in the form of circumcision, castration, or subincision.

When the topic of a debate is the life of babies prior to birth, the issue is nearly always framed in terms of "abortion." But while "abortion" started out as a medical term, a new usage has arisen in the course of political debates. So the word now has two meanings, and this renders the debates confusing.

Medically speaking, *abortion* refers to "termination of pregnancy before the fetus is viable;" it does not refer to the termination of the life of the baby (or the child, fetus, embryo, zygote, etc.).[2] In political debates, however, people have given the word a new meaning. In the new usage, *abortion* refers to the termination of the life of the baby.[3]

In the medical usage, the referent entity is the mother, and the referent action is the ending of the condition of her being pregnant. It is the mother who is "aborted." In the political usage, the referent entity is the child (or fetus, etc.), and the referent action is the ending of the life of that being: it is the child who is "aborted." Aborting the child kills the baby (second meaning), while aborting the mother does not kill her, it only ends the condition of her being pregnant. If the pregnancy is terminated in such a way that the child lives, it is still correct to say that the mother has had an abortion (first meaning). But if the pregnancy is ended and the child is born alive, then there has been no abortion (second meaning).

Confusion arises in legal, moral, and political debates whenever terminology obscures the difference between the two sets of interests: the *mother's* well-being or autonomy, and the *baby's* well-being. The arguments over "abortion" are about the balancing of conflicting interests, but the language of the debates is unable to distinguish between them.

Some illustrations will show how the language of a debate can either eliminate or take into account the two halves of a balancing equation.

If someone comes onto your property without your permission, the trespass can harm a number of your interests. The law gives you a right to end the trespass. But the trespasser also has interests, the most important of which is the right to life. However, the law does not give you the right to kill the human being who is interfering with your property. There is a critical distinction between ending the trespass, and ending the life of the trespasser.

And there is a distinction between ending a pregnancy – the medical condition of a woman being pregnant –, and ending the life of the child.

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[2] *Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing, & Allied Health* (5th ed., W.B. Saunders, Philadelphia, 1992), at 12. *See also*, *Mosby's Medical, Nursing, & Allied Health Dictionary* (6th ed., 2002) (defining *abortion* as "the spontaneous or induced termination of pregnancy before the fetus has developed to the stage of viability), at 6*; Stedman's Medical Dictionary* (26th ed., Williams & Wilkins, Baltimore, 1995) (defining *abortion* as, "Expulsion from the uterus of an embryo or fetus prior to the stage of viability at about 20 weeks of gestation"), at 4; Henry Alan Skinner, *The Origins of Medical Terms* (2d ed., 1961) ("In a medical sense an ABORTION is the termination of a pregnancy before the seventh month, thereafter it is a premature birth."), at 2.

[3] Only the political usage is recorded in Simon Blackburn, *The Oxford Dictionary of Philosophy* (Oxford Univ. Press, Oxford, 1996) (defining *abortion* as, "Termination of the life of a foetus, after conception but before birth."), at 1.

Consider this argument between two people, who will be called Red and Green:

Red: "I have a right to an abortion!" (Meaning: "I have a right to stop being pregnant.")

Green: "There is no right to an abortion!" (Meaning: "There is no right to end the life of the baby.")

These two people are not talking about the same thing. Red is referring to the pregnancy, while Green is referring to the child. Both of them are thinking about only one half of the balancing equation, and the multiple meanings of "abortion" have hidden the miscommunication from them.

One reason that the two sets of interests get blurred is because of the limits of technology. In most, but not all, instances, it will not be technologically possible to terminate the pregnancy and at the same time to save the life of the baby. But conceptually the interests are different.

The right to life, and all of the sectoral rights in the ICESCR (i.e., the rights in Part III), require the state to make trade-offs, or balancing decisions, between competing interests. But decision-makers can only make these trade-off judgments when they keep both sides of the balancing scale clearly in mind. The same is true when the limits of technology would end the life of a baby during the course of ending a pregnancy: balancing the mother's welfare and the baby's welfare against each other will require a clear-sighted and fair-minded appraisal of the interests and rights of the two individuals involved.[4]

2. The CRC recognizes human rights during the entire pre-natal period of life

Several human rights treaties have recognized the right to life of children in the pre-natal period of life, with varying degrees of explicitness.

The International Covenant on Civil and Political Rights puts an absolute prohibition of capital punishment of women who are pregnant (Article 6). The intention of the prohibition is to protect the innocent baby, not the mother. And since the Covenant not only places a duty of forbearance on the state, but also creates a right to life, the pre-natal child is, by logical inference, the right-holder.[5]

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[4] Recognition of the need for balancing is found throughout the implementation reports for the CRC, either implied or stated. *See, e.g.*, Philippines, UN Doc. CRC/C/3/Add.23 (1st report, 1993), at para. 46 (Under the Constitution, the State "shall equally protect the life of the mother and of the unborn child."); Macedonia (Republic of), UN Doc. CRC/C/8/Add.36 (1st report, 1997), at para. 24 ("a unique compromise between the right to life of the unborn child and the right of the mother to decide").

[5] The intention to protect the life of the child is made clear in the legislative history: "The principal reason for providing in paragraph 4 [final Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to save the life of the innocent unborn child." UN doc. A/C.3/SR.819, para. 17; see also para. 33.

The American Convention on Human Rights explicitly recognizes that babies have human rights before they are born. Article 1 reads:

> Every person has the right to have his life respected. *This right* shall be protected by law, and, in general, *from the moment of conception*. No one shall be arbitrarily deprived of his life. (Emphasis added.)

The Convention on the Rights of the Children was specifically written to protect human beings from conception onward. Unfortunately, there is a lot of misinformation on this subject. It is not unusual to hear such things as, "The Working Group made a comprise that allowed each State to do decide for itself the meaning of 'human being' in Article 1"; or, "The CRC does not apply prior to birth." Those are not true statements.

Here are the facts about the text of the CRC and the legislative history:

- CRC Article 1 confers rights on all "human beings" who are under 18 years of age (unless the State sets a lower age limit). Article 1 does not define "human being," so we must interpret the word by reading it in context with the other provisions.[6]

- The right to health, in Article 24, expressly gives children rights during the entire pre-natal period. When Article 1 is read in the light of Article 24, "human being" covers children during the entire pre-natal period, that is to say, from conception onwards. Article 24 reads:

  > 1. States Parties recognize the *right* of *the child* to the enjoyment of the highest attainable standard of health …
  > 2. States Parties shall pursue full implementation of *this right*, *in particular*, shall take appropriate measures: …
  > (d) To *ensure* appropriate *pre-natal … health care* for mothers." (Article 24; italics and underlining added.)

  The child is the right-holder of the right to pre-natal care, not the mother, according to the text of Article 24: *States Parties recognize the right* of *the child … to pre-natal … care*.

- The fact that the text says "pre-natal …health care *for mothers*" (emphasis added) does not covert the right into the right of the mother. By definition, pre-natal care is medical care that is delivered to the mother's body. Pre-natal care is a standard feature of a health care system, but in administering this routine care, medical personnel do not cut the mother open to give medical attention to the child. The care to the child is delivered through actions directed at the mother's body. In other words, the child has the right to have health care given to his or her mother, for the purpose of ensuring the child's well-being.

[6] The primary rule of interpretation is the "ordinary meaning rule." Under VCLT article 31(1): A treaty shall be interpreted [a] in good faith [b] in accordance with the ordinary meaning to be given to the terms of the treaty [c] in their context and [d] in light of its object and purpose." (Brackets added.)

Likewise, children have a right to clean drinking water (CRC Art. 24(2)(c)). To ensure this right, the action is directed at the water supply, not at the body of the child. And to ensure that the baby receives pre-natal care (in paragraph (d)), the action is directed to the mother's body.

In both cases, the *child's* right to health is ensured by action directed at the child's *environment*: the water supply, and the mother's body, respectively.

- Pre-natal care is given for the benefit of both the child and the mother, and the well-being of each is tied to the well-being of the other. The two beneficiaries are recognized in the 1959 UN Declaration on the Rights of the Child:

> *The child … shall be entitled* to grow and develop in health; to this end, special care and protection shall be *provided both to him and to his mother*, including, adequate *pre-natal* and post-natal care. (Principle Four.)

The Declaration recognizes that the welfare of two human beings is at stake. The mother needs pre-natal care, and she has a right to this care under human rights law (e.g., ICESCR Arts. 12 and 10(2)). The child also needs pre-natal care. Recognizing the child's needs recognizes that the pre-natal child has an identity separate from that of the mother. This separate identity is recognized in the life-cycle approach of biologists. For instance, the *Encyclopedia Britannica* says:

> Although organisms are often thought of as adults, and reproduction is considered to be the formation of a new adult resembling the adult of the previous generation, a living organism, in reality, is an organism for its entire life cycle, from fertilized egg to adult, not just for one short part of that cycle.[7]

The life-cycle approach is universally recognized. For instance: An influential World Bank publication begins by saying: "As it is currently used internationally, early childhood is defined as the period of a child's life from conception to age eight."[8] UNICEF has championed the lifecycle approach, [9] and so has the

[7] *The New Encyclopedia Britannica* (15th ed., 2003), at vol. 26, p. 611.
[8] Judith L. Evans, Robert G. Myers, and Ellen M. Ilfeld, *Early Childhood Counts* (The World Bank, Washington, D.C., 2000), at 2.
[9] *E.g.*, "[G]ender-based discrimination begins in early childhood (indeed, in some cases even before birth) and takes its toll across the entire life cycle. Thus, making advances in the fulfillment of the rights of women also means defending the rights of and creating opportunities for girls. This is why the 'lifecycle' approach has been so important for UNICEF's key focus on the girl child." *UNICEF Statement: Day of General Discussion on "Implementing Child Rights in Early Childhood," Committee on the Rights of the Child, 17 September 2004* (conference paper), at 2.

Committee on the Rights of the Child,[10] and so have States in reporting on the CRC.[11]

The 1959 UN Declaration on the Rights of the Child was an advance in international human rights because it expressed the needs of children in terms of rights, and this includes children in the pre-natal period: *The child … shall be entitled …to pre-natal…care* (italics and underlining added). As a Declaration, the right is just a Principle, rather than a legally binding obligation. The Convention on the Rights of the Child took the final step by formalizing principles into human rights that are legally binding on States, including the rights of children before birth: *States Parties recognize the right* of *the child* to … *pre-natal … care*. The texts of the Declaration and the CRC expressly include children in the pre-natal period of their life-cycles: the child is the right-holder, while the action is directed to the mother's body, which is the child's primary environment, and the medium through which pre-natal care is administered to the child.

- One of the most important functions of a preamble is to guide the interpretation of the operative provisions. The preamble of the CRC expressly says that children need rights while they are in the pre-natal period of their life-cycle:

  > "*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." (Ninth preambular paragraph, quoting the 1959 Declaration; emphasis added.)[12]

  Reading Articles 1 and 24 in the light of the preamble leads to just one conclusion: the framers intended for "human being" to include children throughout the entire pre-natal period.

  Children need special protection and care during the entire pre-natal period -- as stated in the Declaration, and as universally recognized in the life-cycle understanding of our existence --, and they need legal protection during this period to help ensure they receive the special care. This "inclusive interpretation" gives pre-natal children legal protection under international law. Rejecting this

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[10] "Early childhood is a crucial period for the sound development of young children; and [] missed opportunities during these years can not be made up at later stages of the child's life." *Committee on the Rights of the Child: Day of General Discussion on "Implementing child rights in early childhood: Outline,"* UN doc. CRC/C/137, para. 2 (January 13, 2004).

[11] Most CRC implementation reports reflect the lifecycle approach in one way or another, so only two examples will be cited here. Canada, UN Doc. CRC/C/83/Add.6 (2nd report, 2003), at para. 304 ("The Government of Canada promotes the nutritional well-being of children through the development and broad dissemination of national nutritional guidelines, including Canada's Food Guide for Healthy Eating and guidelines for *preconception*, *prenatal* and infant nutrition.") (emphasis added). India, UN Doc. CRC/C/28/dd.10 (1st report, 1997), at para. 156 ("'It shall be the policy of the State to provide adequate services *to children*, both *before* and after birth and through the period of growth, to ensure their full physical, mental and social development.'") (emphasis added).

[12] The preamble was amended at the Second Reading (1988-1989), many years after Article 1 had been changed to extend CRC protection from conception onwards; *Legislative History*, pp. 292-299.

interpretation will deny them legal protection. The "exclusive interpretation" produces an inconsistency between the preamble and the operative articles, so it must be reject. The inclusive interpretation harmonizes all of the provisions of the CRC, so it has to be accepted.

- The legislative history confirms the above interpretation. The inclusive interpretation is a rational reading of the CRC that is true to the letter and spirit of the text. Not everyone will like that interpretation, needless to say. Indeed, the entire field of international human rights law is filled with political controversies, reflecting conflicts of interests, and differing worldviews, values, and opinions. But the test of an interpretation, under the Vienna Convention on the Law of Treaties, is not whether one likes the conclusion that is reached.

  According to the VCLT, when a textual analysis produces an interpretation that is reasonable, the legislative records can be used to confirm the reading.[13]
  The legislative history of the CRC allows us to confirm the above interpretation beyond a shadow of a doubt.

  The original working draft of Article 1 expressly limited rights "from the moment of his [or her] birth" (in the forerunner to Article 1). If this language had remained in the text, then children could not have CRC rights prior to birth. But the limitation was removed in the first session.[14]

  The legislative history tells us why the framers removed the limitation: delegates said that the Convention "should be extended to include the entire period *from the moment of conception*."[15] (Emphasis added.)

  The removal of the "from the moment of [] conception" limitation, and the reason for the removal -- to ensure CRC coverage "from the moment of conception" -- set the stage for the writing of the rest of the Convention. Leaving "human being" undefined, with the stated understanding that it applies from conception onwards, set the stage for the creation of the right to health years latter: it allowed for Article 24 to include the child's right to have the mother be given pre-natal care in order to ensure the child's well-being. The pre-natal child could not have this

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[13] VCLT, Article 32:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty [e.g., the legislative history] and the circumstances of its conclusion, in order
>
> [A] to *confirm* the meaning resulting from the application of article 31, or
>
> [B] to *determine* the meaning *when* the interpretation according to article 31:
>
> (a) leaves the meaning *ambiguous or obscure*; or
>
> (b) leads to a result which is *manifestly absurd* or unreasonable. (Brackets and emphasis added.)

VCLT Art. 32[A] is the corollary to the ordinary meaning rule, while Art. 32[B], the legislative history rule, is the fallback rule when the ordinary meaning rule fails. The main text discussion is applying the corollary rule in Art. 32[A].

[14] Article 1, Revised Polish Draft, 1979; Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* (United Nations, 2007), vol. I, p. 305.

[15] 1980 Working Group; *Id*.

right unless "human being" included the child from conception onwards. And it set the stage for amending the preamble years later. The intention to extend CRC rights "from the moment of conception" -- as established in the legislative records of 1980 --, is the same intention for quoting the 1959 Declaration in the ninth paragraph of the preamble at the end of the drafting process years later: the framers intended for children to have legal protection before birth. And they wanted them to have this protection as a means for ensuring that they will receive the special care that they need.

And finally, there is nothing in the records that contradicts the above conclusions. According to the legislative history, no delegate objected to the assertion that CRC rights must apply "from the moment of conception." And there was no agreement, or even suggestion, that each State could decide for itself the meaning of "human being," or that the CRC would not apply during the pre-natal period of the child's life.[16]

In conclusion, the records confirm the inclusive interpretation: when "human being" in Article 1 is read in the context of Article 24 (the right to health) and the preamble (paragraph nine), then CRC rights begin at conception. And the legislative history confirms this beyond a shadow of a doubt.

- The preceding discussion has put forward reasons in favor of the inclusive reading that the CRC covers children throughout the pre-natal period. We must now consider the counterarguments.

  While several publications claim that the CRC does not apply during the pre-natal period, none of them have told readers about the legislative history of Article 1. Nor have they discussed the child's right to pre-natal care under the right to health. In other words, these commentators avoided facing the most important issues. These commentators took a "result-oriented" approach to the legal question, rather than conduct a bona fide legal analysis under the Vienna Convention on the Law of Treaties.

To sum up the legal analysis, the CRC is a coherent whole. (i) Removing the "from the moment of [] birth" qualification (in Article 1) allows children's rights to start at conception; (ii) that is consistent with the right to health (Article 24), which gives children a right to pre-natal care -- a child could not have a right to pre-natal health care unless the child was a right-holder under Article 1; (iii) the preamble confirms that the framers of the CRC intended for the Convention to give "legal protection before … birth"; and (iv) the legislative records verify that the framers intended CRC protection "from the moment of conception."[17]

The legal analysis is supported by other facts:

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[16] *Id.*

[17] For the full legal analysis, see Bruce Abramson, *Violence Against Babies: Protection of Pre- and Post-natal Children Under the Framework of the Convention on the Rights of the Child* (World Family Policy Center, 2006). The book is a revised version of an official Ngo submission to the Secretary General's Study on Violence Against Children. Available at www.worldfamilypolicy.org/policy%20issues/VIOLENCE%20AGAINST%20BABIES.pdf.

- At the time the CRC was created, all States had national laws that protected children prior to birth, and, under international law, the American Convention expressly applies from conception onwards, and the ICCPR, under the right to life, protects pre-natal children by forbidding the execution of their mothers as punishment for committing crimes. If the framers had restricted coverage to children in the post-natal-to-adulthood period of life, then the CRC would have fallen below existing international standards and state practices.

- A survey of CRC implementation reports conducted in conjunction with the Secretary General's Study on Violence Against Children showed that the practice of States Parties is consistent with the legal analysis. The overwhelming majority of States said, either expressly or impliedly under the sections on Article 1 or Article 6, that children have CRC rights during the pre-natal period. (128 State Parties out of 176.)[18]

  For instance: "The protection of the right to life begins with the protection of intra-uterine life"; State law "recognizes the right of life of the unborn child"; and national law "protects the right to life from conception onwards." These are the State Parties themselves speaking.[19]

  While the remaining minority are silent on the matter under these articles, no State Party report expressly denied that the CRC covers babies during the pre-natal period.

- The implementation reports also show that States are taking numerous, positive steps to protect children in the pre-natal period, and that these measures need to be expanded, and further developed.[20]

- The Committee on the Rights of the Child has said that violence against pre-natal children violates the CRC. For instance, disability discrimination, and sex selection against girls, violate the rights of pre-natal children, according to the Committee.[21]

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[18] The reports are cited in *Violence Against Babies*, at p. 53.

[19] Respectively, China, CRC/C/83/Add.9 (2nd report, 2004), para. 56 (under the article 6, Rights to Life section); Italy, CRC/C/70/Add. 13 (2nd report, 2002), para. 360 (under the sub-heading on The Right to Life); El Salvador, CRC/C/3/Add.9 (1st report, 1993), para. 72 (under the right to life section).

[20] Some examples: (i) Adolescents are helped to develop non-exploitive, respectful, responsible male-female relationships, therefore avoiding unwanted pregnancies. (ii) Pregnant women are provided material, psychological, social, and moral support when dealing with an unplanned or unwanted pregnancy. (iii) States are enlarging the options of pregnant women and their partners by improving adoption and other forms of alternative care, and by reducing negative attitudes (towards unmarried mothers, towards victims of rape and sexual abuse, towards children with disabilities, etc.) And (iv), through a wide assortment of measures, States and Ngos are reducing the economic and social barriers that constrain the options of pregnant women and girls. For a full discussion, see *Violence Against Babies*, at pp. 138 to 146.

[21] *Pre-natal disability discrimination*: Day of Discussion, UN Doc. CRC/C/69; para. 338.

- And the UN Conference on Women held in Beijing condemned pre-natal sex selection against female children as human rights violations. For instance, States and civil society are called upon to "eliminate all forms of discrimination against the *girl child* which result in harmful and unethical practices such as *pre-natal* sex selection." [22] Sex selection against pre-natal females could not be sex discrimination against girl children unless these pre-natal babies were considered to human beings with human rights.[23]

In summary, States wrote the CRC to give maximum coverage: they removed the "from the moment of [] birth" limitation in order to ensure protection "from the moment of conception." But taking the maximum approach to coverage does not mean that the Convention is inflexible.

3. The CRC is strong but flexible: Trade-offs and reservations are allowed

Overall, the CRC takes a highly protective approach to the human rights of children and adolescents. But the States that created the Convention also took into account the fact that people have differing opinions on many subjects, and that there are important differences between societies that must be respected. So the framers of the CRC gave the Convention flexibility by using the same two devices that are found in the ICCPR and the ICESCR: (i) Most rights allow a State to make trade-off decisions when it applies the rights to actual situations; and (ii) States are allowed to make reservations.

The right to life allows for trade-off decisions

Pre-natal sex selection: Concluding Observation, India, UN Doc. CRC/C/15/Add.15 (2000), para. 32 (criticizing "discriminatory social attitudes and harmful traditional practices against girls including female infanticide, selective abortions"). For an example of State Party practice in defending the human rights of pre-natal children under the CRC, see the reports of India, UN Doc. CRC/C/28/Add.10 (1st report, 1997) at para. 84 (reporting, under Article 2 and the heading "Discrimination against the girl child," that "the female child is aborted and not allowed to live"), para. 85 ("selective abortion of the female foetus), & para. 91 ("female foeticide"); India, UN Doc. CRC/C/93/Add.5 (2nd report, 2003), at p. 73 (referring to the "'brutal murders of girl-children in the womb'," quoting the National Commission for Women, *in* Box 3.3, under the section on Article 2).

Note that the right to non-discrimination (CRC Art. 2(1)) is an umbrella right that protects the sectoral rights, which, in this discussion, is the right to life (Art. 6(1)). For a full discussion of sex and disability discrimination, see Bruce Abramson, *Article 2: The Right of Non-Discrimination* (Martinus Nijhoff, 2008).

[22] Fourth United Nations Conference on Women at Beijing, Declaration and Plan of Action, at para. 277c.

[23] See also, *id*., para. 283d (to "enact and enforce legislation protecting *girls* from all forms of violence, including *pre-natal* sex selection "); para. 115 ("acts *of violence against women* also include *pre-natal* sex selection"), and para. 124i ("enact and enforce legislation against the perpetrators of practices and acts of *violence against women*, such as *pre-natal* sex selection"). (Emphasis added.)

Although traditionally *women* was used to refer to adult females, it is now common to see it used as an umbrella word that includes all females; see, e.g., the submission, European Disability Forum, "EDF input to the general discussion of the CESCR on sexual and reproductive rights" (October 2010).

For most human rights, a States has to "translate" the abstract statement of the right that is found in the text of the article into concrete entitlements of real-life right-holders. The process of specifying the concrete entitlements calls for the State to make trade-off judgments, and the judgments are subject so some sort of a reasonableness (or "proportionality") test. The right to life in CRC Article 6(1) is one of these rights: it is not an absolute right, but a right that depends upon balancing decisions.

For instance, if the right to life were absolute, a police officer would not be able to use deadly force to protect himself when assaulted by a minor, and soldiers would not be able to fire upon under-aged soldiers from an opposition armed force. And the State would have to prohibit all cars and trucks, since motor vehicles cause the deaths of many children and adolescents; but that would prevent food from being produced, transported, and marketed, which would cause even more deaths. So an absolute right to life is an absurd idea.

The right to life is the same for all CRC right-holders during all periods of development -- pre-natal, neo-natal, infancy, toddler-hood, pre-pubescent, adolescent, and any other way of classifying periods of development. So the right to life of children in the pre-natal period is subject to trade-off decisions, just as anyone's right to life is subject to balancing decisions under ICCPR Article 6, or any other treaty.

However, for a State to make a valid trade-off judgment, the decision-maker would have to believe that the pre-natal child is a human being within the meaning of Article 1; that is to say, would have to believe that the child is a holder of the right to life, and is entitled to equal respect of his or her human dignity. The CRC is binding on all state actors, whether legislators, judges, or officials in the administrative branch. So regardless of which branch is making a trade-off decision between the right to life of children in the pre-natal period and any other person's rights or interests, the decision-maker has to accept the fact that the child is a "human being" and a right-holder under the CRC. A state actor who does not accept these legal facts would have to be disqualified from making a trade-off judgment. Likewise in a state that allowed capital punishment of adults. A judge who did not believe that a particular defendant was a human being would not be able to make a fair decision when imposing the death penalty in that case: the judge would have to be disqualified on the ground of prejudice.

So the CRC is both strong and flexible with respect to the right to life in Article 6(1): the right to life starts from the moment of conception; a State can make trade-off decisions when translating the right into concrete entitlements; and the officials who do the balancing have to accept the legal fact that children in the pre-natal period of life are human beings who hold the right to life under the CRC, and who are entitled to equal respect for their human dignity.

States can make reservations

The CRC allows a State to make reservations at the time that it ratifies the Convention, and the test is same as the one in the Vienna Convention on the Laws of Treaties: the reservation must not be "incompatible with the object and purpose" of the treaty (CRC Article 43). This opens up the possibility for a State to make a narrowly

tailored reservation to either the right to life or to the jurisdictional statement of who the right-holders are in Article 1.

Only a few States made statements that are relevant to children in the pre-natal period of life, and some of these are framed in terms of understandings or declarations, rather than reservations. This paper will not discuss these statements since there are only a few, and because legal arguments can be made both for and against their being treated as reservations, and considered as valid. The point in this paper is simply that the States that created the CRC made it strong but flexible: the CRC was specifically written to give maximum protection to children by starting coverage from conception, but this was balanced by two devices that allow for States to have some flexibility. And it is precisely because of this flexibility that States were able to agree to the final text of the CRC, and to ratify it with so much enthusiasm.

4. Lessons from the implementation reports on the Convention on the Rights of the Child.

States say that these balancing decisions have been difficult

The implementation reports on the CRC often say that the State had difficulty arriving at its decision on when to allow the life of a child to be terminated in the pre-natal period. The Government might refer to "the special conflict situation" in which the right to life of the pre-birth child "calls into question the protection of the life and health" of the mother, or instance.[24] Or to the "the much more difficult question concerning abortion."[25] Or to the "unique compromise between the right to life of the unborn child" and the mother's autonomy rights.[26] The report may also refer to the current political debates that are going on over the protection of pre-natal children. Sometimes the State refers to the moral values of society. And sometimes the difficulties are indicated by the seemingly contradictory information in the report.

The language that is used also indicates the difficulties that the States experience in making these balancing decisions. For instance, while some reports speak of "killing" the fetus or child, many of them turn to euphemisms, like "interrupting the pregnancy." No one would refer to the execution of a criminal as "the interruption of the criminal processes," of course, and channeling thoughts towards the *pregnancy* diverts attention from the *child* who is the subject of the discussion in the sections on Article 1 (definition of "the child"/who the Convention protects) and Article 6 (right to life). So "interruption of pregnancy" is a way to talk about something unpleasant or controversial without directly talking about it, which is the function of a euphemism.[27]

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[24] *Liechtenstein*, CRC/C/61/Add.1, at para. 82 (1st report, 1999).
[25] *Denmark*, CRC/C/8/Add.8, at para. 62 (1st report, 1993); *see also Latvia*, CRC/C/11/Add.2, at para. 143 ("the much more difficult question concerning abortion") (1st report, 2002).
[26] *Macedonia*, CRC/C/8/Add.36, at para. 24 (1st report, 1997); *see also* paras. 37-9, & 142.
[27] Some States have not been embarrassed to use the word "kill" in their implementation reports. For example: Iceland, UN Doc. CRC/C/11/Add.6 (1st report, 1995), at para. 109 ("kills her fetus"); Jordan, UN Doc. CRC/C/70/Add.4 (2nd report, 1999), at paras. 17, 23, 24 ("to kill the child by resorting to abortion"), & 26 (the "law regards a fetus as a person whom it is prohibited to kill"); Saint Vincent and the Grenadines, UN Doc. CRC/C/28/Add.18 (1st report, 2001), at para. 79 (the criminal "offense of killing an unborn child"); United Kingdom, UN Doc.

When the difficulties that the States Parties face are viewed in the context of the CRC as a whole, three conclusions emerge.

(i) States are taking children's human rights seriously

The first conclusion is that States are taking pre-natal rights seriously. The fact that so many Governments are being transparent and accountable about the rights of children during the pre-natal period, and that they are doing this despite the absence of a clear reporting guideline on this point, is one of the best indicators of how seriously they are taking these rights.

(ii) The political debates do not appear to reflect a children's rights perspective

But while the reports show that States are taking the children's pre-natal rights seriously, there is not much indication that the political debates themselves are being conducted from a rights-based, CRC perspective. Although the well-being of babies prior to birth is not being ignored, it does not appear that their welfare is receiving much public discussion or acknowledgment within the framework of international human rights law, including the Convention on the Rights of the Child.

When it comes to the overall implementation of the Convention, both the Committee and the broader CRC movement emphasize the same basic themes: the Convention calls for a new attitude towards children; the State must vigorously teach society about children's rights; that everyone must take a "rights-based" approach to children; the "best interests of each child" must be "a primary" consideration of the State; children are not the property of their parents, and that parents should be making their children's best interests their "paramount" consideration; and despite the sacrifices that parents, society, and the state are already making for them, all actors must make even more sacrifices for children, in the light of their special vulnerabilities. But these themes do not appear as often in the context of the CRC rights of children during the pre-natal period of their lives.

It is within this broader context that one must read the implementation reports. *Children's Rights: Reality or Rhetoric?* summarizes the central difficulty in realizing the human rights of children:

> The CRC has been radical in seeking to change the way in which children are viewed. Yet in reality, the notion of children as individuals in their own right is still largely unrealized. A range of social and cultural factors makes it difficult for many to accept children as right-bearers.[28]

Although the children's rights movement has made a great deal of progress, the rights of the most vulnerable of the vulnerable have been marginalized, and this is reflected by the

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CRC/C/41/Add. 7, (Addendum to 1st report, 2000), at para. 198 (an offense "to kill … an unborn child"); Vanuatu, UN Doc. CRC/C/28/Add.8 (1st report, 1997), at para. 153 ("killing of the unborn child").

[28] *Children's Rights: Reality or Rhetoric?* (International Save the Children Alliance), at 288.

absence of indications in most reports that the political debates about "abortion" are being conducted from a children's rights perspective.

(iii) Double standards

The third conclusion is that the difficulties pertain to the differential treatment of babies, on the one hand, and adults and older children, on the other. As the implementation reports show, many States allow parents to terminate the life of a pre-natal child under specified circumstances. There are always *two variables* in these laws: *(a) the grounds* upon which the life of a child can be terminated with impunity, and *(b) an age criterion* that defines the class of children to whom those grounds can be applied. The State's legalization laws will combine the two variables.

As examples of the *a-variable*, impunity might be granted if the child has a certain kind of disability, or will be burden on the parents, or the mother's life is at stake, or simply because the mother desires that the child's life be ended. As for the *b-variable*, the authorized grounds might be restricted to children under 10 weeks of age, or 14 weeks, or 24 weeks, or they might apply to all children prior to birth. The law will require that *both of the variables* be satisfied before the State will grant impunity for the termination of the child's life. If the conditions for impunity are not met, the termination of the child's life will be a criminal offense.

None of the specified grounds in these laws – the a-variables -- is also a ground for impunity when an adult's life is intentionally terminated. No state allows for the intentional ending of the life of an adult because of a disability, or because the adult is causing the actor to feel mental distress, or just because the actor wants to, for instance. So the presence of the b-variable creates a double standard based on age discrimination. Below the age cut-off, pre-birth children are treated differently than adults and older children; above the minimum-age line, they are treated the same (i.e., the same a-variables for impunity apply to everyone above the line). As Professor Geraldine Van Bueren has written in *The International Law of Children's Rights*, "minimum ages are inevitably arbitrary."[29]

It is always awkward to defend double standards. It should not be surprising therefore that States have found the subject of children's right during the pre-natal part of their lives to be a difficult human rights topic.

5. Topics that the Committee on Economic, Social and Cultural Rights can address

As the CESCR works on its general comment, there are a number of topics that it should pay particular attention to.

A. Attention to the structural problems

The political rhetoric concerning the pre-natal lives of children is often couched in terms of "choice." The frame of reference is the mother's "choice," rather than the child's, but, ironically, the rhetoric is oftentimes not really about the choices that women actually

[29] Geraldine Van Bueren, *The International Law of Children's Rights* (Martinus Nijhoff. Dordrecht), p. 36.

face in their lives; it is, instead, only about one specific choice -- ending the life of the baby. And yet, when the structural factors that can constrain women are considered, there is often a cruel irony in the rhetoric of "choice." The pressures from society can be so overwhelming that they seem to block certain avenues, pushing women in particular directions. The end result can be a "choice" to act violently, the "choice" to end the life of the child. But when structural factors restrict other options, one cannot say that the women have had a real or fair choice. The CRSCR could attend to these structural factors as it looks for practical ways to reduce pre-natal violence against babies.

1. Avoidance of unexpected pregnancies

In their CRC reports, various States have noted a drop in the numbers of pre-birth children and infants whose lives have been terminated on purpose. One of the main reasons for these reductions is the increased capacity that people have to avoid unwanted pregnancies. Next to promoting a culture of respect for human dignity, this must surely rank as the number one way to reduce the amount of violence against pre-delivery children.

The CESCR can make a valuable contribution by calling attention to the link between reducing violence against pre-birth children, on the one hand, and empowering men and women to avoid bringing unwanted children into being, on the other.[30]

Education and counseling

Oftentimes, public discussions about avoiding the creation of unwanted children focus on information-and-technology solutions. Some state reports go beyond this, however, and refer to the steps being taken to promote appropriate attitudes, values, and behaviors pertaining to male-female sexual relations. For instance, educational programs and one-on-one counseling help young people to understand the risks and realities of teenage sexuality, to respect the personhood of their potential sex partners, and to make wiser decisions about their sexual behaviors and about pregnancy.[31]

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[30] See, e.g., United Kingdom, 2nd report, UN Doc. CRC/C/83/3 (2002), at para. 8.*4 (Our Healthier Nation* says that "a decent education" helps young people "make healthier choices," including the avoidance of "unwanted pregnancies in the early teenage years.").

[31] For examples of State Party practices in this area, see, e.g., Bulgaria, UN Doc. CRC/C/8/Add.29 (1st report, 1995), at para. 184 (programs to help young people form "a responsible attitude to sex and parenthood"); France, UN Doc. CRC/C/65/Add.26 (2nd report, 2003), at 123 (working group to study the causes of teenage pregnancies); Germany, UN Doc. CRC/C/83/Add.7 (2nd report, 2003), at para. 555 (measures to promote "responsible, partnership-based and healthy approach to sexuality," and "a key aspect of prevention work is information on the protection of unborn life"); Norway, UN Doc. CRC/C/129/Add.1 (3rd report, 2004), at paras. 349-50 (plan of action to prevent unwanted pregnancies and abortions, programs to help boys and girls "develop ethical, well-considered attitudes to sexual relations," and state support to Alternative to Abortion in Norway); Sweden, UN Doc. CRC/C/65/Add.3 (2nd report, 1998), at 435 (youth centers aim to prevent abortions among teenage girls); United Kingdom, UN Doc. CRC/C/83/Add.3 (2nd report, 2002), at paras. 8.21.6 to 8.22.3 ("Sex and relationships education," helping young people "deal with pressures to have sex," plans for a "national strategy to reduce teenage pregnancy," and plans for programs to "discourage coercive and manipulative sexual behavior.").

Sexual violence and exploitation

When discussing the situations that result in unwanted pregnancies, attention must be paid to sexual violence (rape, forced prostitution, etc.), in which there is no choice, and sexual exploitation (incest, poverty-induced prostitution, etc.), in which the social situation negates real or free choice.

While a great deal of effort is being made to eliminate sexual exploitation and violence, not enough attention is being paid to the double relevancy. Protecting pre-natal children requires a reduction in the numbers of situations where people feel compelled to choose between violent and non-actions. Sexual violence and sex exploitation can easily result in unwanted children coming into existence, so this is another area of double-relevancy where the CESCR can call attention to the links.

2. Support services during pregnancy

Once a child has come into being at conception, structural factors will also influence whether the mother and father will want the child. These factors are reflected in the three main reasons for ending the lives of children. (i) the child possesses an *undesirable characteristic*, such as being the "wrong" sex, or having a physical disability or other impairment; (ii) the child will be an *economic burden* if permitted to live; and (iii) the child is or will be a *psychological or social burden* to the parent. By contrast, reason (iv) *saving the life of the mother*, probably accounts for only a very small percentage of the worldwide number of children whose lives are intentionally ended prematurely.

In other words, the structural factors that underlie the three main reasons are social. When a parent does not want a particular child to live, that psychological stance towards that child is a reflection of the social attitudes that the parent has internalized. And it also reflects the lack of non-violent options that society has made available. Reducing violence against children during the pre-natal period will require attention to these social factors.

A wide variety of actors are addressing the various structural factors that shape the choices of parents once the child has come into being at conception. As for *undesirable characteristics*, a great many people are working to promote the equal valuation of females and males in society, and there are many efforts to improve the status of people with disabilities.

But despite these efforts, many pre-natal children are being put to death because they are the "wrong sex," or because of prejudices regarding disabilities.

For instance, parents are being allowed to kill their pre-natal children for trivial reasons like having webbed fingers or an extra digit, and for easily correctable things like a cleft palette.[32] When laws and social mores allow the extreme action of killing children for such inconsequential things, then all persons with disabilities are put at risk of discrimination, whether before or after birth.

[32] *Daily Mail* (London), 28 May 2006 (in the United Kingdom, parents are terminating the lives of their pre-natal children for having a cleft palette, webbed fingers, or an extra digit).

Sex selection against baby girls is a major problem. While people usually associate the practice with a few countries in Asia, it is happening in western countries as well.[33] The lives of baby boys are also being terminated on account of the child's sex, although the numbers are far less than the number of girls.

Whether the a-variable is the child's sex or a disability, the underlying problem is the same: a human being is being devalued on account of a physical characteristic. A great amount of work has to be done to change the attitudes and values in society that foster such prejudices.

As for *economic* pressures, many states and civil society actors provide financial support to expectant mothers in need of material resources. Teenager mothers, who are often unmarried or otherwise unsupported by the child's father, are frequently the beneficiaries of this assistance. In addition, poverty-reduction and social-safety-net measures can help reduce the economic motivations. Finally, the *psychological and social* problems of expectant mothers (and fathers) are also being addressed on many fronts. For instance, many States and NGOs provide "crisis pregnancies" services that help the mother to cope with psycho-social problems, and this can reduce her motivation to end the live of the child.

In addition, many States and civil society actors are improving adoption services, as well as promoting the acceptability of adoption, and this greatly expands the choices in "crisis pregnancies." The mother and father can end the parent-child relation without ending the life of the child. Adoption is a therefore a compromise solution: it allows all of the concerned individuals to retain what is most essential to them, in a situation that is less than ideal.

State reports sometimes refer to these types of support services. The Committee on the Rights of the Child also emphasizes the importance of improving the status of girls and women in society, of promoting the inclusion of handicapped people as full members of society, of providing counseling and material support to pregnant teenagers, and of good and safe adoption services.[34]

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[33] See, e.g., Dr. S.K. Sethi, "Case against gender-selection: Why has it become a litmus test of one's support for human rights?" (conference paper for the Celebration of the 20th Anniversary of the Adoption of the Convention on the Rights of the Child, Oct. 8-9, 2009, Geneva). See also, "The Girl Child: Report of the Secretary General, UN doc. A/64/315 (2009).

[34] Austria, UN Doc. CRC/C/83/Add.8 (2nd report, 2004), at paras. 147-48 (since abortion is not a "socially desirable" method of birth control, counseling centers help eliminate "situations of need and distress" that could led such measures); Belarus, UN Doc. CRC/C/3/Add.14 (1st report, 1993), at para. 68 (incentive payments for pre-natal care); Belgium, UN Doc. CRC/C/11/Add.4 (1st report, 1994), at para. 96 ("fund for the protection of unborn children" to relieve economic motivations for abortion); Bolivia, UN Doc. CRC/C125/Add.2 (3rd report, 2004, at Annex I (free medical care to pregnant teenagers along with counseling); Brazil, UN Doc. CRC/C/3/Add.65 (1st report, 2003), at para. 112 (financial support for pre-natal care); France, UN Doc. CRC/C/3/Add.15 (1st report, 1993), at para. 175 ("Substantial allowances paid before and after birth; Full coverage of medical expenses relating to pregnancy, childbirth and postnatal care."); Italy, UN Docs. CRC/C/70/Add.13 (2nd report, 2002), at para. 360 (family planning centers required to help overcome "the causes that may prompt a woman to seek an abortion"), and CRC/C/8/Add.18 (1st report, 1995), at para. 34 (waiting period); Malta, UN Doc.

And once again, the CESCR can make a contribution by focusing on the connection between these measures and the protection of children from violence during the first period of their lives.

3. Social attitudes

Social attitudes are one of the most basic "structures" in society. All societies identify behaviors that are considered improper to engage in, and they all use stigmatization as one of the means to steer people away from such actions. Stigmatization pertains to both the act and the actor. The observance of social mores is promoted when individuals internalize the taboos, or when they refrain from the breaking the taboos out of concern for social condemnation.

While virtually everyone agrees that stigmatization is a necessary and proper means of socialization and social control, the precise ways that it is carried out can cause serious assaults on human dignity. Stigmatization can easily result in "overkill" – the infliction of unnecessary harm, unnecessary when judged by what internalization and deterrence actually require.

There are several ways that stigmatization can be a structural factor that leads to violence against children, especially prior to delivery.

One form of overkill is the utter condemnation of the individual who violates the taboo, a devaluation of personhood that is so severe that it ignores the possibility that the transgressor can see the errors of his or her ways, change, and be restored to society. Condemnation for pre-martial sex, extra-marital sex, or prostitution reaches this severity in many societies. But when a child comes into being as a result of such behavior, society's use of stigma backfires. Society has now created a reason for the mother to "choose" to end the life of the child: motivation (iii), the child is a psychological or social burden because of the stigma.[35]

Another form of overkill is when the stigma spills over to affect the innocent. Two notorious examples of this are the devaluing of the victims of rape, and the devaluation of children whose parents are not married – the stigmatization of "illegitimate" children. In these situations, innocent people are punished for the misdeeds of others.

CRC article 2(2)

All human rights are based upon respect for the human dignity of the individual person, and this inherently requires the state to treat people as much as possible on the basis of criteria or for reasons that are connected to their actual merits. Actual merits include a person's needs, desires, and capabilities. It also includes the behaviors that the

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CRC/C/3/Add.56 (1st report, 1998), at paras. 58-60 (counseling, pre-pregnancy genetic testing, and help for alcohol and other drug addicts who are pregnant); Singapore, UN Doc. CRC/C/51/Add.8 (1st report, 2003), at para. 103 (mandatory counseling for mothers seeking abortions, and compulsory waiting period).

[35] When a child's life is terminated in order to relieve a parent from experiencing psychological distress caused by social stigma, the action can be considered a form of "honor killing."

person has chosen to engage in. But people do not choose to be victims of crimes, and children do not chose their parents, or the circumstances that bring them into being. Depriving an individual of something important because another person has broken a law or a social more is an affront to human dignity. It does not treat the individual according to his or her own merits.

This attention to individual merit is inherent in international human rights law since rights are, by definition, held by individuals. Beyond this, the Convention on the Rights of the Child has contributed to the evolution of human rights by adding an article that specifically addresses the problem of stigmatization of the innocent. CRC Article 2(1) contains the right of non-discrimination on the grounds of race, sex, religion, and other oft-abused criteria, which is the same right found in the two Covenants and the Universal Declaration. But the CRC also recognizes a right that is not contained in the other UN human rights agreements. Article 2(2) provides:

> States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

CRC article 2(2) announces the principle that a person should not be made to suffer because of the actions of others, or more specifically, that people under 18 years of age should not be deprived of the enjoyment of their rights because of what their relatives have done.

Since paragraph (2) is a principle, the state must make balancing decisions in order to translate the abstract right into concrete entitlements. Article 2(2) gets the most attention in connection to state-imposed or sanctioned discrimination against children who are "born out of wedlock." But the principle is much broader than this, and it applies to situations where the motive to take the life of a child during the first nine months of life comes under reason (iii) – the child is or will be a psychological or social burden to the parent.

For instance, when a child is conceived after an act of forced sexual intercourse, there can be a strong felt need to terminate the life of the child. The act of coerced sex is traumatic enough, but conceiving a child as a consequence will create many psychological, social, ethical, and other practical difficulties for the mother. There are few injustices in life that can match the gravity of this one. And if this were not bad enough, societal responses often add new assaults to her human dignity. She may be treated merely as a witness in a criminal case who gives information to the authorities, rather than as human being who has urgent psychological and social needs. She may face devaluation and exclusion; and she may even be blamed for being the victim. And the more inhumanely society treats her, the more society is the cause of her psychological and social burdens.

In the light of these problems, it is not surprising that a number of States have laws that expressly grant impunity on the grounds that the child has come into being as a result of forced sexual intercourse. And the broad grounds for impunity that are found in the laws of other States – such as the mental health of the mother, or "social reasons" – are easily applied to this situation.

These types of impunity laws are subject to CRC article 2(2). When the law allows the termination of the life of a child when the child has been conceived as the result of forced sexual intercourse, then the a-variable pertains to the conduct of the parents. Article 2(2) lays down a legal principle: an innocent child should not be made to suffer because of the wrongdoing of a parent.

Article 2(2) must be put into perspective. The right to life is not absolute for anyone, so the state can, and must, engage in balancing decisions, and these decisions can, and must, take all relevant matters into account. Moreover, the ethical principle that people should be treated in accordance with their own individual merits is inherent in all human rights, but since this is a principle, its application to real-life situations always calls for trade-off judgments. What, then, does article 2(2) add to the legal picture, given the fact that it is a principle that calls for balancing?

Article 2(2) requires the same thing that the CRC as a whole requires. The State must look at matters from the child's perspective, in contrast to seeing things only from the perspective of adults. The State must focus on respecting each child's human dignity, and it must take the child seriously as a right-holder, just as it takes adults seriously as right-holders. And all of that inherently requires treating each child as an individual, to the greatest extent possible under article 2(2).

In conclusion, the CESCR can make a contribution to the realization of children's human rights by calling attention to the "overkill" aspects of stigmatization. Protecting children from violence will require numerous changes in attitudes in regards to all of the motivations for terminating the life of a child in the pre-natal period.[36]

B. Attention to the safeguards: the substantive criteria

As we have seen, many States grant impunity for the intentional termination of the lives of children under specified circumstances. Some of the a-variables are quite imprecise, however. Terms like *irregularities*, *deformed*, *mentally handicapped*, *endangered health*, and *social reasons*, for instance, are extremely broad, and therefore subject to a wide variety of interpretations, and inconsistent applications.

Two of the most common a-variables are also fuzzy: the mother's *life is in danger*, or her *health is in danger*. These variables are so broad that they can be stretched to encompass almost every situation. There is no such thing as a pregnancy without some risk to the mother. And since anywhere from ten to thirty-five percent of women who give

[36] Bhutan, UN Doc. CRC/C/3/Add.60 (1st report, 1999), at para. 50 (in the absence of "social stigmas" pertaining to out-of-wedlock children, mothers are not "pressurized to resort to abortion"); Jordan, UN Doc. CRC/C/70/Add.4 (2nd report, 1999), at paras. 23-24 (fear of scandal and dishonor can be a cause of abortion and infanticide); Korea (Republic of), UN Doc. CRC/C/70/Add.14 (2nd report, 2002), at 236 (improving public perceptions and reducing selective abortions, and pre-natal sex screening is unlawful); Kuwait, UN Doc. CRC/C/8/Add.35 (1st report, 1996), at para. 25 (fear of dishonor can lead to infanticide); Libyan Arab Jamahiriya, UN Doc. CRC/C/93/Add.1 (2nd report, 2002), at para. 87 (protecting honor can lead to infanticide); Lithuania, UN Doc. CRC/C/11/Add.21 (1st report, 1999), at para. 64 ("Attitudes towards abortions are changing within society. An increasing number of people recognize the right to life from the very inception of life," and the numbers of abortions are decreasing.).

birth experience postpartum depression, any pregnancy carries a risk to mental health. (And the intentional ending of a pregnancy also entails risks to physical and mental health; indeed, there is just no such thing as a risk-free life.)

Even terms like *serious risk* are vague, and call for subjective judgments. They are subjective because they require a person to make guesses about the likelihood of future events, and they are subjective because they ultimately depend upon the decision-maker's personal values. Having a human being's life hinge on subjective judgments about the "seriousness of a risk" causes arbitrariness in the enjoyment of human rights.

Respect for human rights requires the elimination of arbitrariness as much as possible. No law can be absolutely precise, of course: no law can totally dispense with all human – and therefore all subjective and potentially erroneous – judgments. The task is to reduce arbitrariness as much as possible under the circumstances. Laws that are formulated in language like, *only when necessary to save the life of the mother*, eliminate arbitrariness about as much as can expected from a statute. If the statutory language were less rigorous than that, then the state would have to supplement the legislation with administrative regulations or guidelines in order to protect against arbitrariness.

The CESCR can promote the realization of children's human rights by recommending reductions in vague and overly broad grounds for impunity (i.e., the a-variables).[37]

C. Attention to the safeguards: the decision-makers

Empowering a single person to make a life-or-death decision about another human being, without providing any checks-and-balance safeguards, is inherently arbitrary. One way that some States have reduced arbitrariness in the decision-making is to require that several doctors make it in consultation. This safeguard helps protect the lives of children in a number of ways. A group decision that is made by peers forces each person to give his reasons to someone who is equally qualified, and to reexamine one's facts and opinions when challenged by a colleague. The consultation requirement also ensures a measure of transparency.

While a number of States have reported having peer-consultation safeguards, there are other measures that can be taken to reduce the amount of unjustifiable violence against children.

For instance, the Committee on the Rights of the Child routinely recommends that State Parties conduct CRC training throughout the public service sector, and educate the public about the human rights of children. It should go without saying that the people who make life-or-death decisions about children need to be trained in the human rights of those whose lives are at stake.

There is an additional qualification that the decision-makers need to have when faced with such a task. It is not enough that someone attends a workshop on children's

[37] Fiji, UN Doc. CRC/C/28/Add.7 (1st report, 1996), at para. 54 (Allowing "abortions on the grounds of 'reasonableness' and a liberal interpretation" of the law have resulted in discrepancies in judgments between doctors in private practice and public service doctors.)

rights if that person does not truly believe that children are members of the human family throughout the entire pre-natal period, and as a consequence are right-holders under the CRC.

For example, if a medical doctor did not believe that members of a particular race were human beings, it would obviously be inappropriate for that doctor to decide about the seriousness of a risk pertaining to the pregnancy of a member of that race. Judgments about ending the life of a child prior to birth, as well as judgments about protecting the life of a mother, rest upon value judgments. If the decision-maker does not believe that the persons whose lives and welfare are at issue are human beings, then this person must be disqualified from the task of judging.

The state must entrust someone to apply the a- and b-variables of the impunity laws to actual cases. The CESCR can help to protect children from violence by making recommendations to States and to civil society about safeguards pertaining to these decision-makers.[38]

D. Attention to monitoring

Some state reports include statistical information about the numbers of children who die each year as a consequence of the impunity laws. Such information is crucial for international accountability for respecting human rights. The figures disclose the magnitude of the violence, and, when the information is given for a period of time, it shows the trends. This data is important for society to assess itself, for state officials to evaluate their prevention policies, and for the international community to carry on the dialogues that are essential for the evolution of human rights law in this area.[39]

Statistical monitoring and reporting is another subject that the CESCR can cover in its efforts to promote the realization of children's rights in the context of the general comment.

E. Privatization of the right to life

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[38] A number of State Parties report requirements for joint decisions by doctors, or by a combination of doctors and other professions; see, e.g., Angola, .UN Doc. CRC/C/3/Add.66 (1st report, 2004), at para. 125; Rwanda, UN Doc. CRC/C/70/Add.22 (2nd report, 2003), at para. 127; Saint Vincent and the Grenadines, UN Doc. CRC/C/28/Add.18 (1st report, 2001), at para. 80; Solomon Islands, UN Doc. CRC/C/51/Add.6 (1st report, 2002), at para. 103; and Zambia, UN Doc. CRC/C/11/Add.25 (1st report, 2002), at para. 130. As one Party has noted, the training and attitudes of medical personnel affect "the rights of the unborn child, and the prevention of abortion." Philippines, UN Doc. CRC/C/65/Add.31 (2nd report, 2004), at para. 199.

[39] Some State Parties have given statistical information; see, e.g., France, UN Doc. CRC/C/65/Add.26 (2nd report, 2003), at para. 123; Lithuania, UN Doc. CRC/C/11/Add.21 (1st report, 1998), at para. 63; Malta, UN Doc. CRC/C/3/Add.56 (1st report, 1998), at para. 63; Russian Federation, UN Docs. CRC/C/125/Add.5 (3rd report, 2004), at 215, and CRC/C/65/Add.5 (2nd report, 1998), at para. 267; Slovenia, UN Doc. CRC/C/70/Add.19 (2nd report, 2003), at 190; and United Kingdom, UN Doc. CRC/C/83/Add.3 (2nd report, 2002), at paras. 8.21.2, 8.21.4, 8.22.1, & 8.23.1 (teenage conception rates, but no abortion data). One State reported an absence of regulations: Luxembourg, UN Doc. CRC/C/41/Add.2 (1st report, 1997), at para. 429 ("The authors of this report do not have any statistics" on abortions "because the law does not provide for notification" and "there is no specific code in the nomenclature of medical acts.").

Some States allow children's lives to be ended for any reason whatsoever when the child is below some particular minimum age. This is a *de facto* denial of the right to life of all children under that age: in effect, it is a "privatization" of the right to life.

Privatization

Privatization of human rights occurs when the a-variable allows private actors to terminate the life of other members of society simply because they choose to do so.

Realization of the right to life requires the state to make balancing decisions. In making the trade-off judgments, the state must consider the interests of all those who will be impacted by its decision, and it must respect their human dignity. There will be some political activists who will be pushing for the balance to be tipped in one direction, to favor certain segments of society and certain interests, and other political activists who will be pressing for the balance to be tipped in another direction. The state must do its best to strike the fairest balance that it can. The state must act on behalf of all society, and it should take special care that it is being fair to those who are unable to participate in the political process.

When the state allows a private actor to end the life of another human being for any reason at all, the enjoyment of the right to life depends upon the unregulated discretion of a private person. Moreover, the private decision-maker has a direct conflict of interest with the right-holder. The state is no longer acting as the referee, deciding between the competing interests of person *A* and person *B*. Instead, it gives person *A* total control over person *B*'s most basic interest of all – the interest in living. The interests of person *A* do not have to outweigh those of person *B*. Person *A* does not need a compelling reason, or a good reason, or even any reason at all – the control is total. However, the interest in living is protected by human rights law, and the state has the duty to protect it. When the state gives total control over the enjoyment of the right to life to private actors, the state totally privatizes the right to life, with respect to the particular right-holders whose lives are at stake.

The impunity laws under discussion pertain to the enjoyment of one particular right, the right to life under CRC Article 6 (and ICCPR Article 6, and UDHR Article 3). The b-variables in these laws pertain to just one segment of the human family, one that is defined by age. In the entire field of international human rights, there is no other right, and no other age group, in which private actors are given total authority to control another person's enjoyment of human rights. These particular impunity laws are not only a type of privatization, they privatize human rights to the maximum extent conceivable, beyond even the scope of slavery.

De facto *denial of the right to life*

To say that person *A* can end the life of person *B* whenever *A* wants to, is to say, as a practical matter, that *B* does not have a right to life. For instance, if the law were to allow people to terminate the life of members of a particular racial group for any reason whatsoever, there would be a *de facto* denial that members of that race have the right to life. Whether the b-variable is race, age, or any other demographic category, people in that category are no longer entitled to have the state take their personal merits into

consideration when their interests conflict with the interests of other people in concrete situations. The impunity law allows actor *A* to disregard the interests of *B* in the actual enjoyment of the right to life, just as if the person were not a human being. Impunity laws that allow people to terminate the life of a child in the pre-natal period for any reason whatsoever is a de facto denial of the right to life by the state.[40]

F. Informed choices

Some of the submissions for the Day of Discussion have stressed the importance of people having sufficient information to make informed choices. Sexual and reproductive health is a complex topic, and there are numerous areas where people need more and better information. This section will briefly discuss a few problems as illustrations of the general problem of people having insufficient, or incorrect, information.

sonograms

A sonogram allows the parents to see in real-time the features and movements of the child while in the womb. Many women report that being able to see their child has been crucial in making the decision whether to kill the child or to proceed to delivery. Every woman should have the right to see her child before making the decision, if she chooses.

"safe sex"

Teenagers are often urged to practice "safe sex" by using condoms. The National Institutes for Health did a mega study – a study of studies – on the effectiveness of condoms for protecting people from eight sexually transmitted diseases.[41] The study was endorsed by UNAIDS.

Based on the NIH's findings, one must conclude that using condoms is not a "safe sex" practice. For **HIV**, the evidence shows that consistent condom use in heterosexual intercourse can reduce the risk of transmission by approximately 85%. This means that there is a 15% risk of transmission. So using a condom significantly *reduces* the risk of acquiring an HIV infection *when compared to engaging in sex without a condom*, and it significantly *increases* the risk of infection *when compared to not engaging in sex*. So there is a "double truth": condoms both increase and decrease the chances of becoming infected with HIV.

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[40] The phrase, "the right to die," is now well-established. While there is considerable controversy over the existence or legitimacy of such a right, the concept and the term is here to stay. *See, e.g.*, Alan Meisel & Kathy L. Cerminara, *The Right to Die: The Law of End-of-Life Decisionmaking* (3rd ed., Aspen Publ., New York, 2004). That is to be contrasted with the topic under discussion. In speaking of the impunity laws containing the various a- and b-variables, it would be perfectly correct English to describe them as granting "a right to kill" children. See note **XX** for citations to state reports that use the word "kill" in regards to children in the pre-natal period.

[41] National Institutes for Health, Department of Health and Human Services, "Scientific Evidence of Condom Effectiveness for Sexually Transmitted Disease (STD) Prevention" (June 12-13, 2000).

For **gonorrhea**, the research showed a "positive effect" in protecting men, but there was not enough evidence to make conclusions about the effect on risks for women. For **chlamydia**, **trichomoniasis**, **genital herpes**, **chancroid**, and **syphilis**, while some studies indicated a benefit in using condoms, problems in research design precluded making an assessment of the effectiveness or ineffectiveness of condoms in preventing these infections. For the **human papillonavirus**, which causes cervical cancer, there was no evidence that condoms reduced the risk of transmitting the virus.

The NIH study also reviewed pregnancy studies. Varying rates of unintended pregnancies were reported, going from 1.1%, to 3%, to 6.3%, to 14%, depending on design variables, such as the length of time being studies, and how usages were measured (e.g., "typical," "consistent," or "perfect").

"safe abortions"

It is common to read expressions like "access to safe abortion." Whether one uses the medical or the popular meaning of the term, an abortion nearly always puts an end to the life of the child. So abortions are not safe for the child. Moreover, many women experience guilt and deep loss after they intentionally end the life of their offspring. Talk of "safe abortion" is appropriate only when it is carefully restricted to the physical health of the mother; it is not appropriate as a general term because it ignores the life of the child, and the emotion, mental and spiritual health of the mothers.

sex education

It is sometimes said that sex education (or sexuality education, etc.) must be scientifically objective, and that the state must compel children and adolescents to attend these courses, without regard to youngster's freedom of choice in the matter, or the parents' rights to supervise their children's exercise of rights (CRC Article 5), or to guide the education of their children (e.g., ICESCR Article 13(3), CRC Article 29(2)).

At the most elemental, mechanical level, sexual reproduction can be reduced to objective facts about physiological processes. But sex education is always aimed at shaping human behavior, or "informing choices." Sexual behavior involves more than scientific facts; it entails subjective things, like morals and emotions.

Most states have some kind of sex education courses in the public schools. There are significant differences in the content of these curricula. In some cases, there are complaints that the school materials are forms of "propaganda" that try to instill in children attitudes, values, and behaviors that are contrary to established moral principles within society.

The development of sex education curricula, and the rules for coerced attendance, and the rules that allow for diversity of moral opinions through, for instance, alternative methods of obtaining the necessary, raise serious questions of democratic processes, transparency and accountability in state decision-making in education, and in respecting human rights.

These are only some of the topics that need to be addressed when speaking of "informed choices."

Conclusions

The submissions to date to the CESCR have dealt with only a narrow range of problems relating to the sexual and reproductive aspects of health. For instance, the reproductive health of men is either ignored or given nominal mention. And most aspects of the reproductive health of women have not been covered. A problem as serious as breast cancer has received no notice, for instance.

On a global scale, one of the most serious human rights problems is the lack of qualified birth attendants, together with the lack of pre- and post-natal care for mothers and children. The right to these services needs to be thoroughly addressed in the general comment.

The topic that has received the most attention in the submissions is “abortion.” The purpose of this paper is to address the topic from a children’s human rights perspective. Conflicts of interests – over allocations of resources, or over the enjoyment of rights – cannot be resolved fairly unless all of the relevant interests, of all of the people involved, are given proper attention and weight. The purpose of the Convention on the Rights of the Child is to ensure that all human beings, from conception to 18 years of age, are treated with full respect for their human dignity, and that they receive the special care and protection that they need.