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TO BEAR OR NOT TO BEAR: REPRODUCTIVE FREEDOM AS AN INTERNATIONAL HUMAN RIGHT

*Berta E. Hernández**

I. INTRODUCTION

The right to reproductive freedom¹ is recognized and protected in virtually every corner of this world. Domestic and international tribunals have increasingly found that the right to privacy includes such a right.² For example, in the United States a woman's fundamental right to reproductive freedom is grounded upon the constitutional right to privacy.³ As Justice Brennan explained in *Eisenstadt v. Baird*:⁴ “[i]f the right of privacy means anything, it is the right of the individual, married or

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1. The use throughout this Article of the term “reproductive freedom” means just that: the individual's choice to reproduce or not to reproduce. In this context, the term includes, for example, the right to have or to refrain from having an abortion. The latter, albeit not the “usual” perspective, is an important consideration because large, populous countries, notably India and China, in an attempt to curb tremendous population growth not only encourage but also often apply coercive pressure on women to have abortions — even when women would rather carry the child. For a discussion of China's coercive population control policies, see Note, *Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers*, 30 VA. J. INT'L L. 1007, 1010-16 (1990).

2. See *infra* notes 70-220 and accompanying text (Parts II & III). See also Cook, *Abortion Laws and Policies: Challenges and Opportunities*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 61, 71 (Supp. 3) [hereinafter Cook, *Abortion Laws and Policies*].

3. *Roe v. Wade*, 410 U.S. 113 (1973). This includes the right to decide whether to terminate a pregnancy. *Id.* at 153. Numerous articles have been written on abortion and the *Roe* decision and are beyond the scope of this Article. However, for a listing of well over 100 articles on abortion published shortly after the *Roe* decision, see 17 Index to Legal Periodicals 1-3 (1977). The *Roe* decision was and still is exceedingly controversial.

4. 405 U.S. 438 (1972). In *Eisenstadt*, the Supreme Court invalidated a law that made it more difficult for unmarried persons to obtain contraceptive devices than it was for married persons.

single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁵ Very recently the Canadian Supreme Court, essentially agreeing with the United States view, invalidated Criminal Code provisions limiting access to abortion as infringing on a woman's right to security of the person in derogation of principles of fundamental justice contained in the Canadian Charter of Rights and Freedoms.⁶

In addition, in the international sphere, since 1966 myriad international resolutions, declarations and statements by international groups have acknowledged that matters of family planning and reproductive freedom are issues of individual rights.⁷ Similarly domestic legislation worldwide reflects the recognition of the right to reproductive freedom.⁸ Thus, reproductive freedom as a matter of concern to the international community⁹ is

5. *Id.* at 453. Thereafter, in 1973, the Court in *Roe* and in *Doe v. Bolton*, 410 U.S. 179 (1973) determined that the right of privacy recognized in *Eisenstadt* was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. Specifically, the court recognized that the right to an abortion was protected by the fundamental right of privacy. Notwithstanding some erosion of the right to choose by the United States Supreme Court in allowing states not to grant financial assistance for abortion services in certain instances (*see, e.g.*, *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *see generally* Smith, *Abortion: From Roe to Webster*, 33 *CATH. LAW.* 237 (1990)) and most recently in upholding regulations that, *inter alia* prohibit Title X projects, particularly medical doctors, from providing counseling concerning abortions as a method of family planning even when a patient expressly asks for such counselling, *Rust v. Sullivan*, 59 U.S.L.W. 4451 (1991) the Fifth Amendment right to choose remains. The 1983 *Akron v. Akron Center for Reproductive Health, Inc.* decision contained strong language supporting the position that "the right to privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." 462 U.S. 416 (1983). Even the recent *Sullivan* decision noted that "the regulations do not impermissibly burden a woman's Fifth Amendment rights . . ." 59 U.S.L.W. at 4459.

6. *Morgenthaler, Smoling and Scott v. The Queen*, 44 D.L.R.4th 385 (Can. 1988).

7. For a comprehensive list of such declarations and resolutions, see Isaacs, *Reproductive Rights 1983: An International Survey*, 14 *COLUM. HUM. RTS. L. REV.* 311, 319 n.47 (1983) [hereinafter Isaacs, *Reproductive Rights*].

8. *See infra* notes 162-219 and accompanying text (Part III).

9. Specifically, the 1968 Proclamation of Tehran asserted: "the protection of the family and of the child remains the concern of the international community. Parents have the basic human right to determine freely and responsibly the number and the spacing of their children." Final Act of the International Conference on Human Rights, U.N. Doc A/Conf. 32/41 (Apr. 22 to May 13, 1968), reprinted in *HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS* at 19, U.N. Doc. ST/HR/1 (U.N. Sales No. E.73.XIV.2 (1973)). This right was reiterated in the 1974 World Population Plan of Action in Bucharest. There, representatives of 136 governments stated that "[a]ll couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so."

part of a personal right of privacy as well as part of a fabric of social rights which include rights to health care and equality for women.¹⁰ Using the various "sources"¹¹ of international law as an analytical framework, this Article posits, based on an internationalist's¹² perspective, that reproductive freedom — as part of the penumbral zone of enumerated and existing human rights or as a particular right *in se* — is now included in the body of protected international human rights. Consequently, any government interference with the individual's exercise of such freedom constitutes an impermissible intrusion into the individual's human rights.

Specifically, part II posits that the substantive individual rights of privacy, health and equality — either as treaty rights or as customary international law derived from general acceptance of the treaty rights — protects peripheral rights that include the human right to reproductive freedom. In reaching this result, the Article reviews decisions of international and domes-

Macklin, *Liberty, Utility, and Justice: An Ethical Approach to Unwanted Pregnancy*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 37, 40 (Supp. 3) (quoting *United Nations: World Population Plan of Action*, in 1 THE POPULATION DEBATE: DIMENSIONS AND PERSPECTIVES 155-67 (1975)) [hereinafter Macklin]. Most recently at the 1985 United Nations Conference on the Decade of Women, Third World women from 26 countries and their supporters from 17 Western countries echoed this standard and emphasized the need for all methods of family planning, including abortion, so that women's health and participation in society could be enhanced. The statement provided:

"Women in the Third World demand access to all methods of family planning, including abortion as a back-up method, and assert our right to choose for ourselves what is best for us in our situations. By protecting our lives we protect the lives of those children that we generally want and can care for. This is our conception of 'Pro-Life'."

A. GERMAIN, REPRODUCTIVE HEALTH AND DIGNITY: CHOICES BY THIRD WORLD WOMEN (1987), technical background paper commissioned for the International Conference on Better Health for Women and Children Through Family Planning, Nairobi, Kenya, October 5-9, 1987.

10. Isaacs, *Reproductive Rights*, *supra* note 7, at 353.

11. Stat. I.C.J. art 38. The sources of both international human rights and international law generally are the same. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102, 701 comment a (1987) [hereinafter RESTATEMENT (THIRD)].

12. What the Article refers to as the internationalist's perspective is the consideration that all peoples equally possess individual rights — regardless of whether they are from large or small nations, rich or poor nations. U.N. CHARTER. The purpose as expressed in the preamble to the United Nations Charter includes the reaffirmance of "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." U.N. CHARTER preamble. *But see* *Texaco Overseas Petroleum v. Libyan Arab Republic*, 17 I.L.M. 1, 30 (1978) (where arbitrator discounted a majority vote on various resolutions concerning expropriation because they were not supported "by any of the developed countries with market economies which carry on the largest part of international trade").

tic tribunals as well as pronouncements of international bodies that expressly recognize (a) reproductive freedom as a privacy right; (b) the nexus between health and reproductive freedom; and (c) the relationship between reproductive freedom and women's ability to participate equally in society. The Article also explains why the usual rationale for condemning abortion — protection of fetal life — cannot justify any interference with reproductive freedom. International and domestic tribunals interpreting international law uniformly have concluded that the unborn are not "persons" and thus do not enjoy rights, in particular the right to life, under international law.

Part III reviews domestic abortion laws worldwide and concludes that these laws — either as "general principles of law recognized by civilized nations" or as international customary law derived from the practice of nations as evidenced, in part, by legislation — establish reproductive freedom as an internationally protected human right in *se*.¹³ The analysis plainly shows that the vast majority of states have positive laws recognizing the right to reproductive choice thus establishing the right as a general principle of law. Significantly, the small minority of states with restrictive regulations honor such regulations in the breach. The actual practice in those states, as in states that have expressed the right, reveals that reproductive choice, specifically abortion, exists without state interference or prosecution. Thus, the general practice of states establishes that reproductive freedom is protected as international customary law.

The following sections first briefly explain the "sources" of international human rights law and then describe the emergence of the modern view of such law — providing the historical background predicate to establishing reproductive freedom as an international human right.

A. *The Sources of Human Rights Laws*

The sources of international law considered here to establish a right to reproductive freedom are those listed in Article 38 of the Statute of the International Court of Justice:¹⁴ (1) trea-

13. Stat. I.C.J. art. 38(1)(b), (c). *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 883-84 (2d Cir. 1980) (in considering factors to determine that customary law proscribed torture, the court considered evidence that indicated the widespread adoption of domestic laws opposing torture).

14. Similarly, in the United States, international law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage

ties,¹⁵ (2) customary law,¹⁶ (3) general principles of law recognized by civilized nations¹⁷ and (4) "judicial decisions and the teachings of the most highly qualified publicists of the various nations"¹⁸ Following, these sources of international law are discussed briefly.

1. Human Rights Agreements

Treaties — agreements between two or among more states or international organizations that are "intended to be legally binding and governed by international law"¹⁹ — have become the principal method for making law in the international legal system.²⁰ International human rights agreements have created obligations and responsibilities for states in respect of all indi-

and practice of nations; or by judicial decisions recognising and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (the *Smith* court, looking at the work of learned writers held that a statute proscribing piracy as defined by the Law of Nations was sufficiently clear to afford the basis for a death sentence). The court in *Filartiga*, in explaining customary law and general principles as sources of international law, which it noted was a part of United States law, stated that:

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

630 F.2d at 880-81 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); see also *Lopes v. Reederei Richard Schroeder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963).

Customary law in the United States is federal law, which, like treaties and other international agreements, is accorded supremacy over state law by article VI of the Constitution. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

15. Stat. I.C.J. art. 38(1)(a); RESTATEMENT (THIRD), *supra* note 11, § 102(1)(B).

16. Stat. I.C.J. art. 38(1)(b).

17. *Id.* at art. 38(1)(c).

18. *Id.* at art. 38(1)(d).

19. RESTATEMENT (THIRD), *supra* note 11, § 301(1). Such agreements, however, technically create obligations that are binding only between or among the contracting states and thus are only a source of law with respect to such parties. Nevertheless, multilateral agreements which are open to all states are used increasingly for general legislation to make new law such as human rights. RESTATEMENT (THIRD), *supra* note 11, § 102 comment f. Such agreements also are used for codifying and developing customary law as in the Vienna Convention of the Law of Treaties. See *infra* notes 25-27 and accompanying text.

20. RESTATEMENT (THIRD), *supra* note 11, pt. I, Introductory Note. Much of the established customary law has been codified by general agreements. Nevertheless, even subsequent to codification, customary law remains as a source in particular with respect to states that do not adhere to codifying treaties. For a discussion of custom as a source of international law, see *infra* notes 29-49 and accompanying text.

viduals subject to their jurisdiction, including their own nationals.²¹ In fact, one purpose of creating the United Nations was "to achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."²² Thus, the United Nations Charter was the first formal articulation of human rights as a matter for international concern.²³

Subsequent to the Charter, myriad human rights instruments have been executed, including international and regional agreements which give further protection to human rights²⁴ specifically recognizing the rights to privacy,²⁵ health,²⁶ and equality

21. *The Paquete Habana*, 175 U.S. 677 (1900). For example, obligations assumed by the United States in the United Nations Charter and the Charter of the Organization of American States, both of which include human rights provisions and both of which are treaties of the United States, are the law of the land. *See also* Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967) (states agreeing that the Human Rights Committee established by the covenant may consider complaints by individuals).

22. U.N. CHARTER arts. 1(3), 55-56.

23. R. WALLACE, *INTERNATIONAL LAW* 176 (1986) [hereinafter R. WALLACE]. The United States is bound by the U.N. Charter which "stands as the symbol of human rights on an international scale . . . and resolves to reaffirm faith in fundamental human rights and in the dignity of the human person." *Fernandez v. Wilkinson*, 505 F. Supp. 787, 796 (D. Kan. 1980), *aff'd sub nom., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). *But see, e.g., Hitai v. Immigration and Naturalization Service*, 343 F.2d 466 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), (holding that the Charter was not self-executing and thus its articles did not create binding obligations on the United States).

24. The analysis of the development and evolution of the rights to privacy, health and equality in Part II supports the thesis of this Article that reproductive freedom is a peripheral right under the enumerated rights and, consequently, is an internationally protected human right sourced in treaties and customary law.

25. The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 12 (1948) ("No one shall be subject to arbitrary interference with his privacy, family, home or correspondence . . .") [hereinafter Universal Declaration]. *See also id.* at art. 16 on right to marry and found a family; International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/6316, at art. 17 (1966) ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . .") [hereinafter Civil Covenant]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8(1), Council of Europe, Eur. T.S. No. 5, 213 U.N.T.S. 211 (1954) ("Everyone has the right to respect for his private and family life, his home and his correspondence . . .") [hereinafter European Convention] (*see also* art. 12 granting the right to marry and found a family); the American Convention on Human Rights, art. 11, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/ser. 4 v/II 23, Doc. 21, rev. 2 (English ed. 1975) ("No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence . . .") [hereinafter American Convention]; *see also id.* at art. 17 (granting the right to marry and found a family).

26. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, art. 12 ("1. The State

based on sex.²⁷ Part II reviews these specific rights as the basis for protecting the penumbral right of reproductive freedom as an international human right.

2. Customary Law of Human Rights

Custom, and law made by international agreement, are co-equal as international legal authority. Customary law results from a general and consistent state practice followed from a sense of legal obligation.²⁸ The best evidence of customary law is proof of state practice as demonstrated by official documents, including treaties,²⁹ and other indications of governmental ac-

Parties . . . recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken . . . shall include . . . [t]he provision for the reduction of the stillbirth-rate and of infant mortality") [hereinafter Economic Covenant]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR Supp. (No. 46) U.N. Doc. A/34/49 ("States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning") [hereinafter Women's Convention]; Universal Declaration, *supra* note 25, at art. 25 ("Everyone has a right to a standard of living adequate for the health and well being of himself and his family . . . including medical care.").

27. U.N. CHARTER preamble ("reaffirm . . . the equal rights of men and women . . ."); U.N. CHARTER art. 1(3) ("promoting and encouraging human rights and for fundamental freedoms for all without distinction as to . . . sex"); Universal Declaration, *supra* note 25, at art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind such as race, color, sex, language, religion, political or other opinion"); Women's Convention, *supra* note 26 *passim*; Civil Covenant, *supra* note 25, at arts. 2 (no distinction on rights under covenant based on sex), 3 ("The states parties to the present Covenant undertake to ensure the equal rights of men and women" to the rights set forth in the covenant.), 26 ("the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex"); Economic Covenant, *supra* note 26, at arts. 2 (the rights under the covenant are to be exercised without discrimination on the basis of sex, among other things), 3 ("The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant"); European Convention, *supra* note 25, at art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex"); American Convention, *supra* note 25, at art. 1 (rights and freedoms under Convention are without discrimination on the basis of sex, among other things).

28. Stat. I.C.J. art. 38(1)(b); RESTATEMENT (THIRD), *supra* note 11, § 102 comment b.

29. See North Sea Continental Shelf Cases (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3, 28-29, 37-43. Thus, when a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states it may become law for the nonparties that do not dissent. See RESTATEMENT (THIRD), *supra* note 11, § 102 comment i. For example, the Charter of the United Nations has been adhered to by virtually all states. Even the few remaining nonmember

tion such as official statements of policy whether unilateral or that result from cooperation with other states.³⁰ Thus, national courts deciding questions of international customary law examine actions of states around the world.³¹

A customary international law of human rights³² based upon state practice, human rights agreements and other international instruments³³ has developed and has continued to grow.³⁴ The

states have acquiesced in the principles it established. Consequently, many of the Charter's provisions, such as those prohibiting the use of force, have become rules of international law binding on all states. See RESTATEMENT (THIRD), *supra* note 11, § 102 comment h. Similarly, the *Continental Shelf* cases established that a treaty rule can become a general rule of international law if representative states participated in the treaty, particularly states whose interests were at stake. 1969 I.C.J. 3. Originally, the practice of states had to continue over an extended period of time to establish customary law. RESTATEMENT (THIRD), *supra* note 11, § 102 Reporter's Note 2. In deciding the *Continental Shelf* cases, however, the International Court of Justice agreed that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law." 1969 I.C.J. at 49.

30. RESTATEMENT (THIRD), *supra* note 11, § 103 comment a. "[E]very document demonstrating the conduct of States in certain situations can serve as evidence of the element of practice" necessary to establish custom. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 45 (2 ed. 1987) [hereinafter L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT] (citing WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (1964)). As Judge Lachs stated in his dissent in *North Sea Continental Shelf Cases*, "Even unratified treaties may constitute a point of departure for a legal practice." 1969 I.C.J. at 225.

31. Pertinent state action may include acts of foreign legislatures and diplomats, as well as juridical decisions of national and international tribunals. RESTATEMENT (THIRD), *supra* note 11, pt. I, Introductory Note. The United States Supreme Court has ascribed the basic principles governing the application of customary international law in domestic courts as follows:

international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The *Paquete Habana*, 175 U.S. 677, 700 (1900).

32. RESTATEMENT (THIRD), *supra* note 11, § 702, sets out the customary international law of human rights. The violations of human rights cited in this section, however, are violations of customary international law only if practiced, encouraged or condoned by the government of a state as state policy. The presumption may arise that a government has condoned or encouraged prohibited acts, however, if such acts have been taking place and the state has taken no steps either to prevent the acts or to punish the actors.

33. RESTATEMENT (THIRD), *supra* note 11, pt. VII, Introductory Note, at 145 (referring to *id.* § 702). For example, in *Filartiga v. Pena-Irala* the court had no trouble finding that "[i]n light of the universal condemnation of torture in numerous international

International Court of Justice and the International Law Commission have recognized the existence of customary human rights law.³⁵ Domestic courts also apply the law of nations — international customary law — to protect human rights.³⁶

Because the practice creating customary human rights laws includes the relationship between a state and its own nationals and residents, what is accepted as creating customary international law of human rights may be widely different from the

agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), . . . an act of torture committed by a state official against one held in detention violates the established norms of the international law of human rights, and hence the law of nations." 630 F.2d 879, 880 (2d Cir. 1980). In reaching this conclusion, the court considered the Universal Declaration, *supra* note 25, and the American Convention, *supra* note 25, as well as the Civil Covenant, *supra* note 25, and the European Convention, *supra* note 25, (although the United States is not a signatory to the latter two), because these human rights instruments evidence modern usage and practice of nations. More recently, in *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), the Eleventh Circuit concluded that the district courts had jurisdiction under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1602-1611 (1988)), in an action for damages for the detention and torture of the plaintiff by agents of the Saudi Government in Saudi Arabia.

Similarly, in *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-800 (D. Kan. 1980), *aff'd sub nom., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), the court, using the Universal Declaration, *supra* note 25, and the American Convention, *supra* note 25, as authority, and citing to the European Convention, *supra* note 25, and the Civil Covenant, *supra* note 25, as principal sources of human rights law evidencing the custom and usage of nations, agreed that international law secured a prisoner the right to be free from arbitrary detention.

34. RESTATEMENT (THIRD), *supra* note 11, pt. VII, Introductory Note. The customary international law of human rights is also the law of the United States. Significantly, in the United States Federal statutes refer to "internationally recognized human rights" and have legislated national policy towards governments guilty of "consistent patterns of violations" of such rights. *See, e.g.*, the United States Foreign Assistance Act of 1961, as amended ("no assistance may be provided . . . to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, . . . or other flagrant denial of the right to life, liberty and the security of the person . . ." 22 U.S.C. § 2151n(a) (1988). *See also* 22 U.S.C. § 2304 (1988) which provides that no security assistance may be provided to such governments. *See also* Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691-1736bb-6, sec. 1712 (1988) (no financing of the sale of agricultural commodities to such government); International Bureaus, Congresses, etc., 22 U.S.C. §§ 261-290K-11, sec. 262d (1988) (United States policy opposes assistance to such government by international financial institutions with the exception of instances where the program serves "the basic human needs" of the citizens of such country).

35. *See Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 32.

36. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *see generally* T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 98 (1987).

practices that generally establish customary international law.³⁷ For example, norms that create “international crimes” and obligate all states to proceed against violations are considered peremptory norms of international law — norms from which no state can deviate. Such norms might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights.³⁸ An analysis of state action in respect to reproductive freedom reveals the emergence of such a right as a rule of customary international human rights law, either as a peripheral right to the international common law protecting the human rights to privacy, health and equality (Part II) or as a particular right (Part III).

3. “General Principles”: Individual Rights Protected by and Common to Many Legal Systems

International law can also be derived by “borrowing” general principles of law recognized by civilized nations from municipal law systems. General principles are those applied by the

37. RESTATEMENT (THIRD), *supra* note 11, § 701 Reporter’s Note 2, lists the practice of states that creates customary human rights laws:

Practice of states that is accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America and Africa (citation omitted); general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.

Some of the above listed practices also support the conclusion that particular human rights have been absorbed into international law as general principles common to major state legal systems. *Id.*, Reporter’s Note 2. *See also id.*, § 702, Reporter’s Note 1.

38. *Id.*, § 102, Reporter’s Note 6. In the United States, the Restatement has accepted the category of *Erga Omnes* obligations — obligations that arise, *inter alia*, from the principles and rules concerning the basic rights of human persons, including protection from slavery and racial discrimination as including customary law obligations in respect of human rights. *See Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 32. RESTATEMENT (THIRD), *supra* note 11, § 702.

most representative systems of municipal law.³⁹ General principles common to municipal legal systems can thereby fill "gaps" in international law that treaties and customary international law fail to address.⁴⁰ A given principle that is affirmed constantly in international judicial decisions and accepted in the practice of states acquires the status of custom.⁴¹ A search for general principles can be conducted through an exercise in comparative law.⁴²

The use of municipal law principles is limited by the requirement that such principles be appropriate for application on the international level.⁴³ Tribunals which apply "general principles" have not carried out detailed examinations of the major national law systems to determine whether these principles pervade "the municipal law of nations in general."⁴⁴ Nevertheless, a rule of municipal law common to many legal systems may be deemed to have become either a rule of customary law or a law implied by treaty.⁴⁵

Municipal laws concerned with, *inter alia*, the individual

39. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 98 (quoting Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT'L L. 20, 34-39 (1957) [hereinafter Mann]). See also M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 47 (1988) [hereinafter M. JANIS]. A general principle of law is a proposition that can be found virtually in every legal system. At one time, however, the term "civilized nations" meant European states and later included the United States and still later Japan. At present it is recognized that a search for general principles of law should include all states in the community of nations. *Id.* (citing G. GONG, THE STANDARD OF CIVILIZATION IN INTERNATIONAL SOCIETY (1984)).

40. M. JANIS, *supra* note 39, at 47.

41. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 90-91 (quoting M. Virally, *The Sources of International Law* in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 143-148 (M. Sorensen ed. 1968)). Once a general principle is accepted as international customary law, it does not matter that the principle originally was borrowed from municipal law. The source "general principles of law recognized by civilized nations" has only been employed in individual or dissenting opinions, and never in the majority decisions of the courts. Courts have on several occasions, however, applied principles that are "generally recognized" or "admitted" and certainly borrowed from municipal law, but have not conclusively acquired the status of customary rules.

42. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (finding that torture violates customary international law based upon a review *inter alia* of the domestic law rules "of over fifty-five nations" which revealed a consensus proscribing torture as a violation of international law). See also M. JANIS, *supra* note 39, at 48.

43. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 92 (quoting Schachter, *International Law and Theory in Practice*, 178 REC. DES COURS 78-80 (1982-V) [hereinafter Schachter]).

44. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 99 (quoting Mann, *supra* note 39).

45. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 96.

should not be incorporated into the international legal spectrum "lock, stock, and barrel." However, domestic legal principles regarding individual rights that enjoy general recognition are appropriate for adoption into international law.⁴⁶ As is shown in Part III, principles recognizing an individual's right to make reproductive choices are universally found in domestic legal systems and thus are appropriately applied in international law. Moreover, general principles of law have been used, particularly in United States courts, to substantiate proof of customary international law.⁴⁷ Given the virtually uniform existence of domestic laws recognizing the right to reproductive freedom, such rules are properly construed as having acquired the status of custom.

B. The Evolution of Human Rights — Establishing Reproductive Freedom as an International Human Right

International human rights are those vital to individuals' existence — they are fundamental and inalienable rights, predicates to life as human beings.⁴⁸ Human rights are moral, social, and political rights that concern respect and dignity associated with our lives as individuals⁴⁹ and have their origin in "natural

46. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 92-93 (quoting Schachter, *supra* note 43). Professor Schachter states that "[i]n these areas, we may look to representative legal systems not only for the highly abstract principles of the kind referred to earlier but to more specific rules that are sufficiently widespread as to be considered 'recognized by civilized nations.' It is likely that such rules will enter into international law largely through international treaties or particular arrangements accepted by the parties." *Id.* The general provisions of such treaties and arrangements require supplementing. Such supplementation can often be achieved by recourse to commonly accepted national rules. *Id.*

47. The *Filartiga* court's comparative study of domestic law rules outlawing torture, when added to the analysis of treaties, state practice, and opinions of judges and publicists, led to the conclusion that a rule of customary law prohibiting torture existed. *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980). The Court stated: "Having examined the sources from which customary international law is derived . . . the usage of nations, judicial opinions and the works of jurists . . . we conclude that official torture is now prohibited by the law of nations." *Id.* at 878-85. Similar to the prohibition against torture, the proscription against prolonged arbitrary detention is a violation of human rights that reflects a general principle of law common to the major legal systems. *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.*, 654 F.2d 1382 (10th Cir. 1981). See also RESTATEMENT (THIRD), *supra* note 11, § 702, Reporter's Note 1 (listing in addition to torture and arbitrary detention, prohibitions against slavery, murder or causing disappearance of individuals, and racial discrimination as other rules of customary international law which also are "general principles.").

48. R. WALLACE, *supra* note 23, at 175.

49. RESTATEMENT (THIRD), *supra* note 11, § 701 comment b, at 152. A full history of

law [and] in contemporary moral values."⁵⁰

The inclusion of international human rights law⁵¹ as part of international law is a relatively recent development.⁵² However, it is universally accepted that the way a sovereign treats individuals — both its own citizens and aliens — is a matter of international concern.⁵³

the development of international human rights laws is beyond the scope of this Article. For comprehensive coverage of this subject, see L. HENKIN, *THE RIGHTS OF MAN TODAY* (1968); M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980) [hereinafter M. McDUGAL, H. LASSWELL & L. CHEN]; L. SOHN & T. BUERGENTHAL, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973) [hereinafter L. SOHN & T. BUERGENTHAL].

50. RESTATEMENT (THIRD), *supra* note 11, pt. VII, Introductory Note; see also L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at ch. 12.

51. International law and various international agreements recognize human rights of individuals and sometimes give individuals remedies before international bodies. See, e.g., M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 71-74 (5th ed. 1984) [hereinafter M. AKEHURST]; L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 980-1039; M. JANIS, *supra* note 39, at 174-97; G. VON GLAHN, *AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* ch. 10 (4th ed. 1981) [hereinafter G. VON GLAHN]; R. WALLACE, *supra* note 23, at ch. 9. Conversely, individuals may be held liable for offenses against international law, such as piracy, war crimes or genocide. RESTATEMENT (THIRD), *supra* note 11, pt. II, Introductory Note, at 70-71. See also *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946).

52. This change shows an evolution of philosophy and marked departure from the positivists' doctrinal view that only states can be subjects of international law. International law traditionally was defined as the law of the international community of states that deals with the conduct of nation-states and their relations with other states, and to some extent also with their relations with individuals, business organizations, and other legal entities throughout the state. For example, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 1 (1962) defined international law as follows: "International law,' as used in the Restatement of this Subject, means those rules of law applicable to a state or international organization that cannot be modified unilaterally by it." (emphasis added) Increasingly, however, individuals (and other entities) have been accorded international personality in various measures. R. WALLACE, *supra* note 23, at 1. RESTATEMENT (THIRD), *supra* note 11, § 101, at 127, reflects this change by defining international law as follows: "International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se* as well as with some of their relations with persons, whether natural or juridical." See also M. AKEHURST, *supra* note 51, at ch. 1; M. JANIS, *supra* note 39, at 163-97; G. VON GLAHN, *supra* note 51, at 1-11; R. WALLACE, *supra* note 23, at 163-97.

53. U.N. CHARTER arts. 55, 56. While the U.N. Charter has been deemed not to be wholly self-executing (See, e.g., *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965)), courts have used the Charter as well as other non-self-executing agreements as evidence of binding principles of international law. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) ("The United Nations Charter (a treaty of the United States (citation omitted)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern."); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (government's duty under international law to refrain from kidnapping a criminal defendant from within the

This modern view of human rights emerged in 1945 with the Nuremberg Tribunals and the Charter of the United Nations⁵⁴ that together revolutionized the nature of human rights. The Tribunal concluded that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁵⁵ Thus, the vivid awareness of Nazi human rights atrocities prompted the nations of the world expressly to require that the new United Nations organization promote human rights and fundamental freedoms.⁵⁶ The Nuremberg Trials defined the relationship of individuals to international law and conclusively established that the rules of public international law should and, in fact, do apply to individuals.⁵⁷

Central to this philosophy of international human rights laws is that every individual has rights in his or her society with which the state cannot interfere but, rather, which the state must recognize, respect and ensure.⁵⁸ Thus, states have assumed human rights obligations, the protection of which is not left solely to the states.⁵⁹ Instead, human rights issues are matters of international concern subject to control by international law.⁶⁰ Universal acceptance of human rights principles has resulted in an inclination to find legal obligation in the broad language of international agreements concerning human rights, such as the general language of the United Nations Charter.⁶¹ In addition, other international human rights instruments concluded after

borders of another nation where formal extradition procedures existed because, as such, action infringed on the personal rights of the defendants).

54. Human rights thereafter developed progressively via treaties and customary law. See *infra* notes 89-115 and accompanying text.

55. The Nuremberg Trial, 6 F.R.D. 69, 110 (1946).

56. See U.N. CHARTER art. 1(3); *supra* note 22 and accompanying text. See generally *Nuremberg Trial*, 6 F.R.D. 69.

57. *Nuremberg Trial*, 6 F.R.D., at 110. In condemning "war crimes," "crimes against peace," and "crimes against humanity" the Tribunal referred to national law, international agreements, customs and practices of states that have obtained universal recognition, and general principles of justice as the "sources" of the law of war. *Nuremberg Trial*, 6 F.R.D., at 106-12, 130. See also M. JANIS, *supra* note 39, at 176.

58. RESTATEMENT (THIRD), *supra* note 11, pt. VII, Introductory Note (citing *Id.* § 701, comment a).

59. M. JANIS, *supra* note 39, at 176.

60. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795 (D. Kan. 1980), *aff'd sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (quoting Stotzky, Book Review, 11 LAW. AMERICAS 229 (1979) (reviewing L. HENKIN, THE RIGHTS OF MAN TODAY (1978))).

61. RESTATEMENT (THIRD), *supra* note 11, § 701, Reporter's Note 1.

World War II reflect this universal obligation to protect individuals' rights in society and for the first time in history specifically articulate the international protection of certain rights, such as the rights of privacy, health and equality.⁶²

A similar expansive view of the development of human rights is found in the practices creating customary human rights law and the attendant legal obligations notwithstanding that states may sometimes (or even often) violate the alleged rights. Additionally, human rights protection in the constitutions or laws of many states are considered part of international law,⁶³ although principles common to domestic legal systems generally are a secondary source of international law.⁶⁴ This is the framework against which individual human rights, here specifically reproductive freedom, are reviewed in international law today.

Moreover, in analyzing reproductive freedom as an internationally protected human right it is imperative to understand that historically states' regulation of reproduction never has been premised upon some genuine concern for an *individual's* human rights to privacy, health, equality or religion. Rather, such regulation has been a response to the opposition to family planning by influential religious institutions or to the sovereign's own need to control population growth often based on labor or military needs.

In this context, although abortion is a controversial method of fertility control, it is indisputable that throughout history women have exercised that option and will continue to do so whatever the risks.⁶⁵ Thus, as was stated at the United Nations Conference on the Decade of Women, abortion cannot be divorced from family planning and the protection of the individual's right to reproductive freedom must include access to abortion.⁶⁶

62. These rights are discussed in this Article as sources of protection of an individual's reproductive freedom.

63. RESTATEMENT (THIRD), *supra* note 11, § 701, Reporter's Note 1. See also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

64. RESTATEMENT (THIRD), *supra* note 11, § 701, Reporter's Note 1. Tribunals must interpret international law as it has evolved and exists in the present time. *Filartiga*, 630 F.2d at 881 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796)) ("distinguishing between 'ancient' and 'modern' law of nations").

65. Sai & Nassim, *The Need for a Reproductive Health Approach*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 103, 107 (Supp. 3) (1989) [hereinafter Sai & Nassim].

66. Although abortion is only one narrow aspect of reproductive freedom, there is probably little quarrel that it is the most controversial. Thus, the emphasis on abortion throughout this paper is not with the purpose of excluding other reproductive options.

A brief review of abortion regulation in recent history is instructive. For example, although abortions were decriminalized in 1920 in the Soviet Union, the government reversed its policy in the mid 1930s to compensate for the loss of population anticipated in expectation of a World War.⁶⁷ Similarly, the devastating effects of World War II on population prompted many Eastern European states to outlaw abortion in the hope of increasing population to reestablish the labor force and rebuild armies.⁶⁸

Governments also have used abortion laws to reduce population. For example, India and China are two countries with serious over-population problems in which sovereigns have instituted coercive abortion policies as part of the states' programs to control population growth.⁶⁹

* * *

In sum, based upon a review of treaties, the decisions of domestic and international tribunals interpreting the treaties, policy statements by international bodies supporting interpretation of treaty rights, domestic legislation, actual practice of states, and the opinion of experts in the field, this author concludes that reproductive freedom is an internationally protected human right. States' regulation of reproductive freedom to achieve population goals (which include, in the case of Nazi Germany, genocide) or to placate influential religious institutions impermissibly erodes the integrity of an individual and precludes such individual's exercise of his or her rights of privacy, health, equality, or religion. Consequently, a state cannot regulate reproductive freedom without violating such individual's human rights as those

Rather, the emphasis is premised on the view that if resolution can be achieved with respect to possibly the most controversial of family planning issues, such resolution would encompass other less polemic alternatives.

67. In 1955, after Stalin, abortion was again decriminalized. Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027, 1052-53 (1988).

68. See Note, *Governmental Abortion Policies and the Right to Privacy; the Rights of the Individual and the Rights of the Unborn*, 11 BROOKLYN J. INT'L L. 103 (1985) [hereinafter Note, *Governmental Abortion Policies*]. Even Hitler, shortly after rising to power criminalized abortion and instituted an anti-abortion policy in order to increase the population of the state. David, Fleischhacker & Höhn, *Abortion and Eugenics in Nazi Germany*, 14 POPULATION & DEV. REV. 81, 89-101 (1988). In fact, during World War II tribunals could impose the death penalty for illegal abortions. *Id.* at 81, 97. This new policy resulted in many more abortionists being charged. *Id.* at 94. However, in Hitler's Germany the charged abortionists successfully could use as a defense to the claims levelled against them that the woman was Jewish — termination of a Jewish fetus did not violate the proscription against abortion. *Id.*

69. Note, *Governmental Abortion Policies*, *supra* note 68, at 103.

rights have evolved since the Nuremberg Trials.

II. THE RIGHTS TO PRIVACY, HEALTH AND EQUALITY PROTECT THE HUMAN RIGHT TO REPRODUCTIVE FREEDOM — TREATIES, CUSTOM, JUDICIAL DECISIONS AND INFLUENTIAL PUBLICISTS

The United Nations Charter, the Universal Declaration of Human Rights (Universal Declaration or Declaration) and other international agreements provide the framework for analyzing reproductive freedom as an international human right. The Charter's "reaffirm[ance of] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .";⁷⁰ its charge to the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion";⁷¹ and the "pledge" of member states to ensure that such rights are achieved are important statements with respect to reproductive freedom.⁷² In this context, it is significant that "[s]ince 1968, the United Nations has recognized, and repeatedly restated, the right of individuals to decide freely and responsibly the number and spacing of their children."⁷³

The Universal Declaration, adopted by the United Nations General Assembly in 1948,⁷⁴ proclaimed a series of political, civil, economic, social, and cultural rights of individuals.⁷⁵ These included for the first time the specific rights to privacy⁷⁶ and health.⁷⁷ The Declaration also reiterated the right to equality re-

70. U.N. CHARTER preamble.

71. U.N. CHARTER art. 55.

72. U.N. CHARTER art. 56.

73. Germain, *The Christopher Tietze International Symposium: An Overview*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 1, 4 (Supp. 3) (citing INTERNATIONAL PLANNED PARENTHOOD FEDERATION, *THE HUMAN RIGHT TO FAMILY PLANNING* (1989)) [hereinafter Germain, *An Overview*].

74. Universal Declaration, *supra* note 25. The Declaration was adopted without dissent, but with eight states abstaining. Since then, virtually all states have given at least some indication of support for the Declaration. It has been incorporated or reflected in national constitutions and has contributed to an international law of human rights. See RESTATEMENT (THIRD), *supra* note 11, pt. VII, Introductory Note.

75. For a discussion of the Universal Declaration, see *supra* notes 25-27 and accompanying text. Mrs. Franklin D. Roosevelt, Chair of the Commission on Human Rights and a representative of the United States, prior to the final vote, explained the Declaration was "to serve as a common standard of achievement for all peoples of all nations." 5 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 243 (1985).

76. Universal Declaration, *supra* note 25, at art. 12.

77. Universal Declaration, *supra* note 25, at art. 25.

ardless of sex.⁷⁸ Although initially the Universal Declaration was an aspirational statement, it is now recognized as the standard of recognized rights.⁷⁹ There is consensus today that the rights enumerated therein — including the rights to privacy, health and equality — are now protected as part of customary law⁸⁰ and its standards have now, through wide acceptance by nations, become binding customary law and, in practice, frequently invoked as legally binding by nations and by private individuals and groups.⁸¹ In fact the United States has expressly

78. Universal Declaration, *supra* note 25, at art. 2.

79. Various international assemblies have recognized the principles of the Universal Declaration as customary law. For example, the unofficial assembly for human rights, which met in Montreal in March 1968 stated that "the Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law." Montreal Statement of the Assembly for Human Rights, *reprinted in* 9 J. INT'L COMMISSION JURISTS No. 1, 94, 95 (1968). In Teheran, at the official international conference on human rights which met in April-May 1968, a similar conclusion was reached with the Proclamation of Teheran which provided that the "Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community." Final Act of the International Conference on Human Rights, May 13, 1968, U.N. Doc. A/Conf. 32/41 at 4 para. 2; U.N. Publ. E 68. XIV. 2. A resolution was passed providing, among other things, that the Universal Declaration was an obligation for the members of the international community. M. AKEHURST, *supra* note 51, at 77 (citing United Nations Conference on Human Rights, Teheran, April 22 to May 13, 1968, Proclamation of Teheran, *reprinted in Official Documents: United Nations Conference on Human Rights*, 63 AM. J. INT'L L. 674 (1969)). *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 882, 883 (2d Cir. 1980); Fernandez v. Wilkinson, 505 F. Supp. 787, 796 (D. Kan. 1980), *aff'd sub nom., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). In 1968 the General Assembly endorsed the Proclamation of Teheran "as an important and timely reaffirmation of the principles embodied in the Universal Declaration of Human Rights." May 13, 1968, G.A. Res. 32/130, 23 U.N. GAOR, Supp. (No. 18) at 49, U.N. Doc. A/Conf. 32/41. The Secretary General also emphasized the proclamation by the Teheran conference that "the Universal Declaration constitutes 'an obligation for the members of the international community.'" *Introduction to the Annual Report of the Secretary-General and the Work of the Organization*, Sept. 1968, 23 Supp. No. 1 A (A/7201/ADD.1), at 13. L. SOHN & T. BUERGENTHAL, *supra* note 49, at 518-19, 522. *See also* RESTATEMENT (THIRD), *supra* note 11, § 701, Reporter's Note 6, at 156. As Sohn & Buergenthal have noted, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1963 Declaration of the Elimination of All Forms of Racial Discrimination both proclaimed the duty to observe the provisions of the declaration of human rights — and both declarations were adopted unanimously. L. SOHN & T. BUERGENTHAL, *supra* note 49. With but a few variations, the same rights found in the declaration are recognized by the Civil Covenant, *supra* note 25, and the Economic Covenant, *supra* note 25. Additionally, these particular conventions also protect rights that are recognized in the Declaration. RESTATEMENT (THIRD), *supra* note 11, § 701, Reporter's Note 5, at 156.

80. *See* R. WALLACE, *supra* note 23, at 186-87.

81. *See* Fernandez v. Wilkinson, 505 F. Supp. 787, 796 (D. Kan. 1980), *aff'd sub*

accepted as law the international human rights standards set forth in the Universal Declaration.⁸²

In addition, the Civil Covenant⁸³ and the Economic Covenant,⁸⁴ both based on the Declaration, also expressly protect these rights.⁸⁵ Similarly, the Women's Convention, which focuses on the right to equality on the basis of sex, protects such rights

nom., 654 F.2d 1382 (10th Cir. 1981) (quoting Bilder, *The Status Of International Human Rights Law: An Overview*, 1978 INT'L L. PRAC. 1, 8). In *Fernandez* the court concluded that "the Declaration has evolved into an important source of international human rights law." 505 F. Supp. at 797. The *Fernandez* court also turned to the American Convention (now ratified by the United States), as a source of international human rights law. Finally, the court relied on the Civil Covenant and the European Convention as principal sources of fundamental human rights law, notwithstanding that the United States is not bound by the documents themselves. The court stated that such documents are "indicative of the customs and usages of civilized nations." *Id.* See also *supra* note 47.

82. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (the "prohibition [against torture] has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights . . ."); *Fernandez*, 505 F. Supp. at 797 (the "Declaration has evolved into an important source of international human rights law"). See also M. AKEHURST, *supra* note 51, at 77. In fact, human rights norms recognized as customary international law are law in the United States and can be enforced against the United States in appropriate proceedings. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 995-96.

83. Civil Covenant, *supra* note 25. For provisions in Civil Covenant protecting rights to privacy and equality, see *supra* notes 25-28 and accompanying text.

84. Economic Covenant, *supra* note 26.

85. The United States is a signatory to very few international human rights agreements and has ratified even fewer although it is bound by the United Nations Charter which "resolves to reaffirm faith in fundamental human rights and in the dignity of the human person." *Fernandez*, 505 F. Supp. at 796. In 1978 President Carter transmitted to the Senate the Civil Covenant, *supra* note 25, the Economic Covenant, *supra* note 26, the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, and the American Convention, *supra* note 25. The Senate has not consented to any of these treaties and, thus, they have not been ratified. However, even in the absence of ratification by the United States, some provisions of these covenants and conventions reflect principles of customary international law and consequently form part of United States law. See *Filartiga*, 630 F.2d at 883-84 (citing the Civil Covenant and the European Convention as part of the "universal renunciation [of torture] in the modern usage and practice of nations"); *Fernandez*, 505 F. Supp. at 797 (referring to the European Convention and the Civil Covenant as "two other principle [sic] sources of fundamental human rights" because they are "indicative of the customs and usages of civilized nations"). Further, it is noteworthy that the acts proscribed by the covenants and conventions are acts that the United States Constitution, federal or state law generally prohibit. Accordingly, the obligations these international instruments would impose on the United States are in all events largely honored pursuant to federal or state law. See RESTATEMENT (THIRD), *supra* note 11, § 701, Reporter's Note 8, at 159 and cases cited therein. Significantly, with respect to the subject of this Article, it has been clearly established, as a matter of United States Constitutional law, that the fundamental right of privacy includes the protection of reproductive choice. See *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny.

and specifically mentions the right to health.⁸⁶ Finally, regional arrangements such as the European Convention and the American Convention expressly protect the rights of health, privacy and equality.⁸⁷

In the following sections this Article proposes that reproductive freedom is (or should be) part of the penumbra of rights embodied in the specific international human rights to privacy, health and equality found in treaties and in customary law.⁸⁸

A. *Privacy*

The individual right to privacy, as a human right, is articulated in myriad international human rights agreements.⁸⁹ The right to privacy in these conventions is expressed in general terms and, in essence, simply means that individuals have a human right to privacy or private life. It is accepted that the notion of privacy is broad in scope, encompassing actions within the realm of interpersonal relations and acts of individual autonomy.⁹⁰

86. Women's Convention, *supra* note 26. For a detailed discussion of the Women's Convention, see *infra* notes 148-50 and accompanying text.

87. See *supra* notes 25-27 and accompanying text.

88. While it must be noted that the human rights treaties nowhere expressly grant a "right to reproductive choice," this Article discusses why the rights to privacy, health and equality are appropriate bases for finding a peripheral human right to reproductive choice. The right is found in human rights instruments based on a non-interpretive analysis of the express rights of privacy, health and equality — an appropriate and accepted analysis in international law. See, e.g., *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988) (where the European Court of Human Rights concluded that criminal laws proscribing consensual homosexual acts between adults violated the right of privacy under Article 8 of the European Convention); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (where the court simply noted that sexual life is part of private life; specifically, the court held that under Article 8(1) of the Europeans Convention, the applicant has a right to "respect for his private life (which includes his sexual life) . . ."). *Id.* For a review of the *Norris* and *Dudgeon* decisions, see Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN. J. INT'L L. 189 (1990). For an extensive discussion of an analogous analysis — a noninterpretive review of the United States Constitution, particularly with respect to reproductive choice, see Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U.L. REV. 278 (1981).

89. See Universal Declaration, *supra* note 25, at art. 12; Civil Covenant, *supra* note 25, at art. 17; European Convention, *supra* note 25, at art. 8; American Convention, *supra* note 25, at art. 11. Significantly, these conventions separately protect the rights of men and women to found a family. See also European Convention, *supra* note 25, at art. 12 ("Men and women of marriageable age have the right to marry and to found a family."); American Convention, *supra* note 25, at art. 17 ("The right of men and women of marriageable age to marry and to raise a family shall be recognized.").

90. See M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 49, at 815-17.

There is ample support in international and domestic judicial decisions that the international human right to privacy, often linked to family life,⁹¹ includes the human right to make reproductive choices, including abortion. Moreover, the consistent view of scholars is that the broad notion of privacy that protects personal and interpersonal autonomous decision making includes the protection of the right to reproductive choice.⁹²

The well-known decision of the European Commission on Human Rights in *Bruggemann & Scheuten v. Federal Republic of Germany*⁹³ is an example of a decision by an international

91. See e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); and *Morgenthaler, Smoling and Scott v. The Queen*, 44 D.L.R.4th 385 (Can. 1988), are decisions clearly supporting the proposition that a right to reproductive choice is founded upon the fundamental right of privacy. For a list of other court decisions in various jurisdictions upholding the right to reproductive choice (abortion), see Cook, *Abortion Laws and Policies*, *supra* note 2. For a discussion of decisions of international tribunals and domestic courts interpreting the right to privacy in international agreements as protecting reproductive freedom, see *infra* notes 93-115 and accompanying text.

92. See McDougal, Lasswell & Chen, *Human Rights for Women and World Public Order: The Outline of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497,504 (1975) [hereinafter McDougal, Lasswell & Chen]. The authors state that "most of the women in the world are still denied freedom to control their own fertility because of either legal or religious prohibitions or the lack of relevant information, resources, and family planning services." They conclude that such inability to determine the number of children and/or the interval between each birth has resulted in the deprivation of benefits with respect to health, education, employment and roles in family and public life — all rights insured in the various international treaties. See also Cook, *U.S. Population Policy Sex Discrimination, and Principles of Equality Under International Law*, 20 INT'L L. & POL. 93, (1987) [hereinafter Cook, *U.S. Population Policy*]; Michel, *Abortion and International Law: The Status and Possible Extension of Woman's Right to Privacy*, 20 J. FAM. L. 241 (1981) [hereinafter Michel, *Abortion and International Law*]; Note, *Governmental Abortion Policies*, *supra* note 68, at 103, all agreeing that the international right to privacy encompasses the right to reproductive choice. The convincing thesis of these "highly qualified publicists," here joined by this author, is itself evidence that the right of privacy encompasses the right to reproductive choice. See Stat. I.C.J. art. 38(1)(d).

93. *Bruggemann & Scheuten v. Federal Republic of Germany*, 10 Eur. Comm'n H.R. (Reports and Decisions) 100 (1977). The *Bruggemann* facts arose when, in 1974 the West German legislative body, the Bundestag, amended the German Criminal Code to legalize abortions. Law of Apr. 26, 1974, Bundesgesetzblatt BGB1.I 1297 (W. Ger.). The law permitted abortions performed by physicians within the first trimester of pregnancy, provided that the pregnant women had previously obtained medical and social counseling. After the first trimester, the law permitted abortion only if necessary to preserve the life or health of the woman or if there was a strong possibility that the child would be born with a serious defect. *Bruggemann*, 10 Eur. Comm'n H.R. at 103-04. In 1975, however, the West German Federal Constitutional Court invalidated this new law and held that because an unborn child has a right to life under the West German Constitution, the Grundgesetz, the abortion law was contrary to this constitutional mandate. Judgment of February 25, 1975, 39 BVernG 1 (W. Ger.). The vote was 6-2. Significantly, the German court recognized that pregnancy falls within the sphere of the woman's private life which

tribunal that supports the thesis that the right of privacy includes reproductive freedom.

In *Bruggemann* two women, citizens of West Germany, challenged a recent decision of the West German Federal Constitutional Court which invalidated an amendment to the German Criminal Code legalizing abortions. They alleged that such decision violated their rights under the European Convention, in particular, the right to privacy contained in article 8(1). Significantly, Germany had conceded that family planning falls within the sphere of private and family life but claimed that article 8(2) of the European Convention allowed interference with privacy rights to protect the right of the fetus — a claim with which the Commission ultimately agreed.

In its initial review of the case to decide whether to consider the merits, however, the European Commission had held that pregnancy and its termination were matters of private and family life and were therefore within the scope of article 8(1).⁹⁴ The European Commission further found that "respect for private life 'comprises also . . . the right to establish and . . . develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality.' . . . therefore sexual life is also part of private life . . . [and] regulation of abortion is an intervention in private life"⁹⁵

the German constitution protects. *Bruggemann*, 10 Eur. Comm'n H.R. at 103-04. The court also held that the legislature had to enact laws that effectively protect the fetus throughout pregnancy against attacks from the state or others including the mother. *Id.* at 107. Soon after this decision, the West German legislative body enacted conforming legislation that prohibited abortion absent exceptional circumstances. Law of February 12, 1976, Bundesgesetzblatt I 1213 (W. Ger.), reprinted in *Bruggemann*, 10 Eur. Comm'n H.R. at 107-10. Much has been written on the West German constitutional court's decision. See, e.g., Morris, *Abortion and Liberalism: A Comparison Between The Abortion Decision of the Supreme Court of the United States and the Constitutional Court of West Germany*, 11 HASTINGS INT'L & COMP. L. REV. 159, 161-68 (1988); Cook, *U.S. Population Policy*, supra note 92, at 119-20; Michel, *Abortion and International Law*, supra note 92, at 246-51. Note, *Governmental Abortion Policies*, supra note 68, at 117-21. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1352 n.99 (1988).

94. *Bruggemann*, 10 Eur. Comm'n H.R. at 100.

95. *Id.* at 115. The commission also noted that although regulation of abortion is an interference with private life it "may or may not be justified under Article 8(2)." *Id.* Thereafter, in its decision on the merits, the Commission held that neither the West German legislature nor the judiciary had breached the article 8 right of privacy in the European Convention because the government did not impermissibly intrude into the woman's sphere of privacy. *Id.* at 117. Significantly, the majority relied on the fact that at the time the convention had entered into force the abortion laws of all member states were at least as restrictive as the West German law. *Id.* at 117.

Three observations regarding *Bruggemann* are important. First, *Bruggemann* supports the position that the right to privacy protects reproductive freedom because the issue was not disputed. Germany, the Commission and the applicants all agreed that family planning falls within the sphere or penumbra of the right to privacy. The only quarrel concerned whether there was any justification, such as protecting the fetus' right to life, for allowing interference with the conceded right to privacy.

Second, the Commission concluded that the German law did not unduly interfere with the woman's right of privacy based upon its review of the domestic abortion laws in existence in the member countries in 1950. However, in the last twenty years virtually all the European countries parties to the convention have liberalized their domestic abortion legislation.⁹⁶ Thus, today the only conclusion that could be supported by the Commission's comparative law analysis is that the domestic laws of the member states include reproductive freedom as a protected privacy right.

Third, the *Bruggemann* majority's conclusion that protection of fetal life justified interference with the woman's privacy right — the argument made by Germany and the most prevalent argument in opposition to reproductive freedom⁹⁷ — today lacks

The Committee of Ministers of the Council of Europe later affirmed the Commission's decision using much the same reasoning. *Bruggemann & Scheuten v. Federal Republic of Germany*, 1978 Y.B. EUR. CONV. ON HUM. RTS. (Committee of Ministers) 638, Resolution DH (78) 1. This indicated to the Commission that member states had not intended the right to privacy contained in article 8 to invalidate the then-existing domestic abortion laws.

A forceful dissent argued that the commencement and termination of pregnancy is absolutely protected by the right of privacy and family life found in article 8(1). *Bruggemann*, 10 Eur. Comm'n H.R. at 118. (Fawcett, Commissioner, dissenting). Further, Commissioner Fawcett noted that an unborn child, not capable of independent life, had no rights under the Convention and therefore interference with the woman's decision to terminate her pregnancy could not be justified under article 8(2). *Id.* at 120. The position of the dissent is in line with the current domestic abortion laws of member states.

96. See *infra* notes 162-220 and accompanying text (Part III); see also Cook, *Abortion Laws and Policies*, *supra* note 2, at 63-64; Henshaw, *Induced Abortion, A World Review*, 1990, 22 FAM. PLAN. PERSP. 76 (1990) [hereinafter Henshaw, *Induced Abortion*]; Cook & Dickens, *International Developments in Abortion Laws: 1977-88*, 78 AM. J. PUB. HEALTH 1305, 1307 [hereinafter Cook & Dickens, *International Developments*]; Cook, *U.S. Population Policy*, *supra* note 92; Isaacs, *Reproductive Rights*, *supra* note 7; Michel, *Abortion and International Law*, *supra* note 92, at 251; Cook, *International Dimensions of the Department of Justice Arguments in the Webster Case*, 17 LAW, MEDICINE AND HEALTH CARE 384 (1989) [hereinafter Cook, *International Dimensions*].

97. In addition, many countries do not confront the abortion issue because of religious and moral obstacles to even discussing the question. World Health Organization,

any foundation as a matter of international law. International and domestic decisions are clear and uniform: there is no fetal right to life in international law. Fundamental rights expressed in human rights agreements, including the right to life,⁹⁸ are applicable only to born human beings.⁹⁹ Therefore, as the decisions discussed below show, such non-existent fetal right to life cannot compete with, let alone be the basis to deny, reproductive freedom as included in the right to privacy.

In 1974, when Austria's 1974 Penal Code provision granting the right to abortion on request was challenged, the Austrian Constitutional Court determined that the European Convention did not recognize fetal right to life.¹⁰⁰ The Austrian Government had argued that the language of article 2 — "everyone's right to life shall be protected by law"¹⁰¹ — applied to the fetus as well as to born human beings. The Court, however, refused to include unborn life in the definition of "everyone." Significantly, the

Abortion Laws, 21 INT'L DIG. OF HEALTH LEGIS. 437 (1970), reprinted in WORLD HEALTH ORGANIZATION, *ABORTION LAWS: A SURVEY OF CURRENT WORLD LEGISLATION* 4 (1971). For example, the Catholic Church teaches that the fetus has a soul upon conception giving the fetus an equal "right to life" as a born human being. See Paul & Schaap, *Abortion and the Law in 1980*, 25 N.Y.L. SCH. L. REV. 497, 500-02 (1980); Michel, *Abortion and International Law*, *supra* note 92, at 241; Note, *Governmental Abortion Policies*, *supra* note 68, at 103. Abortion is a mortal sin immediately and automatically subjecting the woman to excommunication. Interestingly, Catholic theologians are presenting new theories on when life begins. Discussions focus on life beginning at implantation rather than at conception. See N.Y. Times, Jan. 13, 1991, § 4, at 5, col. 1. Acceptance of such a position could have a critical impact on the position of the Catholic Church on abortion particularly with the availability of new abortifacient drugs such as RU 486. See *infra* notes 193, 196 and accompanying text. Notwithstanding such discussions, however, the Catholic Church continues to exert pressure on states to align their abortion legislation with the Church's religious opposition to the practice. See, e.g., *Poland Ends Subsidies for Birth Control Pills*, N.Y. Times, May 9, 1991, § A, at 11, col. 1 (reporting that while "60 percent of Poles oppose the bill [banning abortion on which the Polish Parliament is scheduled to vote next week] several lawmakers say they intend to vote for it in an effort to please Pope John Paul II, who will visit Poland, his homeland, next month"). The N.Y. Times also reports that "[s]ince June 1989, when Poland's first non-Communist leaders . . . took office, elements in the country's Catholic church have been pressuring for parliamentary adoption of laws reflecting the church's social agenda." *Id.*

98. American Convention, *supra* note 25, at art. 1; European Convention, *supra* note 25, at art. 2(1); Universal Declaration, *supra* note 25, at art. 3; Civil Covenant, *supra* note 25, at art. 6.

99. See Fox, *The American Convention on Human Rights and Prospects for United States Ratification*, 3 HUM. RTS. 243, 263 (1973) [hereinafter Fox].

100. Judgment of October 11, 1974, 39 Band der Sammlunh, 2 Halbjahr 1974, Erkenntnisse und Beschlüsse des Constitutional Court, Aus., Erklärungen des Verfassungsgerichtshofes 221 (1975); see also Michel, *Abortion and International Law*, *supra* note 92, at 252-53; Cook, *International Dimensions*, *supra* note 96, at 384.

101. European Convention, *supra* note 25, at art. 2.

Austrian Court, in reaching its decision, considered the domestic law of member states and noted that the Convention could not recognize the right to life of the unborn because the law of member states did not recognize such rights.¹⁰² The French Constitutional Court also refused to find a fetal right to life in the European Convention.¹⁰³

In 1980, in *Paton v. United Kingdom*, the European Commission interpreted article 2 of the European Convention consistently with the Austrian Constitutional Court's conclusion.¹⁰⁴ The Commission stated that "both the general usage of the term 'everyone' . . . in the Convention . . . and in the context in which this term is employed in Article 2 . . . tend to support the view that it does not include the unborn."¹⁰⁵ Specifically addressing the question of the juxtaposition of the right to life of a fetus with the woman's right to choose, the European Commission concluded that the protection of the life and health of the woman implicitly limited the right to life of the fetus.¹⁰⁶

Similarly, in the *Baby Boy* case the Inter-American Commission on Human Rights held that the unborn do not have a protectible right to life.¹⁰⁷ This decision is significant because the American Convention provides that the right to life "shall be protected from the moment of conception."¹⁰⁸ Notwithstanding

102. In addition, the Austrian Court noted that the European Convention's predecessor, the Peace Treaty of St. Germain, contained language that implicitly limited the term "everyone" to born human beings. See Benda, *The Impact of Constitutional Law on the Protection of Unborn Human Life: Some Comparative Remarks*, 6 HUM. RTS. 223, 235 (1977).

103. Decision of January 15, 1975, Conseil Constitutionnel, D.S. Jur. 529 (Fr.) reprinted in M. CAPPELLITTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 577-79 (1979).

104. See Decision of 13 May 1980 on the admissibility of the application, reprinted in 19 Eur. Comm'n H.R. 244 (1980) (Reports and Decisions). The plaintiff sought an injunction to restrain his wife from having an abortion. The English High Court denied the injunction and he appealed that decision to the European Commission claiming a violation of a right to life of the unborn child under article 2 of the European Convention. The Court upheld the decision that, "in English law, the fetus has no legal rights until it is born and has a separate existence from its mother . . ." *Id.* at 246-47.

105. *Id.* at 250.

106. *Id.* at 252.

107. Case 2141, INTER-AM. C.H.R. 25, OEA/ser. L./V./II.54, doc. 9 rev. 1 (1981).

108. American Convention, *supra* note 25, at art. 4(1) ("[e]very person has a 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.") In fact, the majority of the delegates of the Organization of American States at the San Jose conference in Costa Rica construed the words to permit legal abortions; an attempt by representatives opposed to abortion to delete the words "and, in general," was defeated. See

such language, the Commission concluded that the Convention does not bar legal abortions. In the *Baby Boy* case the petitioner had claimed that *Roe v. Wade* violated article 4 of the American Convention by limiting the legal protection of the unborn.¹⁰⁹ However, the Commission stated that "it is clear that the petitioners' interpretation of the definition given by the American Convention on the right of life is incorrect. The addition of the phrase 'in general, from the moment of conception' does not mean that the drafters of the convention intended to modify the concept of the right to life" ¹¹⁰

Finally, the Convention on the Rights of the Child (Children's Convention) supports the view that the unborn have no right to life under international law.¹¹¹ The preamble to the Children's Convention refers to a human person and the rights of "everyone" as expressed in other human rights agreements. The Children's Convention does not explicitly protect an individual before birth,¹¹² rather, it defines a child as "every human being below the age of 18 years . . ." ¹¹³ Because the terms "everyone" and "human being" have been interpreted consistently in national and international tribunals as referring only to human beings born alive, such language in the Children's Convention does not, and cannot, include protection of fetal life.¹¹⁴

In sum, international law clearly recognizes a right to pri-

Fox, *supra* note 99, at 243.

109. *Baby Boy Case*, Case 2141, INTER-AM. C.H.R., at 30-32; see also *American Convention*, *supra* note 25 and 108. American Declaration on the Rights and Duties of Man (1948), art. 1, Res. XXX, Ninth International Conference of American States, OEA/Ser. L/V/II.23/Doc. 21, Rev. 6 (1948) [hereinafter American Declaration], which provides that "every human being has a right, liberty and the security of his person." The commission, relying on the preparatory works of the American Declaration, rejected any interpretation of article 1 of the declaration that would have protected unborn life more stringently than *Roe v. Wade*. Indeed, the Commission noted that at the conference phase the question of whether the right to life existed from conception was considered but language which would clearly have stated that principle was not adopted. *Baby Boy Case*, Case 2141, INTER-AM. C.H.R., at 39-41.

110. *Baby Boy Case*, Case 2141, INTER-AM. C.H.R., at 42.

111. *Convention on the Rights of the Child*, G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49), U.N. Doc. A/44/736 (1989) [hereinafter Children's Convention]. See also Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156 (1990) [hereinafter Alston].

112. See, Alston, *supra* note 111, at 163, 170, 177-78.

113. Children's Convention, *supra* note 111, at art. 1.

114. See *supra* notes 104-06 for the decisions of international tribunals that establish that the terms "everyone" and "human being" refer only to persons born alive; see also Alston, *supra* note 111, at 170 (noting that there is no precedent for interpreting the terms "child," "human being," or "human person" as including a fetus).

vacy that encompasses a woman's right to reproductive freedom. Moreover, there can be no competing rights between the fetus and a woman;¹¹⁵ jurists from diverse states as well as international tribunals have concluded that there is no fetal right to life in international law. Accordingly, the right to reproductive freedom must be accepted as part of an individual's international human right to privacy.

B. Health

A second individual right that provides a basis for finding an international right to reproductive freedom is the right to health protected by international human rights treaties including the Universal Declaration,¹¹⁶ the Economic Covenant,¹¹⁷ the African Charter¹¹⁸ and the American Declaration.¹¹⁹ State legislation that justifies promoting family planning, abortion, and voluntary sterilization because of the health benefits accruing to women and children implicitly recognizes that these reproductive alternatives form part of a general right to health under international law. Thus, an individual's right to health must include the freedom to choose any of these options.¹²⁰ Finally, the

115. As one commentator noting that a fetal right to life should not exist has written, what "we must ask: Is fetal life more valuable than the life and health of the woman in whom it is lodged? Should a fetus at any stage of development be granted a higher moral value than infants and children already born? According to what hierarchy of values can fetal life be held more important than the lives of those children, or of a teenage girl carrying an unwanted pregnancy, or of a woman who will undergo a life-threatening back-alley abortion rather than carry a pregnancy to term?" Macklin, *supra* note 9, at 41.

116. See Universal Declaration, *supra* note 25, at art. 25 ("Everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services Motherhood and childhood are entitled to special care and assistance").

117. See Economic Covenant, *supra* note 26, at art. 12 ("the states parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health").

118. African Charter on Human and Peoples' Rights, art. 16, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 58 (1982) ("every individual shall have the right to enjoy the best obtainable state of physical and mental health").

119. See American Declaration, *supra* note 109. Article XI provides that "every person has a right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."

120. A comprehensive discussion of health benefits and family planning is contained in CENTER FOR POPULATION AND FAMILY HEALTH, *Family Planning: Its Impact on the Health of Women and Children* (1981). As a commentator has noted: "Poorly performed abortion causes mortality, sterility, and ill health. Illegal abortions waste women's lives

nexus of family planning to health is acknowledged in the numerous resolutions and declarations that have been concluded which specifically recognize the right to family planning as a human right.¹²¹

The World Health Organization (WHO) also has declared that "the right to health is a fundamental human right"¹²² In addition, both WHO¹²³ and the United Nations¹²⁴ endorse the basic human entitlement to determine freely the composition of one's family and recognize that such freedom is inextricably tied to health. For example, at the 1985 United Nations World Conference on Women, over 150 countries, including the United States, adopted the Nairobi Forward-Looking Strategies of Implementation for the Advancement of Women¹²⁵ which specify that:

Appropriate health facilities should be planned, designed, constructed and equipped to be readily accessible and acceptable. Services should be in harmony with the timing and part pattern of women's work, . . . [and] family planning services, should be within easy reach of all women In view of the unacceptably high levels of maternal mortality in many developing countries, the reduction of maternal mortality from now to the year 2000 to a minimum level should be a key target for

and ruin the chances of their families, but preaching and punishment will not stop them. Given current technology, we need to ask whether permitting such carnage to continue is human or humane. Documentation of the consequences of legal restrictions on abortion is desperately needed as a basis for policy reform. Yet opposition to legal abortion has caused funding for abortion-related research to dry up. Any policy that hinders understanding of such a common cause of human suffering and death must be considered unacceptable and must be fought vigorously." Sai & Nassim, *supra* note 65, at 108.

121. See, ISAACS, *Reproductive Rights*, *supra* note 7, at n.29; see also RESTATEMENT (THIRD), *supra* note 11, Introductory Note 7.

122. World Health Assembly Res. 23.41, WORLD HEALTH ORGANIZATION, HANDBOOK OF RESOLUTIONS AND DECISIONS OF THE WORLD HEALTH ASSEMBLY AND THE EXECUTIVE BOARD 501 (1973).

123. See *World Health Organization, Women, Health and Development: A Report by the Director-General*, 90 World Health Organization Pub. at 7 (1985). The definition of health used by the World Health Organization is "complete physical, mental and social well-being." Germain, *An Overview*, *supra* note 73, at 5.

124. See *Report of the World Conference to Review and Appraise the Achievement of the United Nations Decade for Women: Equality, Development and Peace* 39, U.N. Doc. A/Conf. 116/28/Rev. 1, U.N. Sales No. E.85IV.10 (1986). Since 1968 the United Nations has recognized and repeatedly reiterated the right of individuals to decide freely and responsibly the number and spacing of their children. See Germain, *An Overview*, *supra* note 73, at 4 (citing INTERNATIONAL PLANNED PARENTHOOD FEDERATION, *THE HUMAN RIGHT TO FAMILY PLANNING* (1989)).

125. U.N. Doc. A/Conf./116/28/Rev. 1 (1985) [hereinafter Nairobi Strategies].

Governments and non-governmental organizations, including professional organizations.¹²⁶

The following statistics clearly show that denial of reproductive freedom imperils the fundamental right to health.¹²⁷

Worldwide there are some ten to twenty million clandestine abortions every year.¹²⁸

Clandestine abortions result in 50 deaths per 100,000 procedures in developed countries and about 400 deaths per 100,000 in developing countries.¹²⁹

126. Nairobi Strategies, *supra* note 125, at 155.

127. For a discussion on the effect on maternal health of restrictive abortion policies, see Hartmann, *The Impact of the Reagan Administration's International Population Policy on Human Rights Relating to Health and the Family*, 20 N.Y.U. J. INT'L L. & POL. 169 (1987); Cook, *U.S. Population Policy*, *supra* note 92; Cook, *Reducing Maternal Mortality: A Priority for Human Rights Law*, in S. McLEAN, LEGAL ISSUES IN HUMAN REPRODUCTION 185 (1989) [hereinafter Cook, *Reducing Maternal Mortality*]; Women's Health in the Third World: The Impact of Unwanted Pregnancy 1989 INT'L J. GYNECOLOGY & OBSTETRICS (Supp. 3); A. GERMAIN & J. ORDWAY, POPULATION CONTROL AND WOMEN'S HEALTH: BALANCING THE SCALES (1989); Int'l Women's Health Coalition, *Reproductive Choice in Jeopardy: International Policy Perspectives*, Presentations at the Biennial Conference of the Association for Women in Development Washington, D.C. (April, 1987); Law & Rackner, *Gender Equality and the Mexico City Policy*, 20 N.Y.U.J. INT'L L. & POL. 193, 193 n.1 (1987).

128. Sai & Nassim, *supra* note 65, at 107 (citing Henshaw, *Induced Abortion: A Worldwide Perspective*, 13 INT'L FAM. PLAN. PERSP. 12 (1987)). On the other hand worldwide there are 30 to 40 million legally induced abortions each year. This means that the abortion rate is between 37 and 55 abortions per 1,000 women aged 15 to 44 and an abortion ratio of 24 to 32 for 100 pregnancies. Stated differently, every year between three and six percent of women of reproductive age undergo abortion, and one in four pregnancies is terminated in such a way.

129. Sai & Nassim, *supra* note 65, at 107 (citations omitted). By contrast mortality in legal abortions is two per 100,000 procedures in industrialized countries and 6 per 100,000 procedures in developing countries. Although information on clandestine abortions is difficult to get and therefore uncertain, the following estimates of clandestine abortions have been generally accepted: "500,000 in Bangladesh, 600,000 in the rest of South Asia, 1.5 million in the rest of Asia, 400,000 for Rumania, 1.5 million for Africa and approximately 2 million in the Soviet Union and 4 million each in India and Latin America" — totally 15 million clandestine abortions. Henshaw, *Induced Abortion*, *supra* note 96, at 81. Henshaw notes, however, that the uncertainty of the estimates suggest the numbers could be as low as 10 million or as high as 22 million placing the estimated worldwide total abortions between 36 and 53 million yielding annual rate of 32 to 46 abortions per 1,000 women of reproductive age. *Id.* at 80. An example of the tragic effects on health of restrictions on reproductive choice is Rumania. Here, most abortions were prohibited in 1966, and between 1965 and 1984 abortion mortality rose from 21 to 128 deaths per 100,000 life births. *Id.* at 82. Over this same period, maternal mortality from other causes fell from 65 deaths to 21 deaths per 100,000 life births. *Id.* (citations omitted). In 1984 alone the World Health Organization reports that there were 449 abortion deaths in Rumania. *Id.* Important reductions in mortality could be achieved simply by assuring that safe services are available and accessible for women who qualify for them. Sai & Nassim, *supra* note 65, at 110.

Studies in Latin America, where it is estimated that one in three women has an abortion, show that complications of illegal abortion account for as much as 30-40% of maternal deaths.¹³⁰

One of the largest causes of maternal death is unskilled abortions and lack of safe contraceptive devices¹³¹ with 25-50% of maternal deaths being due to botched abortions¹³² including an estimated 200,000 or more Third World women.¹³³

Lack of reproductive health care, including abortion services, results in maternal and infant illness and death.¹³⁴

WHO estimates that 99% of the 500,000 annual maternal deaths occur in developing countries.¹³⁵

High maternal mortality ratios are compounded by high fertility. In Africa there is an average of eight live births per woman and thus probably at least ten pregnancies per woman making a lifetime risk for dying from pregnancy related causes "greater than one in twenty."¹³⁶

In some African countries as many as 25-40% of women have their first child before age eighteen, a group with high risk of maternal mortality.¹³⁷

130. Sai & Nassim, *supra* note 65, at 107 (citations omitted).

131. Cook, *U.S. Population Policy*, *supra* note 92, at 106.

132. Germain, *An Overview*, *supra* note 73, at 1; Cook, *Abortion Laws and Policies*, *supra* note 2, at 67 (citations omitted).

133. Germain, *An Overview*, *supra* note 73, at 1.

134. Cook, *U.S. Population Policy*, *supra* note 92, at 104. Conversely, availability of such services can reduce maternal as well as infant mortality and result in healthy family life. *Id.*

135. Cook, *Reducing Maternal Mortality*, *supra* note 127, at 187 (citing WORLD HEALTH ORGANIZATION, *MATERNAL MORTALITY RATES: A TABULATION OF AVAILABLE INFORMATION*, 2 (1986)). Of these 500,000 deaths, it is estimated that 20-50% could be averted simply by providing access to safe abortion and contraceptive services. *Id.* at 189. (citing Mahler, *The Safe Motherhood Initiative: A Call to Action*, 670 *The Lancet* (1987) [hereinafter Mahler, *The Safe Motherhood Initiative*]). Of the 500,000 maternal deaths it is estimated that 115,000-204,000 result from complications of illegal abortions performed by unqualified practitioners. Henshaw, *Induced Abortion*, *supra* note 96, at 81 (citations omitted). Henshaw notes that a more conservative estimate could be derived from hospital studies that suggest that on an average 20-25% of maternal mortality is attributable to abortion (citation omitted) yielding totals of 100,000 to 125,000 deaths annually from illegal abortion. *Id.* His review of the literature found that the highest reported mortality rate was 2,400 deaths per 100,000 in the rural area of Bangladesh. *Id.* (citation omitted). In industrialized countries the average lifetime risk of a woman dying of pregnancy-related causes is between 1 in 4,000 to 1 in 10,000; for a woman in developing countries it is between 1 in 15 and 1 in 50. *Id.*

136. Cook, *Reducing Maternal Mortality*, *supra* note 127, at 188 (citing WORLD HEALTH ORGANIZATION, *MATERNAL MORTALITY RATES: A TABULATION OF AVAILABLE INFORMATION*, 2 (1986)); Sai & Nassim, *supra* note 65, at 106 (citations omitted).

137. Mashalaba, *Commentary on the Causes and Consequences of Unwanted Pregnancy from an African Perspective*, 1989 *INT'L J. GYNECOLOGY & OBSTETRICS* 15 (Supp.

Pregnancies that come too early or too late in reproductive lives, too close to another pregnancy, or too frequently, raise rates of maternal mortality.¹³⁸

Maternal health affects child and infant survival: a mother's death in childbirth could prejudice the child's chance of survival;¹³⁹ children born to very young mothers are more likely to die;¹⁴⁰ close birth spacing is a risk to children,¹⁴¹ with young children suffering higher infant mortality rates if born less than two years after a previous birth.¹⁴²

This data shows that the availability of safe, effective and acceptable contraception and family planning, including safe pregnancy termination services, is necessary to achieve the fundamental right to health.¹⁴³

In sum, there can be no quarrel that protecting reproductive freedom, including safe abortion services, promotes the fundamental right to health by reducing maternal and infant mortality.¹⁴⁴ In fact, WHO, as part of its efforts to reduce maternal

3) [hereinafter Mashalaba]. In Africa, hospital studies show the complications of illegal abortions are a major public health problem. "For example, Jomo Kenyatta Hospital in Nairobi, Kenya treats 50-60 women a day for abortion complications." Similarly, "a community-based study in Addis Ababa, Ethiopia found that 24% of all maternal deaths and 54% of those directly related to pregnancy were attributable to complications of clandestine abortions." Henshaw, *Induced Abortion*, *supra* note 96, at 81 (citations omitted).

138. Cook, *Abortion Laws and Policies*, *supra* note 2, at 67 (citations omitted); Sai & Nassim, *supra* note 65, at 105, 106.

139. Cook, *U.S. Population Policy*, *supra* note 92, at 112.

140. Cook, *U.S. Population Policy*, *supra* note 92, at 112 (citations omitted). Mothers under 16 years of age are twice as likely to lose their babies as those over 20 years of age. *Id.*

141. Cook, *Reducing Maternal Mortality*, *supra* note 127, at 191-92 (citing D. MAINE & R. McNAMARA, BIRTH SPACING AND CHILD SURVIVAL 17 (1985)); *see also* Cook, *U.S. Population Policy*, *supra* note 92, at 112. For example, older children may be weaned too early. *Id.*

142. Cook, *U.S. Population Policy*, *supra* note 92, at 113. Mortality rates for children aged 1 and 2 are up to four times higher if their birth was followed by another within 18 months. Cook, *U.S. Population Policy*, *supra* note 92, at 112-13 (citation omitted).

143. Sai & Nassim, *supra* note 65, at 108-10.

144. For example, family planning reduces the number of pregnancies thereby lowering the lifetime risk of maternal death and averts high risk pregnancies. Cook, *U.S. Population Policy*, *supra* note 92, at 107 (citing D. MINE, A. ROSENFELD, M. WALLACE, A. KIMBALL, B. KWAST, E. PAPIERNIK, S. WHITE, PREVENTION OF MATERNAL DEATHS IN DEVELOPING COUNTRIES: PROGRAM OPTIONS AND PRACTICAL CONSIDERATIONS (1987), 4-12 (background paper prepared for the International Safe Motherhood Conference, Nairobi, February 10-13, 1987). Women in the following categories have a higher risk associated with pregnancy: women less than 18 years of age; women older than 34 years of age; women who last gave birth within the prior 24 months; women who have had four or

mortality, especially in the Third World, has emphasized the need to publicize the availability of legal and safe abortions. The United States specifically has recognized the relationship between uncontrolled fertility and poor health.¹⁴⁵

Conversely, the absence of adequate health care services exposes mothers and children to illness and death.¹⁴⁶ Given the fundamental right to health and the clear nexus between family planning and health of mothers and children, protection of reproductive freedom as a human right promotes the fundamental right to health and should be an integral part of that right.

C. Equality

The third general individual right that provides the basis of recognizing the peripheral human right to reproductive freedom is the right to equality. This right is contained in numerous international human rights agreements,¹⁴⁷ particularly the Women's Convention, an entire treaty dedicated to the proscription of discriminatory conduct against women,¹⁴⁸ which makes

more births; women from rural areas with limited access to reproductive health services; and women with unwanted pregnancies who would be prone to obtain unskilled abortions. Cook, *U.S. Population Policy*, *supra* note 92, at 107 (citing Rinehart & Kols, *Healthier Mothers and Children Through Family Planning*, 27 *POPULATION REP.* 657, 659 (1984)). Many unwanted pregnancies are high risk, since the women often deny the pregnancy until very late, fail to seek prenatal and delivery care, and/or try to abort the pregnancy in unsafe conditions such as when it is legally restricted and is done by untrained practitioners. *Germain, An Overview*, *supra* note 73, at 2; Sai & Nassim, *supra* note 65.

145. Cook, *U.S. Population Policy*, *supra* note 92, at 103. In fact, the United States policy statement provided:

Perhaps the most poignant consequence of rapid population growth is its effect on the health of mothers and children. Especially in poor countries, the health and nutrition status of women and children is linked to family size. Maternal and infant mortality rises with the number of births and with births too closely spaced.

Cook, *U.S. Population Policy*, *supra* note 92, at 103, (quoting *Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session)*, 10 *POP. & DEV. REV.* 576, 583 (1984)).

146. Cook, *U.S. Population Policy*, *supra* note 92, at 104.

147. See U.N. CHARTER preamble, art. 1(3), Universal Declaration, *supra* note 25, at art. 2; Civil Covenant, *supra* note 25, at art. 2(1); Economic Covenant, *supra* note 26, at art. 2(2); American Convention, *supra* note 25, at art. 1(1); European Convention, *supra* note 26, at art. 14.

148. As of 1986 the Women's Convention had been ratified by 87 states and signed by a number of others including the United States. In 1980, President Reagan submitted to the Senate the Women's Convention but the Senate has not yet consented to the convention and thus it is not yet ratified by the United States. However, the domestic laws of the United States prohibit discrimination on the basis of sex. See *infra* note 154.

freedom from discrimination on the grounds of sex a basic human right in international law. Article 1 of the Women's Convention broadly defines the proscribed conduct as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁴⁹

Particularly pertinent to the analysis of reproductive freedom as a human right are the provisions in the various human rights agreements that obligate state parties to assure men and women "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."¹⁵⁰ Such right to have a family must include not only the right to have children but also the right not to. Thus for women and men to have the right to plan a family they must have the right to make reproductive choices including the right to terminate a pregnancy for health, economic, social, cultural or other reasons.

The right to reproductive freedom is tied inextricably to women's equality by permitting women to enjoy their internationally protected right to equality: to participate, equally with men, in the social, economic, and political lives of their countries.¹⁵¹ International policy statements are in accord with such

149. Women's Convention, *supra* note 26, at art. 1.

150. Women's Convention, *supra* note 26, at art. 16. See also Universal Declaration, *supra* note 25, at art. 16(1) ("Men and women . . . have the right to marry and found a family."). Civil Covenant, *supra* note 25, at art. 23(3) ("the right of men and women of marriageable age to marry and found a family shall be recognized"); European Convention, *supra* note 25, at art. 12 ("Men and women . . . have a right to marry and to found a family . . ."); American Convention, *supra* note 25, at art. 17(2) ("The right of men and women . . . to marry and raise a family shall be recognized . . ."). It is significant to recognize that the right to obtain an abortion belongs to the woman. For example, in judicial interpretations in Canada, England, France, Israel, the United States, and Yugoslavia courts have stated that husbands do not have any role in the woman exercising her right irrespective of the admission of paternity. Cook & Dickens, *International Developments*, *supra* note 96, at 1307 (citations omitted). Significantly, the European Commission of Human Rights upheld the English decision, thereby making this principle applicable to other state signatories to that convention. *Id.* at 1307.

151. McDougal, Lasswell & Chen, *supra* note 92, at 504. For a listing of the various agreements expressly granting women the right to equality, see *supra* note 27 and accompanying text.

views. For example, the Nairobi Strategies recognize that "[t]he ability of women to control their own fertility forms an important basis for the enjoyment of other rights"¹⁵²

Moreover, "freedom from gender discrimination as state policy . . . may already be a principle of customary international law."¹⁵³ In fact, the domestic laws of most states, including the United States,¹⁵⁴ mandate equality for or prohibit discrimination against women generally or in various respects. While it cannot be disputed that some states do practice gender based discrimination "[t]he fact that the prohibition of [sex discrimination] is often honored in the breach does not diminish its binding effect as a norm of international law."¹⁵⁵

Finally, both jurists and scholars agree that for women, the right to equality must include reproductive freedom. The argument that women's international human right to equality must include the right to make reproductive choices was clearly articulated by Justice Wilson of the Supreme Court of Canada in *Morgenthaler, Smoling and Scott v. The Queen*:¹⁵⁶

[T]he history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same posi-

152. Nairobi Strategies, *supra* note 125, at 158. Cook, *U.S. Population Policy*, *supra* note 92, at 123. One commentator has noted that regardless of prohibitions against abortion, women will resort to it for their own sake and the sake of their children. "They know that reproductive freedom is fundamental to their liberty and self-determination, as well as to responsible parenthood, and are willing to risk dying for it. Abortion is an act of self-defense for women whose health, dignity or basic rights are threatened by an unwanted pregnancy. Abortion is also an act of mercy, motivated by women's concern for their children's well-being. Abortion is an act of subversion against restrictive abortion laws made predominantly by men." Germain, *An Overview*, *supra* note 73, at 3 (citations omitted).

153. RESTATEMENT (THIRD), *supra* note 11, § 702 comment l; *see also* RESTATEMENT (THIRD), *supra* note 11, § 701 Reporter's Note 6.

154. *See, e.g.*, U.S. CONST. amends. XIV, XIX (prohibiting sex discrimination with respect to voting). *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

155. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 884 n.15 (2d Cir. 1980) ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law."). The United States Department of State acknowledged that the violation of rights does not preclude the validity of the rights. *Id.* at 884.

156. 44 D.L.R.4th 385 (Can. 1988).

tion as men. It has *not* been a struggle to define the rights of women in relation to their special place in the societal structure in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce . . . is one such right and is properly perceived as an integral part of a modern woman's struggle to assert *her* dignity and worth as a human being.¹⁵⁷

Commentators have explained why reproductive freedom is necessary for women's equality. One writer has noted that safe and early abortions are essential to create a world where women are treated as fully equal human beings, not only as mothers, and where women will receive the respect and dignity to which they are entitled under international human rights laws.¹⁵⁸ Another suggests that denial of the right to reproductive choice violates a woman's right to control the number and spacing of her children.¹⁵⁹

In sum, any proscriptions against reproductive freedom impermissibly deny a woman's right to equality by reinforcing women's traditional roles in childbearing and childrearing, continuing their dependency on men or on the state, and effectively foreclosing their economic development.¹⁶⁰ "The inability to 'decide freely and responsibly on the number and spacing of children (if any)' has . . . deprived many women of benefits regarding their health, education or employment and their roles in family and public life."¹⁶¹ Without the right to reproductive freedom women are deprived of their right to equal participation in the social, economic, educational and cultural affairs of the state in derogation of their international human rights. Thus, considering the relationship of reproduction to women's exercise of these rights, the right to equality must include the right to

157. *Id.* at 491 (emphasis in original) (citing Burrows, *International Law and Human Rights: the Case of Women's Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY (T. Campbell, D. Goldberg, S. McLean & T. Mullon 1st. ed. 1986)).

158. Germain, *An Overview*, *supra* note 73, at 2.

159. Macklin, *supra* note 9, at 42.

160. See Michel, *Abortion and International Law*, *supra* note 92, at 258-60. For other scholars' arguments that the right to equality protects the right to reproductive choice, see, Cook, *U.S. Population Policy*, *supra* note 92; Note, *Governmental Abortion Policies*, *supra* note 68, at 124-25; Germain, *An Overview*, *supra* note 73, at 2 ("[s]afe early abortion services are essential to create a world that is both respectful of and safe for girls and women as fully equal human beings, not only as a mother").

161. McDougal, Lasswell & Chen, *supra* note 92, at 504.

reproductive freedom.

III. DOMESTIC ABORTION LAWS ESTABLISH A PARTICULAR HUMAN RIGHT TO REPRODUCTIVE CHOICE — GENERAL PRINCIPLES OF LAW OR CUSTOMARY LAW

A. *An Overview*

International law recognizes that trends in domestic laws can establish international norms. For example, that torture was illegal under domestic laws was a factor in finding a proscription against torture in international law.¹⁶² Similarly, in *Bruggemann* the European Commission, in deciding whether German law violated a regional human rights agreement, considered the domestic law of member states.¹⁶³ Likewise, the Austrian Constitutional Court looked at the domestic laws of the member states of the European Commission to decide that the term "everyone" in the European Convention did not include the unborn.¹⁶⁴ Thus, in analyzing the existence of the human right to reproductive freedom a review of domestic laws upon which such a right can be based is appropriate.

One scholar's exhaustive review of domestic laws reveals the following pattern:

From the second half of the 19th century through World War II, abortion was highly restricted almost everywhere. Liberalization of abortion laws occurred in most of the countries of Eastern and Central Europe in the 1950s and in almost all the remaining developed countries during the 1960s and 1970s. A few developing countries also relaxed their restrictions on abortion during the same period, most notably China and India. By mid-1986, abortions could be legally obtained for health reasons in North America and in every European country except Belgium and the Republic of Ireland.¹⁶⁵

162. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). These domestic laws can be an independent source of law. Stat. I.C.J. art. 38(1)(c), or evidence of customary law. See *Filartiga*, 630 F.2d at 884.

163. See *supra* note 95 and accompanying text.

164. See *supra* note 100 and accompanying text.

165. Henshaw, *Induced Abortion*, *supra* note 96, at 78. Belgium now allows abortions if the woman is "in distress" — a notion liberally interpreted in France. A number of smaller countries have also liberalized their laws. In the Western World, specifically in Australia and New Zealand, the changes were in part due to the prevalence of the practice of abortion which resulted in health risks, mortality and morbidity. P. SACHDEV, *INTERNATIONAL HANDBOOK ON ABORTION* 3 (1988) [hereinafter P. SACHDEV].

At present, more than three quarters of the world's population resides in countries with laws that reflect the right to the most controversial of reproductive choices — a woman's right to obtain an induced abortion.¹⁶⁶ Significantly, states that have enacted such laws represent all cross-sections of the international world — developed and developing countries; rich and poor countries; states of diverse races and religions. This worldwide liberalization trend¹⁶⁷ regarding abortion establishes reproductive freedom as a "general principle of law recognized by civilized nations."¹⁶⁸ Moreover, these laws establish reproductive freedom as international custom by reflecting obligatory state practice.

In considering the practice of states it is significant that abortion is universally practiced.¹⁶⁹ Even where some states' do-

166. P. SACHDEV, *supra* note 165, at 1. The right to an abortion is not without parameters, and conditions range from abortion on request to some restrictive practices. For example, of countries with populations over 1 million, 40% of the world's population lives in countries where induced abortion is permitted on request; 25% only if the woman's life is in danger; 12% permit abortion for other maternal health reasons; and 23% allow the procedure on both social and social medical grounds. Henshaw, *Induced Abortion*, *supra* note 96, at 76-77. For purposes of establishing the human right to reproductive freedom, however, variations in the practice of nations as evidenced *inter alia* in their domestic laws which as a whole affirmatively recognize the right to reproductive choice, are not a concern. To be sure, provisions establishing the right to an abortion vary greatly. P. SACHDEV, *supra* note 165, at 2. However, the diverging breadth of practices only goes to the scope of the human right but not to its existence. In this respect it is noteworthy that uniform practice is not required to establish the custom. Significantly, even variance from the practice does not signify that a rule of customary international law does not exist. *See Filartiga*, 630 F.2d at 884 n.15 ("the fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law"). *See, e.g.,* RESTATEMENT (THIRD), *supra* note 11, § 701 comment 1 where commentators note that "freedom from gender discrimination . . . in many matters, may already be a principle of customary international law" based upon, *inter alia*, the domestic laws of many states as well as various international agreements which prohibit discrimination against women.

167. P. SACHDEV, *supra* note 165, at 1, 10; Henshaw, *Induced Abortion*, *supra* note 96, at 76, 78-79; Cook & Dickens, *International Development*, *supra* note 96; Cook, *Abortion Laws and Policies*, *supra* note 2; Cook & Dickens, *A Decade of International Change in Abortion Law: 1967-1977*, 68 AM. J. PUB. HEALTH 637 (1978); Isaacs, *Reproductive Rights*, *supra* note 7, at 312.

168. Such "general principles" are, independently, a source of international law. In addition, they are evidence of customary law. *See supra* notes 80-161 and accompanying text.

169. Ladipo, *Preventing and Managing Complications of Induced Abortion in Third World Countries*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 21, 23 (Supp. 3) [hereinafter Ladipo]; Samil, *Commentary on Menstrual Regulation as a Health Service: Challenges in Indonesia*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 29 (Supp. 3) [hereinafter Samil].

mestic laws do not condone the procedure, the *practice* is systematically to ignore any restrictions.¹⁷⁰ Records show that induced abortion has been practiced to terminate unwanted pregnancy in all cultures since history has been recorded.

Western countries recognize the right to reproductive freedom based upon "social, political and demographic factors"¹⁷¹ including women's rights and maternal health care issues.¹⁷² For example, these states take into account that clandestine abortions result in complications and create serious public health problems.¹⁷³

Like the Western world, Eastern European countries accepted the right to reproductive freedom, particularly abortion, because the regular practice of illegal abortions resulted in health risks such as maternal mortality and morbidity.¹⁷⁴ These countries followed the Soviet Union's lead which in 1920 permitted abortion on demand.¹⁷⁵

The liberalization trend of the laws also was influenced by the medical professions which recognized the health dangers of restrictive regulations.¹⁷⁶ In addition, human rights groups, in accordance with international law,¹⁷⁷ have advocated the right of

170. See, e.g., Isaacs, *Reproductive Rights*, *supra* note 7, at 341.

171. P. SACHDEV, *supra* note 165, at 3. Many of these factors can also be used to support the non-interpretive reading of express human rights (as found in the myriad human rights documents presented in Part II, above) that establish the penumbral right to reproductive choice in the express health, privacy and equality provisions of international agreements. See also Henshaw, *Induced Abortion*, *supra* note 96; Cook & Dickens, *International Developments*, *supra* note 96.

172. Isaacs, *Reproductive Rights*, *supra* note 7, at 313. In recognizing the right to reproductive choice, states acknowledge the existence of the practice and its health risks such as high maternal mortality or morbidity as well as infant mortality. P. SACHDEV, *supra* note 165, at 3.

173. Isaacs, *Reproductive Rights*, *supra* note 7, at 341 n.181.

174. P. SACHDEV, *supra* note 165, at 4.

175. P. SACHDEV, *supra* note 165, at 4. The Soviet Union's policy, however, fluctuated with the state's perceived needs to increase its population. See *supra* note 166 and accompanying text. Similarly, East Germany's policies have fluctuated, at times having restrictive laws and at other times having very liberal laws. These laws were dependent upon the government's perceived need to increase or decrease its population. After World War II, the curb on the right was initially relaxed to deal with the problem of the increase in illegal abortions and the consequent health problems. However, in 1950, a more restrictive governmental control was installed. Approximately fifteen years later the right was more broadly recognized and in 1972 abortion on request was recognized. P. SACHDEV, *supra* note 165, at 4.

176. P. SACHDEV, *supra* note 165, at 3.

177. For a discussion of the international law protecting the right to reproductive choice, see *supra* notes 71-161 and accompanying text.

each individual to control his or her own fertility.¹⁷⁸

In reviewing the trend towards uniform recognition of the right to reproductive freedom, an examination of the reasons for government regulation is instructive. In the Western world, prohibition of abortion was based on religious grounds: the Catholic Church's condemnation of abortion or any form of contraception.¹⁷⁹

In contrast, regulation in the Eastern European states was government-driven.¹⁸⁰ Non-socialist European states used the *enactment* of abortion restrictions to stimulate population growth when a sharp decline in birth rates threatened the labor force. On the other hand, some governments relaxed restrictions on family planning based upon the state's desire to curb population growth. In fact, in countries such as China and Korea, governments provide incentives to encourage abortions as a means of fertility regulation.¹⁸¹

178. P. SACHDEV, *supra* note 165, at 3.

179. P. SACHDEV, *supra* note 165, at 3. On the other hand, without the Catholic Church's opposition, such acceptance of abortion has been easier in other jurisdictions. For example, in Bangladesh and Korea religious fundamentalists' opposition was silenced by avoiding enactment on liberal grounds, but in practice restrictive regulations are systematically ignored and abortion is performed as a routine practice. *Id.* at 3-4. See also Michel, *Abortion and International Law*, *supra* note 92, at 1; Note, *Governmental Abortion Policies*, *supra* note 68, at 103.

180. P. SACHDEV, *supra* note 165, at 4. Notably Czechoslovakia (1973) and Hungary (1974) took such measures. Since 1986 all of the restrictions have been repealed. Significantly, Eastern and Central European countries, except for East Germany, have relied on abortion, which is seen as the most efficient solution to pregnancy, as a method of contraception, most likely because modern contraceptive methods are not readily available in these regions. *Id.*

181. P. SACHDEV, *supra* note 165, at 2. For example, in China the official policy is for a one-child family. *Id.* Consequently, abortion is viewed as one of four family planning operations, the other three being vasectomy, tubal ligation and the insertion of an IUD. *Id.* In Korea, on the other hand, abortion is widely practiced despite restrictive laws. The Korean Government does, however, encourage abortions by providing subsidies to private clinics that perform abortions concurrently with sterilization or where the pregnancy resulted from IUD failure. *Id.* at 2-3.

Contrary to the practice in China some countries concerned with decreasing population use incentives to encourage people to have more children. Isaacs, *Reproductive Rights*, *supra* note 7, at 313. Recently Japan instituted such monetary incentives to have more children in an attempt to counteract the declining birth rate. N.Y. Times, Feb. 17, 1991, at A1, col. 3. Japan, considered to have one of the most permissive abortion systems in the world, has an abortion rate of 21.5 per 1000 women. P. SACHDEV, *supra* note 165, at 8. This rate, which is attributable to widespread and effective contraception, has been steadily falling since peaking in 1955. *Id.* The decline in Japan's abortion rate is also a result of the government's emphasis on comprehensive family planning, education, and dissemination of contraceptive devices. *Id.* at 4, 8. *But see* Henshaw, *Induced Abortion*, *supra* note 96, Table 2 at 78 estimating the rate in Japan at 18.6 per 1000 based on

From 1977 to 1988, legislative reforms throughout the international community provided further access to abortion¹⁸² thereby creating additional support for the theory that the right to reproductive freedom has become an international human right. In this period, aside from recognizing standard health reasons for abortion, several countries authorized other grounds such as family welfare.¹⁸³ Finally, many countries deal with abortion as part of comprehensive family planning programs.¹⁸⁴

statistic but at 84 per 1000 based on survey data.

This author's thesis denounces all coercive abortion legislation as a violation of the human right to reproductive freedom. Any state practice that forecloses the *individual's* exercise of his or her right to reproductive choice in pursuit of a *state* objective to control population — either increase or decrease growth — constitutes an impermissible interference with an internationally protected right. Of course, denial of the individual's reproductive freedom by state practice that cedes to religious ideology is similarly violative of an individual's human rights.

182. Cook & Dickens, *International Developments*, *supra* note 96, at 1305. Only five countries narrowed the grounds for abortion and these states still recognized the right within certain parameters. For example, Honduras and Peru proposed penal code provisions that would have allowed abortions only to save the life and health of the woman and in cases of rape and fetal deformity. In Honduras, however, abortions sought for these reasons were thought to violate a provision in the 1982 constitution stating that "the right to life is inviolable." *Id.* In Peru, the 1979 constitution "protects the right to life of one 'about to be born,' but also provides that the state respects responsible parenthood." *Id.* at 1309. Israel liberalized the grounds for abortion when it changed its law in 1977, but two years later removed socio-economic indications therefor; Rumania, which limited socio-economic grounds for exercising the right to abortion for women over 45; and Finland, which reduced the statutory limit on performing abortions from 16 to 12 weeks absent a physical defect in the woman. In 1985 Finland changed the laws further to permit procedures before 25 weeks in case of serious disease or disability of the fetus. *Id.* at 1305.

183. Cook & Dickens, *International Developments*, *supra* note 96, at 1305. Hungary permits abortions where the pregnant woman is single or has been separated for six months, where appropriate housing is lacking or where a woman is age 35 and above and has had three deliveries. *Id.* French Polynesia permits abortion where the pregnant woman has Acquired Immunodeficiency Syndrome, or is sero-positive for the Human Immunodeficiency Virus. *Id.* Hong Kong recognizes adolescence alone as grounds for an abortion. France, Belgium and the Netherlands allow abortion if the woman is "in distress" with respect to her pregnancy. Cyprus, Italy and Taiwan permit abortion on general family welfare grounds. *Id.*

184. Cook & Dickens, *International Developments*, *supra* note 96, at 1308. For a thorough discussion of many Western countries' comprehensive approach to family planning, see M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987). While this author agrees with Professor Glendon's view that a comprehensive approach to family planning is desirable, she disagrees with Professor Glendon's view that the United States' approach is inadequate. Rather, as this Article shows, the United States' approach, like most of the world's, clearly recognizes the human right reproductive freedom. *See supra* notes 2-4 and accompanying text.

The following are examples of comprehensive family planning approaches by some states: Italian law requires local and regional authorities to promote contraceptive services in order to reduce the demand for abortion, Cook & Dickens, *International Devel-*

These few examples show that, worldwide, states have recognized the right to reproductive freedom in diverse ways. Variation in the domestic laws notwithstanding, it is clear that the general principles of law common to civilized nations, as well as the actual state practice of states, establish reproductive freedom as an international human right.

B. Domestic Laws and State Practice Universally Recognize Reproductive Freedom as a Particular Human Right

Nearly forty percent of the world's population lives in jurisdictions where the right to reproductive choice can be exercised on request.¹⁸⁵ The examples of several of these states are noteworthy as showing the unequivocal trend over the last decades to recognize the right to reproductive freedom.

In the Soviet Union the right to an abortion has existed since 1920 and has been absolute since 1955.¹⁸⁶ Under Soviet law

opments, supra note 96, at 1308; Czechoslovakia seeks to prevent abortion by sex education and provides free contraceptives, *id.*; Luxembourg even provides contraceptive services to minors free of charge, *id.*; French law requires that the institution performing the abortion provide the woman with birth control information, *id.*

185. P. SACHDEV, *supra* note 165, at 2; Henshaw, *Induced Abortion, supra* note 96, at 76-77. This is particularly true during the first trimester, although the time restrictions are inapplicable for induced abortions performed for medical reasons even up to and beyond the twentieth week. Countries in this category include the African countries of Togo and Tunisia; the Asian countries of China, Turkey, Singapore and Vietnam; Cuba, Canada, Puerto Rico and the U.S. in North America; and in Europe, Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Finland, France, Great Britain, Greece, Italy, the Netherlands, Norway, Rumania, Soviet Union, Sweden, and Yugoslavia. *Id.* at Table 1; Cook, *Abortion Laws and Policies, supra* note 2, at Table 1; P. SACHDEV, *supra* note 165, at Table 1.1. Cook and Henshaw do not include Bulgaria, Finland or Great Britain in this category. However, given the practice in those jurisdictions, this writer agrees with Isaacs that the right in those states can be exercised on request. Isaacs, *Reproductive Rights, supra* note 7, at 342-47. Also, in Hungary, abortion on request is available for women over 40 and in Romania for women over 45. *Id.* at 342 n.182. In Hungary women have a right to abortion on request if they are married with two living children. Henshaw, *Induced Abortion, supra* note 96, at 79. The two living children requirement was reduced from at least three children. As in prior years, the right to abortion is based upon health, fetal defect or juridical indications. In addition, the right is based upon the woman having inadequate housing, or her being older than 35, unmarried, or separated for at least six months. But women who do not meet such conditions may still apply for approval if they have some other "social reason" for terminating the pregnancy. *Id.* (citations omitted). The abortion trends in nordic countries (Denmark, Finland, Norway and Sweden) — all in this "on request category" — are telling. After an initial increase in the abortion rates following the liberalization of the laws, rates have been steadily dropping. P. SACHDEV, *supra* note 165, at 6-7.

186. Edict of Nov. 23, 1955, Ved Verk. Sov. SSSR, no. 22, item 425, (Edict of the Presidium of the Supreme Soviet of the U.S.S.R.), translated in *SOV. STAT. & DEC.*, Spring 1968, at 47 (unofficial translation). The Soviet Union also has broadened the

an abortion must be performed in a state hospital to be legal and the only existing penalties pertain to doctors who perform abortions anywhere other than in state hospitals.¹⁸⁷

In Britain the reform occurred in late 1967 when Parliament passed a bill authorizing abortion on broad grounds.¹⁸⁸ Canada, Australia, and New Zealand, which are similar to the United Kingdom in political and social perspectives, were influenced by the actions of the British Parliament and followed Britain's lead in recognizing the right to abortions on broad grounds.¹⁸⁹

In 1973 the Supreme Court of the United States ruled that a woman's right to obtain an abortion was a fundamental privacy right.¹⁹⁰ In 1983 the Supreme Court reconfirmed this ruling in *Akron*, stating that the right to privacy encompasses the right to decide whether to terminate a pregnancy¹⁹¹ and in May of 1991 the Supreme Court referred to abortion as one of a "woman's Fifth Amendment rights."¹⁹²

In 1975 the French legislature passed the Voluntary Termination of Pregnancy Act and, with a few modifications, reenacted the law in 1979 recognizing the right to abortion on broad grounds.¹⁹³ More recently, in 1988, the French government au-

grounds for second trimester abortions to include social indications. Henshaw, *Induced Abortion*, *supra* note 96, at 79. Reportedly, the purpose of broadening the restrictions was to reduce the number of illegal abortions. *Id.* (citations omitted).

187. See Note, *The Law of Abortion of the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027, 1053 (1988) [hereinafter Note, *Abortion in the USSR and China*]. Under current Soviet law, women may decide whether to have an abortion which is permitted upon request within the first twelve weeks of conception and does not require specific juridical or socio-economic grounds. *Id.* at 1060. In 1979 the procedural requirements for abortion included the consent of the woman, performance of the abortion in a hospital or other lawful establishment, and a small fee in the cases of legal abortions undertaken for other than medical reasons. Neither a doctor's consent nor a committee's approval is required. *Id.*

188. Abortion Act, 1967, ch. 87, §§ 1, reprinted in 19 INT'L DIG. HEALTH LEGIS. 887 (1968). The act affirms the right to an abortion if "the continuance of the pregnancy would involve risk to the life of the pregnant woman . . . [and] [i]n determining whether the continuance of a pregnancy would involve such risk of injury to health . . . account may be taken of the pregnant woman's actual or reasonable foreseeable environment." Abortion Act §§ (1)(a), (2).

189. P. SACHDEV, *supra* note 165, at 3.

190. *Roe v. Wade*, 410 U.S. 113, 153-54 (1973). See *supra* notes 4-5 for the development of the law in the United States.

191. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

192. *Rust v. Sullivan*, 59 U.S.L.W. 4451, 4459 (1991).

193. CODE CIVIL Law No. 75-17 (Fr.) on the voluntary termination of pregnancy, as amended by CODE CIVIL Law No. 79-1204 (Fr.) This act permits an abortion to be performed by a doctor up to the end of the tenth week of pregnancy.

thorized the use of a drug known as RU 486, a pill that induces abortion, and in 1990 the government decided to subsidize the cost of the pill.¹⁹⁴

Liberia, the Netherlands, and New Zealand have followed the Austrian and West German examples and expressly decriminalized medical interventions for the period between fertilization and implantation. This is significant because in these countries the use of contraceptive methods in this period, such as RU 486, fall wholly outside the abortion laws.¹⁹⁵

Since 1978 the right to abortion has been broad and liberal in China.¹⁹⁶ Family planning is a matter of state policy.¹⁹⁷

The 1979 Cuban Penal Code¹⁹⁸ provided that abortion was illegal only when performed without the woman's consent, or on other than hospital premises, or if the procedure fails to comply with established norms or is performed for profit.¹⁹⁹

In 1981 the Netherlands reformed its law, granting the right to abortion in cases of physical or psychological distress.²⁰⁰ As a matter of practice, however, the Netherlands was "long famous for having restrictive legislation on the books while remaining an abortion haven"²⁰¹

194. N.Y. Times, Feb. 28, 1990, at A7, col. 1.

195. The use of antiprogesterin drugs such as RU 486 makes the termination of a pregnancy a safe and effective procedure and a viable mode of medical treatment during the six weeks since the last menstrual period. Cook & Dickens, *International Developments*, *supra* note 96, at 1308.

196. See Note, *Abortion in the USSR and China*, *supra* note 187, at 1081. In March 1978 the Fifth National People's Congress adopted a new constitution. One article provided that the state advocates and encourages family planning. 2 Hongguo Xianfa Art. 53 (1980), *translated in* 1 Laws and Regulations of the People's Republic of China 1, 14 (1982).

197. Note, *Abortion in USSR and China*, *supra* note 187, at 1081. As a result, local officials began to compel women to have abortions. *Id.* The criminal code did not limit this result because it made no reference to abortion — either to the woman or to the person performing the abortion. *Id.* at 1083. This author's view is that compelling abortion is a form of denying the right to reproductive freedom. See *supra* note 181.

198. Until 1979 abortions and sterilizations were illegal under the concepts of the 1870 Spanish Penal Code. Alvarez-Lajonchere, *Commentary on Abortion Law and Practice in Cuba*, 1989 INT'L J. GYNECOLOGY & OBSTETRICS 93-95 (Supp. 3). In approximately 1936 some flexibility in the practice of abortion was permitted. In 1959 the government recognized the relationship of health to family planning and instructed the Ministry of Public Health to promote the health of the population and to give priority to women and children. Contraceptives then available were distributed. *Id.* at 93.

199. *Id.* at 94-95. From 1968 the number of abortions increased and peaked in 1974. Thereafter the number of abortions as well as the number of births declined every year between 1974 and 1980.

200. Isaacs, *Reproductive Rights*, *supra* note 7, at 348 (citation omitted).

201. Isaacs, *Reproductive Rights*, *supra* note 7, at 348.

Since 1986 the world trend toward recognition of the right to obtain an abortion has continued with significant changes in the laws of Canada,²⁰² Czechoslovakia,²⁰³ Greece,²⁰⁴ Hungary, Rumania, the Soviet Union and Viet Nam.²⁰⁵ Rumania is a particularly interesting jurisdiction. There, in 1966 and in 1985, the government restricted the right to abortion on request, which had existed from 1957, in order to increase the state's population.²⁰⁶ As of January 1, 1990, the new Rumanian Government lifted these restrictions to reinstate the right to abortion on request.²⁰⁷

In states accounting for approximately twenty-five percent of the world's population abortion can be elected on social/medical grounds²⁰⁸ which consider the following social factors as risks

202. Cook & Dickens, *International Developments*, *supra* note 96, at 1306 (citations omitted). In January 1988 the provisions of Canada's criminal code providing that hospital therapeutic abortion committees alone were permitted to certify clinical grounds for abortions were declared unconstitutional under the Canadian Charter of Right and Freedoms. The law which was rejected had caused delays that harmed women's physical and psychological well-being.

203. Henshaw, *Induced Abortion*, *supra* note 96, at 79 (citations omitted). In 1986 Czechoslovakia eliminated requirements that abortion be approved by a committee and that abortion be performed for medical or social reasons only. Abortions are now available on request through 12 weeks of pregnancy and up to 24 weeks for fetal defects or if the woman's life would be threatened by continuing the pregnancy. *Id.*

204. Henshaw, *Induced Abortion*, *supra* note 96, at 79. Greece revised its abortion law and legalized first trimester procedures on request. Previously, however, although abortions were technically illegal, as a matter of practice they had been readily available from physicians. *Id.*

205. Henshaw, *Induced Abortion*, *supra* note 96, at 79 (citations omitted). Viet Nam omitted all references to abortion from the criminal law although abortion on request was already legal. *Id.*

206. In 1985, Rumania again sought to prohibit the exercise of the right to abortion by taxing unmarried persons over age 25 and married persons who remained childless for more than two years without a medical reason. Henshaw, *Induced Abortion*, *supra* note 96, at 79 (citations omitted). However, even during the periods when the restrictions were in effect the practice did not change — illegal abortions were very common and reached a higher rate than any other Western European country in which the right to abortions had been unaffected. *Id.*

207. *Id.* (citations omitted).

208. The countries in this category include the African countries of Burundi, Seychelles, Zambia; the Asian and Oceania countries of Australia, India, Japan, Korea (Dem. Rep.), and Taiwan; the European countries of Cyprus, Greenland, Hungary, Iceland, and Poland; in North America Barbados and Belize; and Uruguay in South America. Henshaw, *Induced Abortion*, *supra* note 96, Table 1; Cook, *Abortion Laws and Policies*, *supra* note 2, at Table 1; P. SACHDEV, *supra* note 165, at Table 1.1. Cook and Henshaw would include Bulgaria, Finland, France, and Great Britain in this category. However, because the practice in those states makes abortion available on request, this author included these states in the "abortions on request" jurisdiction. *See supra* note 185. Moreover, countries such as Germany (West), India, Japan and most countries of eastern

to the mother's health should the pregnancy continue and thus as proper bases to exercise the right: inadequate income, poor housing, and unmarried status.²⁰⁹ In jurisdictions accounting for approximately twelve percent of the world's population, the right to an abortion may be exercised on broad medical grounds, for example, to avert threat to a woman's general health and for genetic or juridical reasons such as rape or incest.²¹⁰

Finally countries that impose the most restrictive limitations on the right to an abortion make up about one quarter of

Europe and Great Britain consider such social medical factors and interpret these grounds broadly so that, particularly at early stages, abortions, in effect, are available on request. Thus, these countries arguably should be considered in the "on request" category. For example, in India, a very populous state, the failure of contraception alone is justification for termination of pregnancies on grounds that it is likely adversely to affect the mental health of the pregnant woman. In fact, since the late 1950s, in order to reduce the rate of population growth, the Indian Government has been paying monetary incentives to those who undergo sterilizations. Isaacs, *Reproductive Rights*, *supra* note 7, at 335. Significantly, while most Latin American Countries have rather restrictive laws (see *infra* note 213 and accompanying text), Uruguay considers that an additional child causes social or economic hardship and is reason enough to exercise the right. *Id.* at 342 n.182. Isaacs lists Czechoslovakia and Hong Kong in this category. *Id.* Interestingly, in South Korea where abortions are illegal except for medical and "philanthropic" reasons, they have been routinely performed as a matter of *practice* since 1962. P. SACHDEV, *supra* note 165, at 9. By 1982 about one-half of South Korean wives have had an induced abortion. *Id.*

209. Significantly, the World Health Organization's definition of health includes mental health. Generally, health, when used in the context of abortion law, refers to both physical and mental health. Isaacs, *Reproductive Rights*, *supra* note 7, at 348. For example, in the United States the Supreme Court defined health to include "all factors — physical, emotional, psychological, familial, and woman's age — relevant to the well being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973). In Canada, the interpretation of therapeutic abortions includes those to avert mental distress of the woman. Isaacs, *Reproductive Rights*, *supra* note 7, at 348 (citations omitted).

210. Henshaw, *Induced Abortion*, *supra* note 96, at 76-77. Some of these statutes recognize the right to an abortion only when a woman's physical health is threatened while others have a broader interpretation permitting the procedure when either physical or mental health is threatened. The following list of countries that comprise this category designates the countries where mental health is a basis with an "M" next to the country's name. The African countries in this category are Algeria, Cameroon, Congo, Egypt, Ethiopia, French Polynesia, Ghana (M), Guinea, Kenya, Lesotho, Liberia (M), Morocco, Namibia, Rwanda, Sierra Leone, South Africa (M), Tanzania, Uganda, and Zimbabwe; Hong Kong, Israel, Jordan, Korea (Rep. of), Kuwait, Malaysia, Mongolia, Nepal, New Zealand, Papua New Guinea, Saudi Arabia, Thailand, and Vanuatu in Asia and Oceania; the European Countries of Albania, Northern Ireland, Lichstenstein (M), Luxembourg (M), Portugal (M), Spain (M), and Switzerland; the North American Countries of Bermuda (M), Costa Rica, Jamaica, Montserrat (M), and Trinidad and Tobago; and the South American Countries of Argentina, Bolivia, Guyana, and Peru. *Id.* at Table 1; Cook, *Abortion Laws and Policies*, *supra* note 2, at Table 1; P. SACHDEV, *supra* note 165, at Table 1.1. See also Isaacs, *Reproductive Rights*, *supra* note 7, at 314.

the world's population.²¹¹ This group of states includes most countries of Islamic faith (for example, Indonesia and Bangladesh), about half of the countries in Africa (for example, Nigeria and the Republic of South Africa),²¹² approximately two-

211. Henshaw, *Induced Abortion*, *supra* note 96, at 76-77. This category is represented by the African countries of Angola, Benin, Botswana, Burkina Faso, Central Afr. Republic Chad, Cote d'Ivoire, Gabon, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Senegal, Somalia, Sudan, and Zaire; Afghanistan, Bangladesh, Burma, Indonesia, Iran, Iraq, Laos, Lebanon, Oman, Pakistan, Philippines, Sri Lanka, Syria, United Arab Emirates, and Yemen in Asia and Oceania; Ireland in Europe; the Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Panama in North America; and Brazil, Chile, Colombia, Ecuador, Paraguay and Venezuela in South America. *Id.* at Table 1; Cook, *Abortion Laws and Policies*, *supra* note 2, at Table 1; P. SACHDEV, *supra* note 165, at Table 1.1. See also Isaacs, *Reproductive Rights*, *supra* note 7, at 314-18.

212. The scope of the right to exercise reproductive choice varies greatly in Africa. The laws in sub-Saharan Africa are rather restrictive; the laws in Francophone Africa are more restrictive than those in Anglophone Africa. Isaacs, *Reproductive Rights*, *supra* note 7, at 315. Currently, most of sub-Saharan Africa allows abortion only when the mother's life is in danger, although a few countries have established more liberal laws. Mashalaba, *supra* note 137. Francophone African countries, contrary to the trend in Anglophone African countries, "almost uniformly forbid abortion, discourage contraceptive use and are likely to consider sterilization a criminal offense." Isaacs, *Reproductive Rights*, *supra* note 7, at 315. In Anglophone Africa, on the other hand, governments support family planning and permit sterilization where necessary to protect the life or health of the person. *Id.* at 315-16 nn.29-30. In Anglophone Africa (including Ghana, Kenya, Nigeria, Sierra Leone, Swaziland, and Uganda) and the Caribbean countries of Barbados, Bermuda, Guyana, Jamaica, St. Kitts, St. Lucia, St. Vincent, and Trinidad and Tobago, doctors may consider a variety of factors including mental condition to determine whether continuing a pregnancy poses a threat to health. *Id.* at 348 (citing Cook & Dickens, *Abortion Laws in Commonwealth Countries*, 30 INT'L DIG. HEALTH LEGIS., Table 1). North African countries, excepting Libya, all support national family planning programs. *Id.* at 316 and 316 n.31. Libya, the only country that does not support family planning, wishes to increase its population. *Id.* Tunisia and Egypt have been concerned with rapid population growth and have instituted contraceptive distribution programs. *Id.* (citations omitted.) On the other hand, oil-producing Arab states limit or do not support access to modern forms of contraception. In general, the laws restrict abortions to save the life or protect the health of the woman. Iraq, Kuwait, Oman, Qatar, and the United Arab Emirates give no government support to family planning, although the president of Iraq was reported to have liberalized his country's laws by canceling regulations that prohibited female sterilization and required doctor's prescriptions for all contraceptives. *Id.* at 316 n.34. "Bahrain, Democratic Yemen, Iraq, Kuwait, Lebanon, Libya, Saudi Arabia, Sudan, and Syria either prohibit abortion completely or permit it only to save the life of the woman." *Id.* at 316 n.35. However, abortion for health reasons is available in Algeria, Egypt, Jordan and Morocco. *Id.* (citations omitted). In 1982 Kuwait modified its law to permit abortion if the pregnancy would result in gross physical harm to the woman or if the fetus had brain damage beyond hope of treatment. *Id.* (citation omitted). The Government of Turkey, which permits abortion to save the life of the woman, in rape cases, or where a child is likely to be born deformed, has proposed making abortion available on request during the first trimester of pregnancy. *Id.* (citation omitted). Tunisia allows abortion on request during the first trimester of pregnancy. *Id.* at 316-17.

thirds of the countries in Latin America²¹³ and three countries in Western Europe (Belgium, Ireland and Malta).²¹⁴ These restrictive laws, however, do not reflect the actual *practice* in these states.²¹⁵ Despite legal restraints on family planning services, such services, including abortion, are available because laws are interpreted flexibly or not enforced.²¹⁶

Abortion is regularly practiced in Muslim countries, for example, which supposedly have restrictive regulations. Countries such as Bangladesh and Indonesia plainly circumvent the prohibitions against abortion by allowing women to exercise their right in the guise of menstrual regulation — a procedure identical to an induced abortion but without a pregnancy test.²¹⁷

In Latin America women who need an abortion and have the economic means of procuring one, have no problems finding competent physicians to perform the procedure.²¹⁸ Abortion services are readily available with virtually all major cities having physicians who perform abortions and clinics that specialize in the procedure.²¹⁹ In Rio de Janeiro there is a chain of abortion clinics that advertises in the newspapers without using the word

213. In Latin American countries such as Columbia, Chile, Brazil, Peru, and El Salvador abortions up to the tenth week are permitted on juridical grounds such as rape or incest, eugenic, or fetal indications of genetic defects or other impairment. *Id.* at 348 n.217. Abortion to protect the health of the woman is permitted in Argentina, Chile, Costa Rica, Honduras, Peru and Uruguay. Isaacs, *Reproductive Rights*, *supra* note 7, at 347 nn.206-11. In Latin America, however, very few prosecutions are brought against alleged abortionists and, as a matter of *practice*, abortions are available. *See infra* notes 216, 218-19.

214. P. SACHDEV, *supra* note 165, at 1 (citing C. TIETZE, & S. HENSHAW, *INDUCED ABORTION: A WORLD REVIEW* (6th ed. 1986)); Henshaw, *Induced Abortion*, *supra* note 96, at Table 1; Cook & Dickens, *International Developments*, *supra* note 96, at Table 1; Cook, *Abortion Laws and Policies*, *supra* note 2, at Table 1; P. SACHDEV, *supra* note 165, at Table 1.1. Interestingly, countries with restrictive abortion laws are primarily in the developing world. Isaacs, *Reproductive Rights*, *supra* note 7, at 349.

215. Henshaw, *Induced Abortion*, *supra* note 96, at 77-78, 79-81; P. SACHDEV, *supra* note 165, at 1-4, 6; Ladipo, *supra* note 169, at 23; SAMIL, *supra* note 169, at 29.

216. Henshaw, *Induced Abortion*, *supra* note 96, at 77; P. SACHDEV, *supra* note 165, at 1-3, 6. Countries such as Indonesia, South Africa, Latin America, the Caribbean and Korea, which limit the right to abortion, simply do not enforce the laws. *Id.* at 1.

217. P. SACHDEV, *supra* note 165, at 2; Henshaw, *Induced Abortion*, *supra* note 96, at 77-78. For example, Bangladesh supports clinics that provide menstrual regulation for up to 10 or 12 weeks gestation as a public health measure. Similarly, menstrual regulation is performed regularly in Indonesia and Malaysia. *Id.* (citations omitted).

218. P. SACHDEV, *supra* note 165, at 6.

219. Henshaw, *Induced Abortion*, *supra* note 96, at 78. Conversely, in India and Bangladesh the lack of facilities makes legal abortion and menstrual regulation basically unavailable. Similarly, Ghana has relaxed restrictions and Togo has eliminated them but the availability of services has not progressed.

"abortion."²²⁰

In sum, the "general practice of states common to civilized nations," as reflected in domestic law or as evidenced by actual practice (customary international law) reveals universal acceptance of the right to reproductive freedom including the most controversial choice: abortion.

IV. CONCLUSION

A clear goal of human rights law, however "sourced," is to establish and ensure respect and dignity for the individual. Such respect and dignity includes the rights to privacy, health, and equality, including equal participation in the social, political, economic and cultural life of the state. These individual rights, contained in international agreements, comprise obligations on states either as signatories or because the instruments evidence customary law.

Such general rights encompass an individual's right to reproductive freedom. International tribunals have acknowledged and states have admitted that the right to privacy includes the right to plan a family. Successful family planning clearly rests upon reproductive freedom. Moreover, it is uncontroverted that no fetal right to life exists in international law. Thus, reproductive freedom, grounded in the right to privacy, cannot be impaired by "balancing" the right of reproductive freedom against a non-existent fetal right to life.

In addition, women's human rights to health and to equality under international law are all but illusory without reproductive freedom. For women, the right to health is wedded to their ability to plan a family. Likewise, the right equally to participate in matters of the state requires that women choose whether and when to raise a family.

For women, autonomy is clearly linked to the choice to reproduce. The lack of freedom to decide responsibly on the number or spacing of children (if any), has deprived women of benefits regarding their health, education, employment, and their roles in family and public life. Denial of the right to reproductive choice will deprive women of their right to participation

220. Henshaw, *Induced Abortion*, *supra* note 96, at 81. Those without economic means, however, seek abortions by unskilled abortionists who pose substantial health risks to women in violation of the fundamental right to health. *See supra* notes 116-46 and accompanying text (Part II(B)).

in the social, cultural, political, educational, and economic life of the state in contravention of their international human rights.

Moreover, the right to reproductive choice is found in virtually all the domestic laws around the world. Such widespread domestic legislation establishes reproductive freedom as a "general principle of law recognized by civilized nations." These laws also evidence the practice of states thereby establishing reproductive freedom as a rule of customary international law. In addition, a review of actual state practice shows that abortions are universally performed and that states routinely accept and even condone such activity by failing to take steps either to prevent the acts or to punish the actors. This practice of states is separate and further evidence that the right to reproductive freedom has become an international customary right.

The historical reasons and purposes behind state regulation of choice are telling. States do not deny that reproductive freedom is an issue of privacy. Nor do states disagree that denial of choice can result, and through the years has resulted, in serious health concerns for mothers and infants alike. Rather, the enactment of laws limiting family planning has been based solely upon the *state's* needs — the desire to defer to influential religious groups or to curb or enhance population.

Such a "sovereign" agenda without regard for and in derogation of the individual's human rights was precisely the type of government activity condemned at Nuremberg. The use of an individual as a pawn of the state without regard or respect for the individual's rights pertaining to family life is contrary to human rights principles. Dictating reproduction to further governmental, often linked with religious, goals impermissibly erodes the very harmony, respect and dignity to which human beings are entitled and that modern day international human rights laws were designed to protect.

Denying individuals, and in particular women, the legal right to reproductive freedom violates international law. A woman denied control of her reproductive capacity "is truly being treated as a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this

position have any sense of security with respect to her person?"²²¹

221. *Morgenthaler, Smoling and Scott v. The Queen*, 44 D.L.R.4th 385, 492 (Can. 1988).