Mr. Abramson is a human rights attorney, specializing in the Convention on the Rights of the Child since 1992. He has attended every implementation review session of the Committee on the Rights of the Child, participated in all of its days of general discussion, and served, on behalf of UNAIDS, as rapporteur for its day of discussion on Children Living in A World of AIDS. He has written numerous papers on the CRC, as was a contributing author to Refugee Children: Guidelines on Protection and Care (UNHCR, Geneva, 1994). He has also participated in other treaty-monitoring bodies, the UN Commission and Sub-Commission, and in other human rights forums.

VIOLENCE AGAINST BABIES began as a conference paper, “The CRC Rights of Babies and Young Children: Three Key Issues” (Sept. 2004), submitted to the Committee’s day of general discussion on Early Childhood Development. In was then expanded into Violence Against Babies: Protection of Pre- and Post-Natal Children Under the Framework of the Convention on the Rights of the Child, which was submitted to the UN Study on Violence Against Children, in July 2005, jointly by the World Family Policy Center and the David M. Kennedy Center for International Studies, in accordance with the rule that public submissions must be from non-governments organizations. The present edition is a revision of that submission, and contains new material, including numerous additional references to State Party reports.

Acknowledgments

I would like to thank the World Family Policy Center and the David M. Kennedy Center for International Studies for submitting Violence Against Babies to the UN Study, and A. Scott Loveless, Ph.D., J.D., of the WFPC, for his editorial support, research supervision, and continuing encouragement, Bryant W. H. Smith, Reed Allen, and Jacob Reynolds for research assistance (Appendices B & C), Lola Verlade and Sylvie Ravina for the translations, Rita Joseph and Patrick Buckley for reference materials, and the WFPC for publication of the revised edition.

The World Family Policy Center is an academic study center within the J. Reuben Clark Law School at Brigham Young University. The David M. Kennedy Center for International Studies is the international studies department at Brigham Young University and, together with the law school and the BYU School of Family Life and School of Social Work, is affiliated with the World Family Policy Center. The positions taken in VIOLENCE AGAINST BABIES are those of the author and do not necessarily reflect those of the WFPC or the DMKCIS. The David M. Kennedy Center for International Studies is an accredited NGO with ECOSOC.
Summary of the book
VIOLENCE AGAINST BABIES

According to the progress reports and the questionnaire to States, the UN Study on Violence Against Children appears to be overlooking three problems: Infanticide, euthanasia, and the intentional termination of the lives of children during the prenatal period of life.

These three forms of violence are discussed in depth in VIOLENCE AGAINST BABIES, an official submission to the Study.

There has been a lot of confusion about violence during the prenatal period of the human lifecycle. This is because people often speak about human rights “from the moment of birth.” However, this is a serious misunderstanding of the Convention on the Rights of the Child:

- The CRC was specifically written to cover children during the entire pre-natal period.
- State implementation reports routinely say that CRC rights apply prior to birth.
- The reports often give information about the constructive steps being taken to reduce pre-natal violence against children.

CRC coverage throughout the pre-natal period

First, the CRC was written to protect children during the entire pre-natal period:

- The original working draft of the Convention expressly limited rights “from the moment of birth.” But this limitation was promptly removed. And according to the travaux préparatoires, one of the reasons for removing it was to give CRC coverage “from the moment of conception” onwards.
- The right to health expressly includes the right to pre-natal care, and this inherently recognizes that human rights attach from the moment of conception. The right to pre-natal care is the right of the child, not the right of the mother, according to the text of article 24.
- To confirm that the CRC applies during the pre-natal period, the ninth preambular paragraph was amended to say that children need “legal protection, before as well as after birth.”

These are only three of the nine reasons why the CRC protects children prior to birth, as explained in detail in VIOLENCE AGAINST BABIES.

State reports recognize CRC rights during the pre-natal period

Second, the State implementation reports routinely say that children have rights during the pre-natal period of the human lifecycle:

- The overwhelming majority of state implementation reports say, either expressly or impliedly under the sections on article 1 or article 6, that children have CRC rights during the pre-natal period. (128 State Parties out of 176.)
- For instance: “The protection of the right to life begins with the protection of intra-uterine life”; state law “recognizes the right of life of the unborn child”; and national law “protects the right to life from conception onwards.” These are the State Parties themselves speaking (China, Italy, El Salvador, respectively).
- And while the remaining minority are silent on the matter under these articles, no State Party report has expressly denied that the CRC covers babies during the pre-natal period.

VIOLENCE AGAINST BABIES provides the details from all of the reports.

All States are taking steps to protect pre-natal children

Third, the implementation reports often give information about the constructive steps that States are taking. Simply passing laws to prohibit violence against pre-natal children is not fully effective, and it does not fully respect human dignity because it fails to address the many “push-pull” factors that lead to acts of violence. States are taking a more holistic approach; for instance:
• Adolescents are helped to develop non-exploitive, respectful, responsible male-female relationships, thereby avoiding unwanted pregnancies.

• Pregnant women are provided material, psychological, social, and moral support, especially when dealing with an unplanned or unwanted pregnancy.

• States are increasing the options of women by improving adoption and other forms of alternative care, and by reducing negative attitudes (towards unmarried mothers, victims of rape and sexual abuse, children with disabilities, etc.)

• States are reducing the economic and social barriers that constrain the child-rearing options of pregnant women and girls.

VIOLENCE AGAINST BABIES cites numerous examples from the State reports.

The scale of the violence

Each year, there are an estimated 46 million intentional acts of lethal violence against children during the first nine months of life. This makes violence against pre-natal children one of the most serious, if not the most serious, human rights issue.

Barriers to addressing violence against pre-natal children

There are a number of barriers in trying to address pre-natal violence constructively. First, there is the tendency to speak in absolutistic terms. However, the right to life, like most other human rights, is not absolute: the right requires balancing decisions. Whether the right-holder is the baby or the mother, the concrete enjoyment of the right calls for balancing. These balancing decisions must be based on full and genuine respect for the human dignity of everyone who will be affected.

Second, the word “abortion” has multiple meanings. In medical usage, abortion refers to the ending of the pregnancy, not to the ending of the life of the pre-natal child. But the word has acquired a second meaning: abortion is now used in common parlance to refer to the ending of the life of the baby.

The multiple meanings lead to serious confusions. A woman’s interest in ending an unwanted pregnancy is different from the child’s interest in living. There are two human beings involved, two sets of interests, two different right-holders. The interests and rights of everyone must always be taken into account and respected, under international human rights law.

A children’s rights perspective

The fundamental premise of the Convention on the Rights of the Child is that the children themselves have human rights. As the International Save the Children Alliance has put it: “The CRC has been radical in seeking to change the way in which children are viewed. Yet in reality, the notion of children as individuals in their own right is still largely unrealized. A range of social and cultural factors make it difficult for many to accept children as right-bearers.” (Children’s Rights: Reality or Rhetoric?, at 288.)

In order for States to address infanticide, euthanasia, and the intentional termination of the lives of children during the pre-natal period, difficult decisions will have to be made. But the decisions must be based on respect for the human dignity, and the human rights, of everyone involved, including the children.

* * * * *

Résumé du livre

VIOLENCE A L’ENCONTRE DES BEBES


Ces trois formes de violence sont analysées en détail dans le document Violence à l’encontre des bébés, en tant que soumission officielle à l’Etude.

Il y a eu beaucoup de confusion au sujet de la violence pendant la période prénatale du cycle de vie humaine. C’est souvent dû au fait que les gens parlent de droits de l’homme à partir du « moment de la naissance ». Cependant, il s’agit d’une importante erreur d’interprétation de la Convention Des Droits de l’Enfant:
. La CDE a été spécialement rédigée dans l’intention de protéger les enfants pendant toute la période prénatale.

. Les documents de mise en application des états disent communément que les droits de la CDE s’appliquent avant la naissance.

. Les documents de mise en application donnent fréquemment des informations sur les mesures à prendre afin de réduire la violence prénatale à l’encontre des enfants.

**Couverture de la CDE pendant la période prénatale**

Premièrement, la CDE a été rédigée afin de protéger les enfants durant toute la période prénatale :

. Le document original de travail de la Convention limitait expressément les droits « à partir du moment de la naissance ». Mais cette restriction a été rapidement retirée et d’après les travaux préparatoires, l’une des raisons de ce retrait fut d’élargir le champ d’application de la CDE « à partir du moment de la conception ».

. Le droit à la santé inclut expressément le droit aux soins prénataux ce qui reconnaît intrinsèquement que les droits de l’homme prennent effet au moment de la conception. Le droit aux soins prénataux est selon l’article 24 un droit de l’enfant et non un droit de la mère.

. Afin de confirmer que la CDE s’applique pendant la période prénatale, le neuvième paragraphe du préambule fut amendé pour stipuler que les enfants ont besoin « d’une protection légale aussi bien avant qu’après la naissance ».

Ce ne sont que trois des **neuf raisons** expliquant pourquoi la CDE protège les enfants avant la naissance, ce qui est expliqué en détail dans *Violence à l’encontre des bébés*.

Ce document est la seule présentation des problèmes dans la littérature des droits de l’homme qui utilise les règles d’interprétation de traité et qui soit ouvert et transparent dans son argumentation.

**Les rapports des Etats reconnaissent les droits de la CDE durant la période prénatale**

Deuxièmement, les documents de mise en application des états disent communément que les enfants ont des droits pendant la période prénatale du cycle de vie humaine :

. Une majorité écrasante des documents de mise en application des états dit, soit expressément ou implicitement dans les paragraphes de l’article 1 ou de l’article 6 que d’après la CDE, les enfants ont des droits durant la période prénatale (128 états signataires sur 176).

. Par exemple : « La protection du droit à la vie commence avec la protection de la vie intra-utérine » ; la loi au niveau de l’Etat « reconnaît le droit à la vie pour l’enfant non né », et la loi au niveau national « protège le droit à la vie à partir de la conception ». Ce sont les états signataires eux-mêmes qui s’expriment (Chine, Italie, El Salvador, respectivement).

Et même si la minorité restante demeure silencieuse sur cette question dans ces articles, aucun état signataire n’a expressément rejeté le fait que la CDE couvre les nourrissons pendant la période prénatale.

*Violence à l’encontre des bébés* fournit les détails de tous les rapports.

Tous les Etats prennent des mesures pour protéger les enfants avant la naissance

Troisièmement, les documents de mise en application donnent fréquemment des informations sur les étapes constructives prises par les Etats. Passer des lois interdisant la violence à l’encontre d’enfants au stade prénatal n’est pas pleinement efficace et cela nerespecte pas la dignité humaine car dans ce cas les nombreux facteurs contradictoires qui mènent aux actes de violence ne sont pas traités. Les Etats adoptent une approche plus holistique ; par exemple :

. On aide les adolescents à développer des relations homme/femme non-exploitatives, respectueuses, et responsables, évitant ainsi les grossesses non désirées.

. On fournit aux femmes enceintes une aide matérielle, psychologique, sociale et morale quand elles ont à assumer une grossesse non planifiée ou non désirée.
Les états ont élargi les options disponibles pour les femmes en améliorant l’adoption et toute autres formes de soin, et en diminuant des attitudes inappropriées (à l’égard des mères célibataires, des victimes de viol et d’abus sexuel, à l’égard d’enfants handicapés etc.…).

Les Etats ont réduit les barrières économiques et sociales qui empêchent les femmes ou les filles enceintes d’élever leur enfant.

Les Etats ont élargi les options disponibles pour les femmes en améliorant l’adoption et toute autres formes de soin, et en diminuant des attitudes inappropriées (à l’égard des mères célibataires, des victimes de viol et d’abus sexuel, à l’égard d’enfants handicapés etc.…).

 les Etats ont réduit les barrières économiques et sociales qui empêchent les femmes ou les filles enceintes d’élever leur enfant.

Violence à l’encontre des bébés cite de nombreux exemples à partir des documents des Etats.

Chaque année, on estime à 46 millions les actes de violence intentionnels et mortels perpétrés contre les enfants durant leurs neuf premiers mois de vie. Ce qui rend la violence contre les enfants avant la naissance une des plus sérieuses, si ce n’est la plus sérieuse, question concernant les droits de l’homme.

Barrières à traiter dans le traitement de la question de la violence à l’encontre des enfants avant la naissance

Il y a un certain nombre de barrières quand l’on essaye de traiter de manière constructive la violence prénatale. Premièrement, il y a la tendance d’en parler en termes absolus. Cependant, le droit à la vie, comme tout autre droit humain, n’est pas absolu : Le droit à la vie demande des décisions équilibrées. Que le détenteur de ce droit soit l’enfant ou la mère, la jouissance concrète de ce droit requiert un équilibre. Ces décisions mesurées doivent être basées sur le respect intégral et authentique de la dignité humaine de chaque être concerné.

Deuxièmement, le mot « avortement » a plusieurs significations. En termes médicaux, l’avortement signifie la fin de la grossesse et non la terminaison de la vie d’un enfant pas encore né. Mais, le mot a acquis une deuxième signification : « avortement » est aujourd’hui dans le langage usuel comme étant la terminaison de la vie d’un enfant.

Les multiples significations entraînent de sérieuses confusions. L’intérêt que peut avoir une femme à mettre fin à une grossesse non désirée diffère de l’intérêt de l’enfant à vivre. Il y a deux êtres humains impliqués, deux types d’intérêts, et deux porteurs de droits. Les intérêts et les droits de chacun doivent toujours être pris en compte et respectés, dans le cadre la loi internationale des droits de l’homme.

Du point de vue des droits de l’enfant

La prémisses fondamentales de la Convention des Droits de L’Enfant est que les enfants sont eux-mêmes porteurs de droits. Comme l’a rappelé l’Association Internationale Sauvons les Enfants : « La CDE a radicalement cherché à changer la façon dont les enfants sont considérés. A ce jour, la notion d’enfants en tant qu’individus ayant leurs propres droits est encore loin d’être une réalité. Toute une série de facteurs sociaux et culturels rendent difficile pour beaucoup de personnes d’accepter les enfants comme porteurs de droits ». (Children’s Rights: Reality or Rhetoric?, at 288).

Afin que les Etats puissent traiter l’infanticide, l’euthanasie et la terminaison de la vie des enfants durant la période prénatale, des décisions difficiles doivent être prises. Mais ces décisions doivent être basées sur le respect de la dignité humaine et des droits de l’homme, de tous ceux concernés, y compris des enfants.

Resumen del libro

LA VIOLENCIA INFANTIL EN LOS BEBÉS

"La protección de la infancia en los periodos post y prenatal en el marco de la Convención sobre los Derechos del Niño".

El Estudio sobre la Violencia Infantil de la Organización de Naciones Unidas (ONU), según se deduce de sus informes de evolución y de los cuestionarios de los Estados, parece haber pasado por alto tres cuestiones: el infanticidio, la eutanasia y la terminación intencionada de las vidas de niños durante el periodo prenatal.

Estas tres formas de violencia se tratan en profundidad en el libro “LA VIOLENCIA INFANTIL EN LOS BEBÉS”, el cual es una contribución oficial de una ONG al Estudio sobre la Violencia Infantil de la ONU.
Ha habido mucha confusión sobre la violencia en el periodo prenatal de la vida humana. Esto se debe a que a menudo se habla de los derechos humanos “desde el momento del nacimiento”. Sin embargo, este es un grave malentendido de la Convención de los Derechos del Niño (CDN):

- La CDN se escribió específicamente para proteger a los niños durante todo el periodo prenatal.
- Las aplicaciones a los Estados de los diferentes informes, aluden sistemáticamente a que los derechos de la CDN rigen antes del nacimiento.
- Los informes proporcionan valiosa información sobre algunas medidas constructivas que se han tomado en los Estados para reducir la violencia infantil en la fase prenatal.

La aplicación de la CDN durante la fase prenatal

En primer lugar, la CDN se escribió para proteger a los niños durante toda la fase prenatal:

- El primer borrador de trabajo de la Convención limitó expresamente los derechos “desde el momento del nacimiento”. Sin embargo esta limitación fue rápidamente eliminada y, según se recoge en los trabajos preparatorios, uno de los motivos de su eliminación fue que la CDN debía regir “desde el momento de la concepción” en adelante.
- El derecho a la salud incluye expresamente el derecho al cuidado prenatal, lo que implicitamente reconoce que los derechos humanos se aplican desde el momento de la concepción. El derecho al cuidado prenatal no es un derecho de la madre, sino del niño, según expresa el artículo 24.
- Como confirmación de que la CDN rige durante el periodo prenatal, el noveno párrafo del preámbulo fue enmendado para señalar que los niños requieren “protección legal tanto antes como después del nacimiento”.

Estas son sólo tres de las nueve razones legales por las que la CDN protege a los niños antes del nacimiento, según se expone detalladamente en “LA VIOLENCIA INFANTIL EN LOS BEBÉS”. Este informe es el único sobre los derechos humanos que usa las normas de la interpretación de tratados, siendo abierto y transparente en sus argumentos.

Los informes de los Estados reconocen los derechos de la CDN en el periodo prenatal

En segundo lugar, los informes de aplicación a los Estados sistemáticamente indican que los niños tienen derechos durante el periodo prenatal de la vida humana.

- La inmensa mayoría de los informes de aplicación a los Estados (128 de los 176 Estados Miembros) dicen en las secciones del artículo 1 (definición de niño) o el artículo 6 (derecho a la vida), ya sea explícita o implícitamente, que los niños poseen los derechos de la CDN durante el periodo prenatal.
- Por ejemplo: “La protección del derecho a la vida comienza con la protección de la vida intrauterina”; la ley estatal “reconoce el derecho a la vida del niño no nacido”; y la ley nacional “protege el derecho a la vida desde su concepción en adelante”. Estas son declaraciones de algunos Estados Miembros (China, Italia y El Salvador respectivamente).
- La minoría restante mantiene silencio sobre estos artículos y ningún Estado Miembro ha negado expresamente que la CDN proteja a los bebés durante la fase prenatal.

“LA VIOLENCIA INFANTIL EN LOS BEBÉS” proporciona el detalle de todos estos informes.

Todos los Estados están tomando medidas para proteger a los niños en la fase prenatal

En tercer lugar, los informes de aplicación a menudo ofrecen información sobre medidas constructivas que los Estados están abordando. La simple aprobación de leyes que prohíban la violencia prenatal no es plenamente eficaz y no respeta plenamente la dignidad humana, puesto que no contempla los numerosos factores que conducen a los actos de violencia. Los Estados están asumiendo un enfoque más integral; por ejemplo:
• Se ayuda a los adolescentes a desarrollar relaciones hombre-mujer responsables, respetuosas, no explotadoras, y en consecuencia se evitan embarazos no deseados.

• Se ofrece a las mujeres embarazadas apoyo moral, psicológico, social y material, especialmente cuando se enfrentan a un embarazo imprevisto o no deseado.

• Los Estados están aumentando las opciones para las mujeres, al mejorar la adopción y otras alternativas, y al reducir las actitudes negativas (hacia las madres solteras, víctimas de violación o abuso sexual, niños con deficiencias, etc.).

• Los Estados están reduciendo las barreras sociales y económicas que condicionan las opciones de las mujeres y jóvenes embarazadas para criar a sus hijos.

“LA VIOLENCIA INFANTIL EN LOS BEBÉS” cita numerosos ejemplos tomados de los informes de los Estados.

Se estima que cada año hay 46 millones de actos intencionados de violencia infantil mortal durante los primeros nueve meses de vida. Esto hace de la violencia infantil prenatal una de las cuestiones más importantes, si no la más importante, en relación con los derechos humanos.

**Barreras para abordar la violencia infantil prenatal**

Hay una serie de barreras al intentar abordar la violencia infantil prenatal de forma constructiva. En primer lugar, hay una tendencia a hablar en términos absolutos. Sin embargo, el derecho a la vida, al igual que la mayoría de los derechos humanos, no es absoluto: el derecho requiere una equidad en las decisiones. Si los sujetos del derecho son el bebé y la madre, el disfrute concreto del derecho llama a esta equidad. Estas decisiones deben basarse en un pleno y genuino respeto de la dignidad humana de todo aquel que se verá afectado.

En segundo lugar, la palabra “aborto” tiene múltiples significados. En terminología médica, aborto se refiere a la interrupción del embarazo, no a la interrupción de la vida del niño. Pero la palabra ha adquirido este segundo significado, y el término aborto se utiliza en el lenguaje habitual para referirse a la interrupción de la vida del bebé.

Los múltiples significados conducen a serias confusiones. El interés de una mujer por interrumpir un embarazo no deseado difiere del interés del niño por vivir. Hay dos seres humanos involucrados, dos tipos de intereses, dos sujetos de derecho diferentes. La legislación internacional sobre derechos humanos debe siempre considerar y respetar los derechos y los intereses de todos.

**La perspectiva desde el derecho del niño**

La premisa fundamental de la Convención de los Derechos del Niño es que los niños son sujetos de derecho en sí mismos. Tal y como lo expresa la Alianza Internacional “Save the Children” (Salvar a los Niños): “La CDN ha sido drástica intentando cambiar el modo en que se ve a los niños. Sin embargo la realidad es otra, pues la idea de que los niños son individuos con sus propios derechos está muy lejos de haberse aceptado. Una serie de factores sociales y culturales hace que sea difícil para muchos reconocer a los niños como sujetos de derechos” (Children’s Rights: Reality or Rhetoric?, art. 288).

Para que los Estados aborden el infanticidio, la eutanasia y la interrupción de las vidas de los niños en la fase prenatal, será necesario tomar decisiones difíciles. Pero estas decisiones deben basarse en el respeto a la dignidad humana y a los derechos humanos de todas las personas involucradas, incluidos los niños.
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**VIOLENCE AGAINST BABIES**


**Introduction**

The General Assembly has requested a comprehensive study on violence against children, using the Convention on the Rights of the Child (CRC) as its principal frame of reference. The UN Study on Violence Against Children will be submitted later this year, and, going by present indications, it will be an excellent report, with a potential for impact exceeding that of the “Machel study” on children in war. But it also appears that the UN Study will be silent on three types of intentionally lethal violence against babies: infanticide, euthanasia, and the intentional termination of the lives of children **during the pre-natal period**.\

The original edition of VIOLENCE AGAINST BABIES was an official submission to the UN Study. It was not a polemical denunciation of violence against babies, but a resource to help the Independent Expert and his assistants to address three emotionally sensitive, and politically difficult, types of violence. This revised edition is intended as a resource for States. It provides a number of tools to assist Governments when they discuss the UN Study in the General Assembly, and afterwards when they work individually and collectively to reduce violence against babies, under the framework of the CRC and other human rights treaties.

The premise of the book is that all States are in the same boat, and that by appreciating their commonalities, they will be better able to work together to promote the realization of human rights worldwide. For example, all States protect and care for human life prior to and immediately after birth; no State is totally free of post-natal and pre-natal violence against babies; the factors that lead to these kinds of violence are the same; and all States have the same rights and duties under international law. There are important differences, to be sure. The frequencies of the three categories of violence against babies, the domestic political situation, the patterns of beliefs within society, and the resources and infrastructure for addressing the “push-pull” factors – these can differ significantly from country to country. Nevertheless, States face the same kinds of problems, and international human rights law is a common point of reference.

While VIOLENCE AGAINST BABIES covers all three categories of violence, more attention is given to the pre-natal than the post-natal period. One reason is the sheer scale of the problem. Each year, intentional acts of violence take the lives of 46 million children within the first nine months of life, which greatly dwarfs the incidence of euthanasia and infanticide.\

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1 The Study is pursuant to General Assembly resolutions 56/103 (2001), and 57/109 (2002).

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**Annual Deaths**

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<tr>
<td>Earthquakes (average)</td>
<td>6,000</td>
</tr>
<tr>
<td>Tsunamis (average)</td>
<td>912</td>
</tr>
</tbody>
</table>

* Sources: Understanding Global Security, by Peter Hough (Routledge, London, 2004), pp. 22, 116, 154, 155, 181, 204; and the sources listed in footnote 1. For the definition of “abortion,” see Chapter 5.A.

The other reason is that reducing violence against pre-natal children is the far more difficult task. Violence on this scale is a product of underlying social problems. Attitudes, ideologies, economic forces, customs, and politics all come into play. Structural problems of this magnitude can only be resolved over time, through incremental progress. But violence against pre-natal children can be a difficult subject to talk about, and this makes solutions that much harder to find.

VIOLENCE AGAINST BABIES provides four “tools” to assist States in addressing the problems, using the Convention on the Child as a principal frame of reference.

First, a State has to know the positions that other States have taken in order to engage in dialogue and coordinated action. VIOLENCE AGAINST BABIES surveys the implementation reports of 176 States. The overwhelming majority say that children have CRC rights during the pre-natal period, and they say this either expressly or impliedly in reporting on article 1 (definition of the child) or article 6 (right to life). For instance:

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“The protection of the right to life begins with the protection of intra-uterine life”; state law “recognizes the right of life of the unborn child”; and national law “protects the right to life from conception onwards.” Moreover, no State report has expressly denied that the CRC applies to birth (although several States made ambiguous statements when they ratified the Convention). (Chapter 4.B.)

Second, a legal memorandum is a valuable resource in determining who the right-holders are under the CRC, and the content of their rights. VIOLENCE AGAINST BABIES gives a comprehensive legal analysis of the Convention’s applicability to pre-natal children, and it pays careful attention to the rules of interpretation in the Vienna Convention on the Law of Treaties.

When the question of CRC rights for pre-natal children arises, people usually just refer to the “legal protection before … birth” language in the preamble. And needless to say, since it’s the preamble, people use it to defend opposite conclusions, and the discussion comes to a halt. However, there are actually nine points in a full legal analysis, and the preamble is the least important of them all. The preamble simply helps to confirm the conclusions reached from the other eight points, and those eight points are more than enough to decide the legal question.

For example, the original working draft of article 1 contained a “from the moment of his birth” restriction. But one of the first things that the framers did was to remove this limitation. And the travaux préparatoires shows that the reason for deleting it was to ensure CRC coverage “from the moment of conception.” Another example: The child’s right to health includes the right to pre-natal care. This is the child’s right, not the mother’s, according to the text of article 24. And children cannot have a right to pre-natal care unless they are right-holders under article 1. Removing the from the moment of his birth limitation in article 1 goes hand in hand with recognizing the child’s right to pre-natal care. The preamble – “legal protection before as well as after birth” – just confirms that we have read articles 1 and 24 correctly. And these are only capsule summaries of three of the nine points in a comprehensive legal analysis. (Chapter 4.D.)

Third, if States are to significantly reduce violence against babies, they need to have pragmatic solutions to a number of social problems, many of which are interconnected. VIOLENCE AGAINST BABIES summarizes what is being done to protect children in the first period of their lives, drawn from the wealth of information that States have been putting into their implementation reports. (Chapter 6.)

The reports give a mixed picture. On the positive side, States are taking significant steps on many fronts, such as helping teenagers to develop healthy attitudes and behaviors in their male-female relations, which helps prevent unwanted and unintended pregnancies, and providing pregnant women and girls with material and social support, particularly in times of crisis. The broad range of constructive things that States are doing for babies and their parents is encouraging, and they need to be promoted as “good practices.”

On the down side, States often have difficulties translating their CRC commitments into domestic law. And although they are taking children’s rights seriously in their reports, they seem to be having difficulty incorporating a children’s rights perspective when they discuss the issues in other forums with other audiences. The book summarizes the various gaps between the promises and the performance.

And fourth, the book puts emphasis on seeing issues within their broader contexts. Some of the things that cause confusion about the CRC rights of babies are the same things that create misunderstandings on many other human rights questions. For instance, rights activists tend to speak in absolutist language, ignoring the need for States to making balancing decisions between or among rights holders, and they tend to portray the monitoring bodies and other actors as the definitive authorities, rather than according State Parties their rightful sphere of authority. To clarify matters, the book explains that the CRC is a framework treaty rather than a legal code, that the right to life requires a State to make balancing judgments, and that a State is accountable to the other State Parties, not a UN monitoring body, for its interpretation and application of treaty rights. (Chapter 2.)

Another way that context is important is the fact babies and their human rights have been marginalized in the children’s rights movement. Reducing pre- and post-natal violence against babies will therefore have to address the things that are causing the marginalizing. (Chapter 1.)

It is clear from this brief overview that VIOLENCE AGAINST BABIES covers a lot of ground. Some readers may want to go directly to the topic of their greatest interest, which might be the legal analysis for some, while for others it might be the practical implications, for instance. But...
regardless of the order in which the chapters are read, all of the topics are linked closely together.

At 46 million acts of violence against children in the first nine months of their lives, this must be one of the most serious, if not the most serious, human rights issue today. And although infanticide and euthanasia of babies are not as serious from a point of view of numbers, all of these categories of violence are human rights problems under international law. And they all come under the scope of the General Assembly’s request for a comprehensive study, whether or not the UN Study addresses them.

Chapter 1
Marginalization of the Rights of Babies

The fundamental premise of the Convention on the Rights of the Child is that children are themselves bearers of rights. The International Save the Children Alliance surveyed the first ten years of the CRC, evaluating the progress that States and civil society have made in putting the Convention’s ideals into practice. In *Children’s Rights: Reality or Rhetoric?*, the gap was summarized this way:

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

In this chapter, we will look at some of the social and cultural barriers that have stood in the way of full realization of the CRC, as they relate to violence against babies. The first set of difficulties is the lower valuation that is often put on the lives of babies. As we will be seeing below, there are conflicts in vision over who is and who is not a member of the human family, with some people accepting all babies as members, other denying them membership, and still others acknowledging their membership, but treating them as inferior human beings. The second set of problems is the difficulty of taking children’s human rights seriously when the right-holder is a young child or a baby. In order to address violence against babies within the framework of the CRC and the UN Study, State officials will have to address these two barriers.

A. Conflicting visions of the human family

Louise Arbour, the UN High Commissioner for Human Rights, has emphasized the need to think in terms of the “human family,” and to look upon all members of that family as “right-bearers.” Most of the violence

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5 *Children’s Rights: Reality or Rhetoric?* (International Save the Children Alliance), at 288.

6 E.g., “[W]e must combat all forms of intolerance by celebrating the diversity and differences that enrich the human family,” in “Introductory remarks by Mrs. Louise Arbour to the Panel Discussion ‘Discrimination and hate crimes: countering the influence of intolerance’” (March 21, 2005); available at www.unhchr.ch.

7 E.g., “Yours is a heavy responsibility which you will fulfill by … the tangible benefits [your] decisions bring to right-holders, … States sign and ratify human rights treaties, thereby becoming duty bearers,” in “Statement by Ms. Louise Arbour, United Nations High Commissioner for Human Rights, On the opening of
committed against babies probably stems from a failure to treat them as full members of the human family. In fact, when we look closely at the matter, we can discern three conflicting visions about babies as belonging to the human family.

There have been important shifts throughout human history as to who counts as a member of the human family, and as to what human beings owe to each other, individually and collectively. So it will help to view the case of babies within the broader context of the evolution in thinking about human rights.

1. The evolution of human rights

In *Visions Seen: The Evolution of International Human Rights*, Paul Lauren tells the fascinating story of the conception, birth, and maturation of human rights from antiquity to the present day. The theme that runs throughout this history is the constant expansion of the circle of concern that people feel for other people. There has been an evolution of what people believe they owe to other members of the human family, but, perhaps even more dramatically, an evolution of who counts as full members of the human family.

Paul Lauren writes:

> Visions of human rights thus are not only complex, they are also often profound and disturbing. The reason for this is that they tend to strike at our very core and make us confront difficult and discomforting issues. They force us to examine critically the nature of men and women, consider what it means to be human, view both the best and worst of human behavior, wrestle with how we ought to relate to one another, question the purposes of government and the exercise of power, and especially examine our own values and deeds in response to those who suffer.

One of the most agonizing issues presented by such visions, for example, is the matter of whether we have any responsibilities for the well-being of other people in need or pain. Thoughtful individuals in many different times and places have pondered whether they should possess a concern beyond themselves that extended to others who suffered or not. If so, they then had to ask further perplexing questions about the extent of concern that have continued for ages: Who is my “brother” or “sister,” and what exactly does it mean to be a “keeper”? That is, just how wide should be the circle of responsibility and what form should concern for others take? A sense of obligation to immediate family members or friends and neighbors in close proximity might be readily apparent, but what about those beyond the community, the tribe, the class, the race, the faith, or, particularly in the modern world, the nation? …

The historical evolution of visions of international human rights that continues to this day started centuries ago with efforts attempting to address precisely these difficult and universal questions. … Moreover, this evolution began not with assertions of entitlements or demands for human rights but instead with discussions of duty.9

In the course of this evolution, all visions of human rights have met “powerful opposition and forces of resistance every step of the way,” Lauren says. This is because they have all “raised profoundly disturbing issues about what it means to be human, thereby directly threatening traditional patterns of authority and privilege, vested interests and prerogatives, …”10

Moral progress is achieved only when people overcome these self- and socially-imposed barriers. Visions of human rights help people to transcend these limitations because they “force [people] to test existing values, reexamine their assumptions, and sometimes change their minds.”11

Progress would not be possible if human beings did not have the capacity to engage in sympathetic understanding of the pain and needs of others. It is the “willingness and an ability to go beyond existing experience by means of imagination” that has permitted human rights to evolve to the point where they are today, and that will allow them to keep on evolving.12

Just as the human family is the key concept for Louise Arbour, the High Commissioner for Human Rights, so it is in Paul Lauren’s history. The evolution of international human rights is “inspired by visions of what it means to be truly human and a sense of responsibility to other members of the same human family.”13

The three types of violence against babies that are the subject of this book – infanticide, euthanasia, and the intentional

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9 Id., at 4-5.
10 Id. at 2.
11 Id., at 282.
12 Id., at 281.
13 Id., at 281.

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termination of a baby’s life during the pre-natal period—raise the profound and disturbing questions that Lauren speaks of. Are babies members of the human family? If so, what do we owe them? When one looks upon the present marginalization of the rights of babies, one sees a freeze-frame picture of a particular moment in the evolution of visions of human rights.

2. The three visions of babies

There are basically three visions about babies and the human family: (1) A child is a member of the human family prior to being born. Children in the pre-natal period of life deserve the same respect for their lives as any other member of the human family, and the state must protect them, just as it protects other human beings. (2) A child becomes a member of the human family when the child is born. Prior to the moment of delivery, the parents have, or should have, the right to kill their children as they wish. (3) A child is not a member of the human family until some period of time has elapsed after the child’s birth. Prior to that time, parents have, or should have, the right to kill their children as they see fit.

Under the first vision, the law should protect babies during the pre-natal period of their lives, as well as after birth. The General Assembly adopted this view in its 1959 UN Declaration of the Rights of the Child: the child “needs special safeguards and care, including appropriate legal protection, before birth as well as after birth.”14 The American Convention on Human Rights also illustrates the first vision. ACHR article 4 states, in part:

Right to life.1. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception.

Under the second vision, the law should protect babies only after they are born. This is the view found in the Innocenti Digest, published by UNICEF. The special issue on violence against children says: “A ‘child’ is defined [in this publication], as in the Convention [on the Rights of the Child], as everyone from birth to his or her 18th birthday” (emphasis added).15

However, “from birth” is the Digest’s definition, since it does not come from the language of the Convention. CRC article 1 states: “For the purposes of the present Convention, a child means every human being below the age of 18 years…” (emphasis added). “From birth” is simply the vision of the Digest’s editor of who counts as a member of the human family.16

Under the third vision, parents would have a grace period after the child’s birth in which they will have complete freedom to terminate the baby’s life. This is the vision of the controversial philosopher Peter Singer. He argues that parents should have the absolute right to kill their children up to the third month after delivery.17

Peter Singer’s writings are reputed to have been read by more people than any other philosopher in history, and, as a consequence, he has been highly influential in shaping people’s opinions and values. He is most famous for putting forth the view that human beings are nothing but animals, and consequently, their lives have no greater moral significance than the lives of any other creature in the animal kingdom. Singer also argues that the lives of human babies do not have any moral significance whatsoever until they reach the age of about three months.18

While Professor Singer’s third vision will strike many people as extreme, it should not be dismissed as unimportant. This vision, in one form or another, seems to lie behind the practice of infanticide (which is the topic of Chapter 3).

Which view did States have when they wrote the Convention on the Rights of the Child? As we will be seeing later (in Chapter 4), the CRC reflects the first vision, and so does State Party practice as shown in the implementation reports.

14 Third preambular paragraph, 1959 United Nations Declaration of the Rights of the Child. It is also reflected in Principle 4 of the UN Declaration: “The child shall … be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care.” The UN Declaration is reproduced in A Guide to the “Travaux Préparatoires,” at 642-44.
16 While Peter Newell is identified as the guest editor of this edition of the Digest, it cannot be assumed that, in an institutional publication, someone from outside the organization would have the final editorial say on controversial matters. For this reason, the main text reference to “the editor” is intended to be understood generically.
18 Singer knows with absolute certainty that parents must have the legal right to kill their post-natal children for any reason whatsoever, but he cannot make up his mind whether they should have this right for three months after delivery, or only for two months. Id.
Nuances in the visions

To speak of three visions does not imply that every adult can be placed unambiguously within one of the visions, or that all people within a given vision think exactly alike. The three visions are a framework to help us understand the differential valuation that results in acts of violence against babies, violence that is substantially different from what is suffered by adults. As with any kind of vision, we can expect to find individual variations in beliefs, and even self-contradictions, or at least ambivalences.

Consider, for instance, the remarks of Professor Philip Alston, a leading figure in international human rights law: “In the last resort it is only the people themselves who can assert and ensure respect for their own rights.” Since it is impossible for babies to “assert and ensure respect for their own rights,” Alston’s statement about human rights excludes babies and young children from the outset. Alston is an adherent of the second vision, as we will be seeing later, but, in some unspecified way, babies who have been born do not fully count as members of “the people.” Or consider the habit of using the pronoun “it” to refer to a baby, even though it would be unthinkable to do the same thing when speaking of an adult. In numerous ways, both large and small, differential valuation of babies is a common feature of life.

To say that there is differential valuation of babies is not to say that their physical well-being is being ignored. All States take special health measures to protect the lives of babies, and by working together bi-laterally, and collectively through the World Health Organization, UNICEF, and the World Bank, in particular, they have made extraordinary progress in reducing infant mortality. But the progress has been mostly in overcoming neglect: by the channeling of money into building public health care systems – providing clean water, immunizations, and treatment for diarrhea and malnutrition, especially – the lives of babies are being protected better than in any previous era of history.

However, progress in overcoming neglect stands in stark contrast to the lack of progress in preventing the intentional deaths of babies. Moreover, the success in overcoming neglect has come mainly from efforts based on humanitarianism and social utility, rather than through the assertion of the human rights of babies.

This section has looked at different perceptions of babies as members of the human family. The next section will examine some of the problems in taking babies seriously as holders of human rights.

B. Several factors work together to marginalize the right to life of babies

Four factors deserve particular mention as reasons for the marginalization of the human rights of infants, and the right to life in particular: (i) The classic understanding of rights excludes young children; (ii) The structure of the CRC inadvertently obscures the rights of young children; (iii) The CRC Committee’s reporting guidelines overlook violence against babies; and (iv) The realization of human rights depends on political work, but babies cannot be political actors.

1. The classic understanding of rights

For the past several hundred years, the classic understanding of “rights” in Western political philosophy has been based on the notion of the right-bearer as an autonomous individual. In addition, the classic understanding of rights has been preoccupied with “negative liberty,” like freedom of expression, in which the concern is about individual autonomy vis-à-vis the state, or freedom from external constraint.

Children are not autonomous, of course, due to their immaturity, and their socially and legally defined dependency. And since children are not autonomous decision-makers in relation to the state, they have not been taken seriously as right-holders in the traditional thinking about “rights.”

But all words have multiple meanings, and, in international human rights law, the concept of “right” is broader than in the historical usage. The root notion of “human rights” is respect for human dignity: Each right protects some aspect of human dignity; each right specifies something that the state must either do or not do, in respect to the human dignity of the individuals affected. This explains why half of the rights in the UN treaties are the so-called economic, social, and cultural rights: the interests that these rights protect are essential to human dignity, like health and education.

And it also explains why babies and young children are right-holders under the Universal Declaration, the two Covenants, and the CRC. Human rights are social constructs or “tools” for ensuring that every State respects the human dignity – the full membership in the human family – of each and every individual, at all times, in all places, under all circumstances. These four UN agreements do not limit rights to individuals capable of making autonomous decisions: the right-holders are human beings, period.

Personal autonomy can play an important role in many of the rights, to be sure, but freedom to live one’s life as one chooses is not the essence of human rights. For instance, the right to life is not aimed at protecting

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autonomous decision-making; it protects the most fundamental interest of all, a human being’s interest in living.

In sum, “right” has a richer meaning in international law than what is typically found in the writings of Western legal philosophers.20

But despite an intellectual understanding of these matters, neither the children’s right movement nor the broader human rights movement is free from the grasp of the classic notion of rights. The emphasis is still on autonomous decision-making, with less attention being paid to respecting human dignity or to affirming membership in the human family. For instance, human rights activists are still primarily concerned with civil and political rights. When the public hears that a government has put a restriction on speech, or that someone claims to have been tortured, everyone knows that a “human rights” issue is being raised. But when they hear about hundreds of thousands infants dying from a lack of basic immunizations, it is not perceived in terms of “human rights violations.” The failure to provide mass immunization does not concern a negative liberty right, and it is not seen as a human rights issue.21

Nowadays the dominant theme in the CRC movement is probably the “participation” of kids in the decision-making of adults, and the advocacy is based on treating the children as autonomous decision-makers.

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20 State implementation reports sometimes make it clear that “right” is not restricted to the classical understanding. E.g., Germany said:

In speaking of the “rights of the child” the Convention does not in each case mean rights in the sense that the child could autonomously make a disposition of his or her own free will or that he or she could invariably enforce these rights by legal action through a representative. . . . . The term “right” is used to describe the relationship of the child to these measures of protection because they serve the well-being of the child and he or she is therefore entitled to them. . . .

Germany, UN Doc., CRC/C/11/Add.5, paras. 11, 12. See also, Switzerland, UN Doc., CRC/C/78/Add.3, para. 46 (“The Swiss Civil Code makes a distinction between the enjoyment and exercise of rights. . . . Only persons who have attained majority and are capable of forming their own views can exercise civil rights. . . . In accordance with this definition, children do not satisfy the majority requirement and cannot therefore exercise civil rights.”); also paras. 47-59.

21 See, e.g., Philip Alston, “The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More For Reflection Than For Celebration,” in Jan Berting (et al), Human Rights in a Pluralistic World (Meckler, Westport, Conn., 1990), at 1-13 (criticizing Amnesty International for fostering in the public’s mind, albeit unintentionally, the classic understanding, to the detriment of economic and social rights).

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Unfortunately, the rhetoric being used to promote participation ends up marginalizing babies and their human rights.

Last year the Committee on the Rights of the Child held a discussion day on early childhood development, which concerns the stage of the human lifecycle that runs through the pre-natal period up to 8 years of age. Afterwards, in its General Comment, the Committee said:

Young children should be recognized as active members of families, communities, and societies, with their own concerns, interests and points of view. For the exercise of their rights, young children have particular requirements . . . .

This is similar to what the International Save the Children Alliance said in Children’ Rights: Reality or Rhetoric?:

[T]he Convention has a broad[] vision . . . . Children are seen as full human beings, rights-holders who can play an active part in the enjoyment of their rights. . . . Every child is seen as important, no matter what its abilities, origins, or gender. Their views and opinions are significant. . . . Children are seen as active members of their local communities and national societies. They contribute their labors to a variety of work and care responsibilities . . . . They play an important part in cultural and leisure activities . . . If encouraged, they become active and involved citizens.

Now, re-read those statements and ask yourself: Were those authors thinking of babies?

Babies certainly do have interests, but it is taking liberties with language to say that they have points of view. “Exercising” or “enjoying” a right requires some kind of consciousness of having a right, as well as an ability to make a decision to press a claim in the name of that right, things that rule out babies. And while babies certainly are members of families and of society, and while we all know how active they are when awake, babies don’t have care responsibilities, or contribute to the community’s leisure activities, or discharge the duties of citizenship. Even though the Committee is specifically referring to children in the early childhood stage of life and the Alliance is claiming to be speaking of all right-holders under the CRC,
their assertions actually exclude babies, because babies are not autonomous decision-makers in the sense in which these authors are speaking.\textsuperscript{22}

2. The structure of the CRC

Another factor contributing to the marginalization of the rights of babies is the structure of the Convention on the Rights of the Child.

The CRC is laid out in accordance with the same plan used in the two parent treaties, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The “umbrella” provisions are put at the beginning of the treaty in one part, with the following part containing what are usually called the “substantive” rights. In the CRC, articles 1 to 5 are the umbrella provisions and articles 6 to 40 are the substantive rights, with the umbrella provisions forming a part of each of the substantive rights. For instance, article 1 is the jurisdictional clause that defines who the right-holders are, and article 2 contains the right not to be discriminated against, on the grounds of race, sex, and so forth, in the enjoyment of the substantive rights: so the umbrella articles work in conjunction with the substantive rights, and vice versa. But whereas the Covenants use the label “Part” to signal the difference between the umbrella provisions and the substantive rights, the CRC requires the reader to figure out the division for themselves.

The first substantive right in both the ICCPR and the CRC is the right to life, which happens to be article 6 in both treaties. However, CRC article 6 actually contains three different rights, unlike its counterpart in the Covenant. CRC article 6 reads:

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

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

Paragraph (1) contains the right to life, and it corresponds with ICCPR article 6(1). But paragraph (2) not only contains a right of survival, it also contains the right to development, and this is a far more extensive right than the other two rights. In fact, it’s an all-inclusive right: because “development” is understood to include the “physical, mental, spiritual, moral, psychological, and social”\textsuperscript{23} dimensions of a child’s existence, it includes everything. This all-inclusive nature of paragraph (2) turns article 6 into a unique kind of right, one that differs fundamentally from all of the other rights in the Convention.

Article 6 is different because it actually encompasses, or subsumes, all of the other substantive rights in the treaty. While articles 1 to 5 are umbrella provision that attach to each of the substantive rights, article 6 is like a “parent-right” or mega-right because it contains all of the other rights. Articles 7 to 40 are particularizations of the State’s duties under article 6(2): they are “sectoral” rights, in the sense that the rights to education, health, and so forth, protect specific aspects or sectors of a youngster’s overall well-being. Each of the sectoral rights logically falls under the comprehensive obligation to ensure a child’s development: there is nothing in articles 7 to 40 which does not logically flow from the State’s duty to ensure development under paragraph (2).

At first glance, it may seem that adding the duty to ensure “development” to the duty to respect “life” would make article 6 a more powerful right. But this is not what has happened in actual practice. At the time that the CRC was being created, one of the state delegations warned that paragraph (2) would undermine the right to life in paragraph (1), but the conceptual and practical problems were not spelled out, and the warning went unheeded.\textsuperscript{24}

The problem is this: combining the right to healthy development and the right to life into one right confuses people as to relation between article 6(2) and the sectoral rights that follow. It encourages people to think that paragraph (2) is a right that is separate from, although complementary to, the sectoral rights, like freedom of association is linked to but distinct from the right to education, instead of seeing paragraph (2) as embracing all of the sectoral rights. And if people are confused about the CRC, then the children – the right-holders – will pay the price.

The text of CRC fails to make clear the relation between the duty to ensure development and the duties in the sectoral rights, and this lack of clarity is a structural problem because it sets the stage for misunderstanding.

\textsuperscript{22}The felt need to fit “children’s rights” into the rhetoric of participation leads to some interesting assertions. For an example of a commentator who tries to explain the CRC rights of newborn babies while unconsciously using the classical model, see Priscilla Alderson, “Can the youngest children be rights holders?” DCI Monitor (Defense for Children International, Geneva), v. 15, no. 3 (Sept. 2002), at 19-20 (“babies were able ‘to form and express’ their views”). Like Cinderella’s stepsisters trying to put on the glass slipper, babies must be autonomous decision-makers, even though it’s impossible.


\textsuperscript{24}A Guide to the “Travaux Préparatoires”, at 121, excerpting UN Doc. E/CN.4/1988/28, pp. 5-7, at para. 24 (“the representative of Venezuela said she … regretted the inclusion of paragraph 2”).
the Convention. And more than anything else, what has ended up turning a potential for misunderstanding into actual confusion is the Guidelines for the implementation reports.

3. The Committee’s reporting Guidelines

Since articles 7 through 40 are particularized applications of article 6(2), almost everything that a State has to say in its implementation report could be said under the heading of paragraph (2). That would be silly, of course, since commonsense tells us that information should be categorized under the relevant sectoral rights; for instance, what the State is doing to promote the development of children in the area of education should go under articles 28 and 29. This leaves very little for the State to report on under article 6(1), respect for a child’s right to life. Road accidents and health hazards fall under the right to health (article 24), and capital punishment, which the ICCPR regulates under the right to life, is forbidden by CRC article 37. So what is left to report on under paragraph (1)?

There are only three things that intentionally deprive children of their lives that occur in every country, things that all governments address through legislation and policies, and which therefore are matters to include in reporting Guidelines directed to all Parties. These three things are infanticide, euthanasia, and the intentional termination of the lives of children during the pre-natal period.

But the Committee’s Guidelines do not ask States to give information on these three problems, neither under article 6, nor under any other provision. And to make matters worse, the Committee downgraded a child’s right to life by reframing it as a “general principle,” and by shifting attention to the right to access to health care (under article 24).25

Since these three intentional causes of death are not obscure or trivial, omitting them from the Guidelines could be interpreted as a signal that the Committee on the Rights of the Child does not want to hear about them. And the subsequent history of the implementation, monitoring, and promotion of the CRC indicates that excluding them has had a negative effect on the activities of non-governmental organizations and intergovernmental agencies. When these organizations give information to the Committee during the review process, and when they conduct CRC training and advocacy, they routinely ignore these three problems. The most notable exception is the termination of the lives of female children during the pre-natal and neo-natal stages.26

The situation is dramatically different for the States that wrote and ratified the CRC. Despite the silence of the Guidelines, the overwhelming majority of initial reports give information on the intentional termination of the lives of children during the pre-natal period, either under article 1 (definition of the child) or article 6. States occasionally report on infanticide, but rarely on euthanasia. On the other hand, there is a second pattern: in a minority of reports, the State Party is silent, just like the Guidelines. (Chapter 4 gives a breakdown of the two patterns, and the relevant excerpts from all of the reports have been complied and are placed on the internet for easy reference.)

The initial report of the United Kingdom is a typical example of the second pattern. The section on article 6 consists of fifteen short sentences.

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25 The General Guidelines [for] Initial Reports – there are no specific guidelines – was issued in 1991. UN Doc. CRC/C/5 (1991). The relevant parts read:

General principles
13. Relevant information … should be provided in respect of: …
   (c) The right to life, survival and development (art. 6); …
   Basic health and welfare
19. Under this section States parties are requested to provide relevant information … in respect of: (a) Survival and development (art. 6, para. 2); ….

The General Guidelines [for] Periodic Reports – again, there are no specific guidelines – was issued four years later. UN Doc. CRC/C/58 (1996). For article 6, it reads:

40. Please describe specific measures taken to guarantee the child’s right to life [and to promote] the survival and development of the child, including physical,
mental, spiritual, moral, psychological and social development, in a manner consistent with human dignity, and to prepare the child for an individual life in a free society.

41. Information should also be provided on measures to ensure registration of the deaths of children, the causes of death and, where appropriate, investigation and reporting on such deaths, as well as on the measures adopted to prevent children’s suicide [sic] and monitoring its incident and to ensure the survival of children at all ages, including adolescents, and the prevention of risks to which that group may be particularly exposed (or example, sexually transmitted diseases, street violence). Please provide relevant disaggregated data, including on the number of suicides among children.

The periodic Guidelines on article 24, the right to health, run for over three pages, and, understandably, States report on the matters mentioned in paragraph 44 under the health section rather than under the right to life. The connection that the Guidelines makes between article 6 and article 24 in the health section is noteworthy for its circularity:

93. Please indicate the measures adopted pursuant to articles 6 and 24: … To ensure respect for the general principles of the Convention, [including] the right to life, and survival and development to the maximum extent possible.

26 CRC art. 45(a) allows non-state actors to participate in the reporting process.
The first sentence reads: “The United Kingdom fully accepts that every child has the inherent right to life.” Since that merely repeats the state’s obligation under article 6(1), and since this section of the report contains no further information on that paragraph, the statement gives the Committee no meaningful information. The last sentence under this section reads: “All of these issues [i.e., the things mentioned in the intervening thirteen sentences] are dealt with in greater detail in chapter VI- Basic health and welfare.” Thus, everything the United Kingdom told the Committee about the fulfillment of its article 6 obligations is superfluous. If article 6 had been officially removed from the Convention, it would have had no impact on what the United Kingdom said in its implementation report. The United Kingdom’s initial report gives the appearance that the Government considers article 6 to add nothing of substance to the Convention. For all practical purposes, the right to life, the right to survival, and the right to development have been replaced by the right to the highest attainable standard of health in article 24.27

We will return to the United Kingdom’s report in the discussion of infanticide and euthanasia in Chapter 3, but for now the point is simply to illustrate how the Committee’s reporting Guidelines have helped to marginalize the right to life of babies.

To sum up, the Guidelines’ failure to mention these three intentional causes of death is marginalizing the right to life of babies, and treating article 6 as a “general principle” has weaken the notion of rights: babies are just subjects of a principle. “Visions of human rights,” as Paul Lauren said, “strike at our very core.” They can make us ask, “[H]ow wide should be the circle of responsibility and what form should concern for others take?” Excluding three intentional causes of death from the Guidelines has encouraged people to exclude babies from the circle of responsibility. These topics are sensitive, and the Committee’s silence appears to have legitimated the corresponding silence of NGOs and intergovernmental agencies. Moreover, while the large majority of initial reports gave meaningful information about violence against babies, the Committee has tended to exclude them from their dialogues with States, so that the periodic reports are paying less attention to them (except for pre- and post-natal sex-selection against girls).28

4. Human rights work is political work

The last source of marginalization of babies that we need to discuss is the political nature of human rights work. One theme has run through the work of all five men and women who have served as the High Commissioner for Human Rights: There is a serious gap between what States have promised to do in the UN human rights agreements, and what they do in actual practice. Paul Gordon has put this problem in the context of the evolution of human rights. While there are a number of reasons for the gaps between the promises in the treaties and reality, progress can be very slow when human rights “threaten[] traditional patterns of authority and privilege, vested interests and prerogatives,” creating “powerful opposition and forces of resistance every step of the way.” Human rights do not evolve by “natural selection,” but through politics.

When it comes to babies and their human rights, there are two interconnected factors that work against their interests in political battles: (i) Babies are totally dependent upon adults to defend their interests, and (ii) the adults whom they most depend on are the actors who commit the three kinds of violence that are the subjects of this discussion. The link between the two is the fact that the adults most involved are civil society actors, rather than state actors.

Babies depend on adults

Rights are socially constructed “tools” for protecting the interests of the members of human society, and the processes of constructing, enforcing, and vindicating rights is political activity in which babies cannot participate.

Rights begin with political demands. When people feel that the state has violated their human dignity is some particular way, they demand

provisions of the Convention.” First, while Nowak goes on to place great importance on article 6 being both a right and a general principle, he never explains what the difference is between the two, and, as a result, the concept of right becomes increasingly weakened in his commentary. Second, he makes the astonishing assertion that “development” refers to “third generation rights,” and then confuses matters further by shifting to social and economic development. Id., at 5-9. Third, Nowak misses the point that arts. 7 to 40 -- rather than “many” -- are subsumed under art. 6(2); e.g., id., at 7 (“The contents of [development … are further defined, e.g., in Article 5, 18, 20, 23(3), ….”). Fourth, as a singular word, neither “right” nor “principle” can be used to refer to more than one thing, and the right to life (in art. 6(1)) is different from the right to survival and very different from the right to development (both in art. 6(2)). And fifth, Nowak drops the two rights to survival and to development by subsequently reducing article 6 to just “the right to life.”

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27 United Kingdom’s initial report, UN Doc. CRC/C/11/Add.1, paras. 121-127 (article 6).
28 For an illustration of the current state of confusion, see Manfred Nowak, Article 6: The Right to Life, Survival, and Development: A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff, Leiden, 2005). Nowak begins by saying, “As one of the four general principles of the Convention identified by the Committee, the right to life, development and survival serves as a kind of umbrella clause, which is further defined and elaborated upon in many other
formal recognition of their “rights” in national legislation or human rights treaties. The “victims” articulate their grievances and fashion their demands for action, with the assistance of other people who identify with them or their cause. All of this is political work, and it’s done by autonomous decision-makers. In a similar way, the creation of national and international legislation, and the subsequent enforcement of these laws, is political work performed by autonomous human beings.

Babies cannot be political actors. In both the pre-natal or post-natal periods of their lives, babies are dependent upon adults to defend their interests. Adults don’t assist these “victims” in articulating or asserting their (the victims’) rights-based claims; adults make all of the political decisions, adults do all of the work.

**Adults commit violence against babies**

In the three types of violence that are the focus of this book—in the pre-natal period—the primary perpetrator will usually be a non-state actor, someone who is either a parent or a member of the child’s family. The word “primary” is important because there are always several sets of actors. State actors set the legal stage, through the laws they write and administer, and on this stage private individuals, acting alone or in combination with others, commit acts of violence against babies. And what the stage actually looks like—what the law says is legal violence—will be determined mainly by the political work of civil society actors.

These national laws must also be written and administered within the framework of international human rights law. In the UN treaties, the State is the duty-bearer of the rights, not private actors. States often have to regulate the behavior of civil society actors in order to carry out their treaty obligations, of course, and this is referred to as the “horizontal effects” of human rights.

While the horizontal effects are usually only implied, they are explicitly recognized in the right to be free from violence in CRC article 19: State Parties must take measures to protect children “from all forms” of violence “while in the care of parent(s), … or any other person who has care of the child.” Regardless of whether the perpetrator is a state or a civil society actor, CRC right-holders must be protected from violence, and the State, and only the State, is the duty-bearer of this right. But realization of article 19 will require the passage of laws that put legal duties on private actors.

**Politics in the world of non-state actors**

As noted above, States have not been silent about the human rights of babies in their laws or their implementation reports, including rights during the pre-natal period, and this is in contrast to children’s rights NGOs. In accounting for the marginalization of babies, a few words need to be said about the political nature of CRC advocacy in the NGO world.

In the first place, children’s rights organizations are not accountable to babies. In promoting the CRC, it is often said that children’s rights are not a matter of charity, but of law. While there is a lot of truth in that rhetoric, it is also true that charity is the root of all the work done by children’s rights NGOs. CRC activists do what their hearts tell them do, not what international law compels them to do, because private actors have no legal obligations to children under the CRC. Older children and adolescents can at least complain when they think “adults are saying one thing and doing something else,” but babies can’t do even that. Babies cannot make these organizations defend or even respect their human rights; the NGOs set their own agendas.

In the second place, the charity that is in the heart is subject to the political forces that constrain people when they work in NGOs. Fundraising, the forging of effective coalitions with other NGOs, or even getting and keeping a job in an activist organization, are infused with politics. And the felt need to make political compromises tends to favor the lowest common denominator; activists holding the first vision of babies often feel pressured to yield to those who hold a different vision.

In the third place, the traditional approach to human rights advocacy is name-shame-and-blame—the vilification of the abstract state, or of specific officials who have authorized or committed torture, or other gross violations of negative liberty rights. But this approach is not suitable for protecting babies from violence under CRC article 19, not when it takes the form of infanticide, euthanasia, or the intentional termination of a baby’s life during the pre-natal period.

For one thing, the initiator of the violence is typically a private person, as already mentioned. For another, these private actors are rarely evil people, and often the circumstances under which the person commits the violence calls for much more understanding than the vilification approach allows for. The people who commit these acts of violence simply cannot be viewed as an abstract Other like a state. In fact, many people who work for human rights organizations probably know someone who has engaged in an terminal act of violence against a baby. Under these circumstances, the

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dehumanizing name-shame-and-blame has to be ruled out as a tactic for defending the human rights of babies. But human rights and children’s rights NGOs have been slow in moving beyond the traditional name-shame-and-blame approach, regardless of the issue at hand.

**Summary of Chapter 1: Marginalization of the Rights of Babies**

We have been looking at two major reasons for the marginalization of the human rights of babies. First is the difficulty of taking babies seriously as members of the human family, which results in the conflicts of visions. In the first vision, babies are members during the pre-natal period of the human lifecycle; in the second vision, membership is recognized only upon birth; and in the third vision, babies don’t belong to the human family until they are at some later period in the lifecycle.

Second is the difficulty in taking babies seriously as right-holders. We have looked at four barriers: (i) While respect for human dignity is the foundation of the UN human rights treaties, legal philosophers and human rights NGOs continue to emphasize autonomy, which eliminates babies as right-holders. (ii) Adding “development” to CRC article 6 set the stage for the overshadowing of the right to life. (iii) The Committee on the Rights of the Child excluded infanticide, euthanasia, and the intentional termination of the lives of children during the pre-natal period from its reporting Guidelines; they also shifted attention from the right to life to the right to health care, and then downgraded the right to life to a “general principle.” And (iv), ironically, the people that babies depend upon the most to protect their human rights are either the same ones who commit the violence against them (their parents or family members), or else the ones who have kept them off the children’s rights agenda (the children’s rights NGOs).

Despite these marginalizing forces, the Member States of the United Nations have formally recognized that babies are holders of human rights under the various treaties, and the large majority of them, in the implementation reports, have recognized babies as having CRC rights in the pre-natal period.

Before we look at violence against babies as a human rights issue under the Convention on the Rights of the Child, it will be helpful to start by laying a foundation. As *Children’s Rights: Reality or Rhetoric?* says, although “implementation [of the CRC] is impossible without a sound understanding,” in reality “there is an alarming ignorance of what the

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31 *Children’s Rights: Reality or Rhetoric?* at 287.
Chapter 2

Putting the Issues in the Context of International Human Rights Law

The “understanding of existing international norms is poor.” That is what professor Philip Alston wrote three decades after the adoption of the Universal Declaration of Human Rights. But even though a great deal has been written about human rights since he wrote that nearly a quarter of a century ago, it is probably safe to say that the misunderstandings have only increased.

Human rights advocacy tends to portray the UN treaties as a kind of legal code that can be directly applied to concrete situations with little or no intermediate judgments. Such rhetoric tends to speak of human rights in absolutists terms, which also overlooks the need for making moral and pragmatic judgments when applying the rights to real-life situations. This in turn fails to respect state sovereignty, the diversity of cultures in the world, and the fact that people of goodwill frequently come to different conclusions on questions of values and pragmatics. Moreover, commentators in the literature fail to reconcile the tensions in their writings, as for instance, when they begin with absolutist language and then moderate their claims, but without bothering to resolve the discrepancy.

These sources of confusion impede the discussions of many human rights issues. But the greater the impact that an issue has on the lives of ordinary people, or the more impassioned people feel about the issue (the two usually go hand in hand), the more trouble they will have in taking a “rights based approach,” when they think of the UN treaties as legal codes made up of absolute rules. Few issues impact more directly on ordinary people, or raise as much passion, as regulating violence against babies during the pre-natal period.

This chapter will be making a simple point, but one that is fundamental to discussing virtually any human rights issue under international law: The two Covenants and the Convention on the Rights of the Child are not legal codes made up of absolute rules; they are framework treaties that require States, and the societies they serve, to make moral and practical judgments in the realization of the rights.

A. The CRC is a framework treaty

A framework treaty is not a legal code

While framework treaties do contain some code-like provisions, there is a difference between a legal code and a framework treaty.

A legal code lays out concrete rules that must be strictly followed, like the rules that one sees in a tax code or a penal code. The officials who “implement” a code do not have to make case-by-case decisions about justice and fairness. If your income was this amount last year, the must pay this amount in taxes, and you must pay it by this date, for example. A code is largely “mechanical” because the lawmakers have already made most of the balancing decisions about fairness and practicality when they wrote the rules. The rules will carefully specify what conduct is prohibited and what conduct is mandatory, and, with equal care, the code will spell out the exceptions to the rules. The State enforces compliance with the code by a combination of positive and negative incentives, but primarily by imposing penalties for non-compliance.

Framework treaties, like the CRC, the ICCPR, and the ICESCR, work in a different way. A framework treaty establishes a vision that will guide an evolutionary process; it sets out guidelines or principles for States to follow; it establishes “mechanisms” that will serve as catalysts to the evolutionary process; and it sets in motion a socio-political dynamic that will drive the evolutionary process forward.

(i) The vision is respect of human dignity

The core vision behind all of the UN human rights treaties is that the state must respect the human dignity of each and every human being in society. Each of the rights contained in these treaties – the right to life, freedom of expression, freedom from torture, the right to education, and the right to an adequate standard of living, and so forth – obviously pertain to human dignity. “Human rights” are a “tool,” or a type of social construct, that humanity uses to help ensure that the state will respect the human dignity of everyone within its realm.

There is a corollary concept in this vision: Each State is answerable to the other States in the international community for its respect of human dignity. Moreover, as a member of the international community, each State has a duty to promote respect for human dignity everywhere in the world, a duty that is given formal expression in the UN Charter.

State officials respect human dignity through the ends to which they direct the state’s powers, and by the limitations on the means that they use to accomplish those ends. Although it is an oversimplification, the rights in the UN treaties can be thought of in terms of duties that pertain to either the ends or the means. For instance, rights to an adequate standard of living and to a primary education pertain to end objectives: government officials must direct their powers towards achieving these things for everyone. On the other hand, the right to a fair trial and freedom from torture pertain to limitations on the means to legitimate ends: state officials are not free to do anything they want to preserve order, simply on the grounds that it works; limits are necessary in order to protect human dignity.

Most of the disputes in human rights controversies are about the means the state is using to achieve its goals. The goals are nearly always stated in abstract terms, like maintaining order or raising the standard of living, and most disputes are about what constitutes a proper trade-off between the competing interests: Is it fair and just to impose these sacrifices on these people as the cost of achieving this goal?

In making these balancing decisions, international human rights law requires officials to respect the human dignity of each and every human being who can be affected. While sacrifices of various sorts have to be made to promote the welfare of society, every human being must be valued as equally precious and unique: human beings are not to be treated as mere means to an end, as it is often put.

In short, the human dignity of each and every person is the first foundational idea in international human right law. And the second foundational idea is that a state is accountable for how well it respects dignity; accountable to its citizens pursuant to the legal and social processes internal to that state, and accountable to the international community of states within the frameworks established by States, particularly under the UN Charter.

(ii) A framework treaty provides guidance for action

A framework treaty recognizes that the State Party has a great deal of discretion in moving towards the common vision; but the discretion, or “margin of appreciation” as it is often called, is not unlimited. It is this need to combine state sovereignty with international accountability that necessitates the framework nature of the United Nations human rights agreements.

A framework treaty provides guidance to States on how to go about achieving the vision of the treaty. The first source of guidance are the provisions that define the rights. While some human rights are concrete rules, like one would find in a code, most of them are generalized statements that point the direction that the States must move in.

The various rights in the CRC fall on a continuum that runs from the highly specific to the highly abstract. On one end of the spectrum, several rights in the CRC are concrete, code-like rules: The prohibition against torture, and the ban against the use of capital punishment against minors, are two such highly-specific rules (article 37(a)).

At the other end of the spectrum are rights that are idealized end-goals. The progressive right to an adequate standard of living (article 27), and the progressive right to a free education aimed at realizing one’s “fullest potential” (articles 28 and 29), are idealized goals. These rights are not laid out in concrete do’s and don’t’s of State behavior like one finds in a legal code.

Most of the other rights in the CRC fall between these two extremes. On the one hand, these other rights are not concrete rules that can be “mechanically” applied to real-life situations. Most CRC rights require the State to make balancing decisions in order to translate the abstract statements in the articles into what the young people are actually entitled to enjoy. On the other hand, these other rights have more tangible substance than the idealized goals. In other words, most of the rights in the CRC are outlines for action that allow each State wide discretion in an evolving process of moving towards the ideals of the treaty’s vision.

The framework approach can be illustrated by some of the juvenile justice provisions in the CRC. For example, article 40(3) says:

State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children [and adolescents under 18 years] alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

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(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) Whenever appropriate and desirable, measures for dealing with such children [and adolescents under 18 years] without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. (Emphasis added.)

The words shall seek to promote in the first paragraph point out the direction the State must move in, rather than impose an obligation to take any particular concrete step. Moreover, the establishment of laws “specifically applicable” to juvenile offenders is a bare outline, which the State must fill in as it progressively advances towards the vision.

On the other hand, the requirement in paragraph (b) to establish a minimum age is concrete enough to be a rule. But since this obligation is qualified by the shall seek to promote clause in the first paragraph, it is not, strictly speaking, a concrete rule like we would find in a tax code. A tax code will say, “If your income is this much, you shall pay this amount in taxes,” not “you shall seek to pay this amount.”

Finally, in paragraph (b), “measures for dealing” with juvenile offenders “without resorting to judicial proceedings” is not an idealized goal but a relatively clear call for action. Still, it is clear only because many States have already developed such measures in their national juvenile justice systems, and have then incorporated them into the Beijing Rules, the Tokyo Rules, and other UN agreements. So one fills in the outline of paragraph (b) by referring to these other documents.

The State is the duty bearer

In the Convention on the Rights of the Child, and in all of the other UN human rights treaties, the duty-bearer is the State, and individual human beings are the corresponding right-holders. It is the State – and only the State – that is the duty-bearer. Consequently, only the State can violate the human rights contained in the UN human rights treaties.34

Horizontal effects

While the State – and only the State – is the duty-bearer of human rights, it cannot fulfill its human rights obligations without passing national or “domestic” laws that regulate the conduct of private persons. This is referred to as the “horizontal effects” of international human rights law. A person’s right to reputation requires the State to pass laws against libel and defamation, for instance. The right to compulsory primary education requires laws that compel parents to send their children to school. And the right to a fair trial requires the State to raise revenue to pay for its judicial system, making tax laws one of the horizontal effects of its treaty obligations.

Because “horizontal effects” refers to the State’s domestic laws, every state law will also define duty-bearers and corresponding right-holders under national law. Often times these parties will be private persons. For example, when a newspaper editor slanders someone, the right-holder is the injured individual, and the editor and the business enterprise that owns the paper are the corresponding duty-bearers. But they are right-holders and duty-bearers under state law, not international law.

When a private person violates a national law that has been enacted as part of the State’s fulfillment of its human rights obligations, the private actor does not violate “international human rights law”: the private person violates state law. If a State has not taken reasonable steps to pass and enforce domestic laws, as required by the “horizontal effects” of international human rights law, the State will have violated human rights. But the newspaper editor who slanders someone, and the mother who does not send her son to school, and the tax-payer who cheats the government, are the duty-bearers of state law obligations, not international law obligations. As private actors, they do not violate human rights norms.

(iii) A framework treaty establishes “mechanisms”

A framework treaty usually establishes a monitoring body to help drive the evolutionary process forward. This mechanism provides guidance in how to move towards the common vision. It also stimulates States to move forward as quickly as they can. And the monitoring committee, acting on delegated authority from the Parties, also provides a forum for holding States accountable. A Party describes its progress in realizing the rights in the treaty, and, in a dialogue with the committee, it gives its justifications for why it has made the policy choices it has in the realization of each of the rights. More importantly, the records – the implementation report, the dialogue with the committee, committee’s concluding observations, and so forth – provide a documentary basis for the States Parties to hold each other accountable for how they are respecting human dignity, within the framework of the treaty.

34 A non-state actor can be complicit in a State’s violation of human rights, of course. Complicity – or aiding and abetting – would occur, for instance, if a private person bribed the police to attack a group of demonstrators. Moreover, a private actor can become a state actor when accepting a delegation of authority.
For instance, the CRC requires State Parties to submit implementation reports to the Committee on the Rights of the Child, which then conducts a dialogue with each State, and issues recommendations (articles 43 to 45). The treaty-monitoring bodies for all of the UN human rights treaties encourage the State to consult with civil society in the preparation of its reports. They also receive “shadow reports” from non-governmental organizations, as well as information from UN agencies, and this assists them in their dialogues with the States.

The reporting process – the dialogues and the recommendations – is an important source of guidance to States as they move towards the common vision, and it is an important mechanism of accountability. The treaty-monitoring bodies are committees, not courts, and their members are not given the authority to make legally binding decisions about state party compliance or the meanings of the rights. The ultimate sources of accountability for treaty compliance are, first, the citizens vis-à-vis their own Government, and second, the States Parties vis-à-vis each other. But the monitoring bodies play a vital role in promoting the fulfillment of human rights obligations.

In addition, the Committee on the Rights of the Child is just one body in a family of UN institutions. The work of each treaty-monitoring body overlaps with and reinforces the work of the committees that oversee the ICCPR, ICESCR, and other UN human rights treaties. Moreover, these bodies work within the broader context of the Sub-Commission and its parent body, the Commission on Human Rights (now replaced by the Counsel), and both of these bodies report to the UN General Assembly. There are also special rapporteurs, and the studies conducted under the auspices of the Secretary General, such as the present Study on Violence Against Children. Finally, the work of the treaty-monitoring bodies intersects with the work of the specialized UN agencies, like the World Health Organization, UNICEF, and the United Nations Development Program. All of these institutions interact with each other, and they all help to guide and stimulate States as they move towards the common vision. All of these “mechanisms” provide sources of guidance, stimulation, and accountability.

In short, the State is still the sovereign under the UN framework treaties: it is the duty-bearer of human rights toward its citizens, and it must enact its own laws, and enforce them, and all of this calls for the exercise of discretionary judgment. But the exercise of this sovereignty is now subject to international accountability through a variety of means and forums.

(iv) A framework treaty sets a socio-political dynamic into motion

A legal code is an end-product of a complex process of State policy-making: all of the carefully laid out rules in the code work together to achieve the various policy objectives of the legislators. In a framework treaty, most of the policy decisions are left to the future decision-making of the individual State Parties as they move towards the vision. A framework treaty will be successful to the extent that it is able to stimulate a strong socio-political dynamic in each State. What laws a particular State enacts, and how well it enforces or carries out those laws, is very much a product of the socio-political processes within that State.

The CRC stimulates this socio-political dynamic by extending the rhetoric of “rights” to adolescents and children, including babies, even prior to birth. They are not to be treated with mere charitable forbearance, but respected as holders of human rights, just like adults are right-holders. The CRC also stimulates the dynamic by requiring the State to teach youngsters their rights (article 42), which, over the course of time, will dramatically change societal attitudes about kids.

Moreover, the CRC Committee encourages States to create institutions to stimulate the process. Setting up an omnibus-office for children’s rights along with an independent human rights monitoring agency, and enacting laws that require child/adolescent-impact assessments before government agencies take action, are examples of new state structures that help to translate the CRC into national laws and policies.

Another powerful component of the process is the extensive networking and coalition-building that is going on among “children’s rights” NGOs. This is happening at the local, national, and international levels, and the result is the changing of attitudes and the influencing of policies. For example, States are writing new treaties to promote the rights of young people, they are reforming their national laws, and they are starting to allocate more of their annual budgets to kids.

Finally, there is a trend in using the CRC in national and international courts. Even if the judges don’t use the CRC rights as a direct source of law, they are starting to use them as “interpretive aids” in the application of national and regional laws.

These socio-political processes not only stimulate the State to take action, they also are a source of the evolving visions of human dignity.

To summarize: While the CRC has turned out to be one of the most successful human rights framework treaties, all such treaties work in the same way. A framework treaty sets out a common vision. It provides guidance – rather than a comprehensive set of detailed rules – about what
the State should be doing to realize the vision, although the treaties usually contain some code-like rules. It creates a mechanism, within a constellation of other UN institutions, in order to ensure international accountability. And it sets into motion a socio-political dynamic that will drive the evolutionary process forward.

To say that the right to life of babies is being marginalized is to say that the framework process has not been functioning as well in respect to babies, and their rights under CRC article 6, as it has in regard to other groups of right-holders and to other rights.

B. Absolute Rights versus Context-dependant Rights

There is a strong tendency for people to speak of human rights in absolutist terms. This tendency is understandable since human rights work is essentially political work, and it is common for political actors to make categorical demands, to speak in terms of clear-cut “black and white.” But the political processes that underlie human rights work often end up obscuring the real nature of human rights.

While a legal code will contain numerous categorical rules – in the general form of, “Do this under these circumstances . . . .”, “Do not do this when . . . .” –, the UN framework treaties take a different approach to rights. The UN treaties are made up of what can be called “absolute rights” and “context-dependent rights.” The State implements an absolute right by applying the statement of the right in the treaty to real-life situations without an intermediary discretionary judgment. An absolute right is a concrete rule, a highly specific “do” or “don’t” like the rules that one finds in a legal code. The prohibition of using the death penalty on minors is an example of an absolute right. On the other hand, the State implements context-dependent rights by making numerous, intermediary balancing decisions. And almost all human rights are context-dependent rights.

1. Context-dependent rights

The hallmark of a context-dependent right is the need for the State to make discretionary balancing judgments as it translates the abstract statement of the right in a treaty into concrete national laws or policies. These balancing judgments always have to be based on the real-life conditions that exist at a given time and place in the State in question; hence the name “context-dependent.” Almost all human rights require these intermediary judgments about the trade-offs between competing interests.

The right of expression is a good example of a right that requires a balancing of interests. In the ICCPR, article 19 states that:

2. Everyone shall have the right to freedom of expression; . . . .

3. The exercise of the rights provided for in paragraph 2 . . . may . . . be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In order for the State to apply this right, it must conduct a situation-specific balancing judgment. It must balance a right-holder’s interests in saying a particular something against the interests of other people, including the interests of society as a whole, as indicated in the broad concepts of “public order,” “morals,” and “the rights of others.”

Article 19 is actually composed of two competing principles. Paragraph (2) is the principle that a person should be free to say whatever that person pleases. Paragraph (3) is the principle that people are not free to say what they please when the welfare of others could be impaired. The two competing principles must be balanced in order to apply freedom of expression to any real-life situation.35

Context-dependent rights exist at two levels: the abstract and the concrete

Once we recognize that freedom of expression in article 19 is made up of two competing principles, an interesting question is raised as to where the right resides. Is the right in paragraph (2), as the wording seems to indicate? or is it in the conjunction of paragraphs (2) and (3), given that every instance of the exercise of the right must entail a balancing? The most helpful solution is to say that every context-dependent right exists at two levels: the abstract and the concrete.

The abstract right of free expression is the principle stated in paragraph (2). Everybody has the abstract right at all times, places, and circumstances: it is universal and unalienable. A person cannot exercise or enjoy something in the abstract, however; a right can only be enjoyed in a concrete situation. This takes us to the second level.

35 Professor Dworkin makes a helpful distinction between principles and rules; a principle must always be balanced against one or more competing principles, a rule is more or less mechanical. Ronald Dworkin, Taking Rights Seriously (1977), at 22-28.
The **concrete right** is what the balancing decision produces in a specific situation. In this illustration, this means that it is the conjunction of paragraphs (2) and (3).

For example, Mr. Smith is a newspaper editor. He **holds** the abstract right of expression under paragraph (2) at all times: he has it whether he is awake or asleep, and irrespective of whether he has anything he wishes to print in his newspaper. But Smith **exercises** or enjoys his abstract right only when he acts in a concrete situation. If he acts by publishing a paper, that act will be subject to a number of legal restrictions. Smith will have to have a business license, and he will have to comply with copyright laws, tax laws, national security restrictions, and slander laws, for instance. All of these laws limit Smith’s enjoyment of his abstract right of expression under paragraph (2) by balancing his interests against the interests of others according to paragraph (3). Smith’s **concrete right** to expression is what he is allowed to do as a result of these balancing judgments. Whether or not the state **violates** Smith’s abstract right of expression will depend upon whether it has made a **proper balancing** of interests in each of these laws.

Let us say that Smith exercises his right of expression by printing an editorial that criticizes a political figure for a particular business dealing. Let also say that Smith made some serious mistakes about the facts, and the political figure brings legal action for slander. Smith admits that he made a careless error, and argues to the court that the slander laws should only punish an editor who acted maliciously or recklessly. The political figure argues that the slander laws should protect him even from negligence, just like it protects ordinary citizens from falsehoods made in good-faith. The political figure demands his human right to privacy and protection of reputation and honor under ICCPR article 17. Let’s also say that the legislators established a recklessness standard for newspapers, but the trial court strikes it down on the grounds that it violates the human right to privacy and reputation. The trial court substitutes a negligence standard for the recklessness test. The case now goes to the nation’s highest court. How should the court rule: Should political figures be protected by the same standard as everyone else (i.e., strict liability for a false statement that damages a reputation)? or by a negligence standard? or by a recklessness test?

Neither freedom of expression in ICCPR article 19, nor the right of privacy and reputation in article 17, tells us the answers to the balancing questions in Smith’s case. The ICCPR is a framework treaty, and these two human rights are context-dependent rights. Each State has the responsibility and the right to make its own judgments about the proper reconciliation of the competing interests. But it does not have complete freedom to draw whatever lines it wants: the ICCPR subjects the State’s judgment calls to international accountability.

**Most human rights are context-dependent**

Nearly all of the rights in the CRC and the two Covenants are context-dependent, and the drafters used a variety of devises to introduce the need to make compromises between competing interests. Some rights contain a complex limitation clause like the one that we have just been looking at in the right of expression. Another device is to make the concrete enjoyment of the right dependant upon the state’s resource capabilities. For instance, all of the so-called “social and economic rights” are expressly subject to such progressive implementation. Another technique is to add qualifying words or phrases directly to the abstract right, like “appropriate.” Other times the need for balancing is a common sense implication of the fulfillment of the right in question. For instance, a defendant’s right to representation in a criminal case is not expressly conditioned, but it would be absurd to claim that the State has to pay for all of the legal expenses for all accused persons, regardless of its ability to pay or the defendant’s ability to pay. Despite a surface appearance of unlimited entitlements or absoluteness, common sense tells us that the right cannot be enjoyed without the State making trade-offs among competing interests.

2. **Absolute rights**

Absolute rights, on the other hand, do not permit the State to make trade-offs. The statement of the right in the treaty is applied directly to real-life situations without any intermediate balancing decision. In contrast to context-dependant rights, absolute rights exist at only one level; an absolute right is a concrete entitlement.

There are only a few absolute rights in the UN treaty system. They include, at least: freedom from slavery; freedom from torture; the rights of a minor not to be subjected to capital punishment; and the right of non-discrimination on the basis of certain specified grounds, such as race, sex, language, and religion. (That is to say, freedom from the state using classifications based on race, etc. to impair a person’s enjoyment of a human right.) These rights are concrete rules that do not permit case-by-case balancing decisions.

When it comes to absolute rights, one can say that the various balancing judgments have been considered by the UN lawmakers and rejected. In the case of torture, for instance, the Member States of the UN considered what has happened throughout history as governments have used torture to maintain law and order, and to achieve a number of particular
objectives, like stopping terrorist attacks. They took into account the possibility that in some situations an act of torture might produce some good for society, and they balanced that with the tremendous amount of harm that torture has inflicted on humanity, usually in the name of the promoting the public’s welfare. The framers of the treaties made the policy judgment that States should not be permitted to balance the interests of particular candidates for torture against the public’s interests on a case-by-case, or context-specific basis. They concluded that international law must categorically deprive States of the discretion to use torture as means for protecting the public’s interests.

Several words of caution need to be inserted when speaking about absolute rights.

First of all, the term “absolute right” is not to be confused with what might be called cosmic absoluteness, or an absolutely-absolute right that can never be subjected to any qualification under any circumstance at any time in human history. Trying to make such an absolute claim would take one into debates about transcendent morality, and would require foreseeing the future.

Secondly, the notion of “absolute right” does not take into account the doctrine of necessity, the legal defense for justifying a departure from a legal obligation under extraordinary circumstances, and it does not consider the possibility that a State might be able to make a valid reservation at the time of ratification, exempting itself from full compliance with the right in question. Discussing those issues here would require the application of two bodies of law that are not well developed in international law. Most importantly, the theoretical possibility that a State might use one of those “escape hatches” to qualify an absolute right does not deprive the taxonomy of its usefulness. Just the opposite: it is precisely because the UN lawmakers made several human rights absolute that gives rise to any need to talk about the possibility of an escape hatch.

To sum up: “absolute” and “context-dependent” rights are terms-of-art in a two-pronged classification system that hinges on balancing decisions. The UN lawmakers either wrote a given right so that balancing is required, or they did not. Determining the validity of reservations and the legitimacy of claims of necessity involve other bodies of law, and questions of transcendent morality are not legal questions.

C. The right to life is context-dependent

The right to life is not an absolute right. It is context-dependent, so what a person is actually entitled to enjoy will depend upon how the state lawmakers have balanced the competing interests in the situation at hand.

The ICCPR makes it clear that the right to life is context-dependant. ICCPR article 6(1) says: “No one shall be arbitrarily deprived of his life.” The word “arbitrarily” subjects the right to balancing. CRC article 6 does not contain any express qualification. But common sense tells us that the right cannot be absolute.

A few illustrations demonstrate that the right to life in the CRC cannot be absolute. For instance, a 17-year-old tries to kill a police officer. If the youngster’s right to life were absolute, then the police officer – an agent of the State – could not use deadly force to save his own life. The CRC would require that the police officer intentionally allow himself to be murdered!

While one can say that, at the most fundamental level, the lives of the teenage assailant and the police officer are of equal moral value, society must still make a choice when the two lives are pitted against each other. And society tips the balance in favor of the police officer, taking into consideration a number of factors in addition to the intrinsic moral worth of each human life.

Automobile accidents are another example. Car accidents are a major cause of death of youngsters under the age of 18. The only way that a State can guarantee that no child or adolescent will be killed by a motor vehicle is to totally outlaw all cars, trucks, motorcycles, and other such machines. As long as a State permits people to use motor vehicles, kids will be killed. So an absolute right to life will require an absolute ban. However, a total ban would mean that there would be no ambulances to take children to the emergency room. And there would be no fire trucks to save them from fires. And grocery stores would not have trucks to bring food in from the farms, and farmers would not be able to use motor vehicles to grow the food. So an absolute ban on motorized vehicles would cause widespread death. Which means that an absolute right to life is a self-contradictory notion.

The activities that a society must engage in to survive will inescapably create risks of death. The task is to “manage” those risks so as to produce as much good to society as possible, while keeping the “costs” – including the loss of human life – to an “acceptable” level. That requires judgments about trade-offs, and only a context-dependent right to life will permit such balancing decisions.

Finally, an absolute right to life would mean that each child would be entitled to an unlimited amount of medical care from the State. If a particular child in a developing country needs a certain type of cancer
treatment, and the equipment and personnel needed to provide the treatment would cost a million dollars a year, the State would have to spend the money. Of course, spending that amount of money on one individual will require the State to take money away from the needs of other people, including children. And that resource allocation would end up causing other lives to be lost, one way or another.

The right to life is very much dependent upon the right to health care in article 24. But the framers of the CRC made it clear that the right to health is context-dependent, or subject to decisions about trade-offs. CRC article 4 specifically says that the enjoyment of social and economic rights is subject to the resources that are “available” to the State Party, and that qualification recognizes the need for balancing judgments. But the right to health would be a context-dependent right even without article 4, since common sense tells us that realization of that right depends on the expenditure of finite resources, and finite resources always require decisions about trade-offs. Because the right to health is context-dependent, the right to life has to be context-dependent as well, since enjoyment of the later depends heavily upon enjoyment of the former.

Summary

The right to life in CRC article 6 is inherently dependent on context-specific judgments. While ICCPR article 6 makes this clear by inserting the word “arbitrarily,” the right to life would be context-dependent even without the explicit qualification. Likewise, common sense tells us that we must read into CRC article 6 a no-arbitrariness, or a reasonableness or proportionality, requirement. At the abstract level, every human being holds the right to life at all times, in all places, and under all circumstances: it is inalienable; it can never be taken away. But the actual enjoyment of the right to life at the concrete level, what any particular individual is legally entitled to enjoy under international law, is context-dependent. And these balancing judgments must not be arbitrary. They must always be reasonable, or “proportionate.”

The real issue about the right to life is not the need for balancing, but the attitudes of the people who make the decisions about the inevitable trade-offs. A decision-maker must truly value the human beings whose lives are at stake. When it comes to violence against babies, the critical problem is often the differential valuation of the lives of babies, in comparison with the valuation of the lives of adults. The various controversies over the intentional termination of the lives of babies usually boil down to conflicts of visions about who is, and who is not, a member of the human family.

D. Sovereignty and accountability

Under the historical notion of sovereignty, each state in theory conducted its internal affairs as it saw fit, without interference from or accountability to other states. Limitations upon its treatment of its own citizens were exclusively a matter of internal laws and customs, subject to some narrow exceptions. International human rights law fundamentally changed this traditional understanding. Once a matter is brought under the scope of a UN human rights treaty, it is a permissible subject for scrutiny by other States; indeed, international accountability becomes mandatory under the UN framework agreements.

Human rights rhetoric sometimes gives the impression that international human rights law has displaced the notion of state sovereignty. This is a serious exaggeration. States write the human rights treaties, and they make the decisions to ratify them, with or without reservations. In the former Commission on Human Rights and in the new Counsel, in the General Assembly, and in the Security Counsel, States are acting as co-equal sovereigns. The international organizations established under the UN Charter, the human rights treaty-monitoring bodies, and the present UN Study on Violence Against Children, are creations of States acting as sovereigns, and the created entities act pursuant to delegated authority. States in the past created the traditional understanding of sovereignty, and States in the present have modified it; but they have not nullified it. The International Criminal Court is certainly an innovation, for instance, but it’s still a creation of States acting as sovereigns.

In its first session, the Committee on the Rights of the Child discussed the division of authority between it and the State Parties. As Mr. Kolosov observed, “The rule [is] that only States parties [are] entitled to...”

36 As mentioned previously, commentators tend not to reconcile absolutist statements with subsequent qualified statements. For instance, Nowak first says, “[T]he inherent character of the right to life can be interpreted as an indicator for the non-derogable nature of this right even in times of war and public emergencies...” with citation to ICCPR, art. 4(2)], and as an indicator for its recognition as jus cogens under international law.” Nowak, Article 6, at 18 (emphasis in original). While Nowak does not explain what “inherent” means, and even though “indicator for its recognition” borders on nonsense, the reader is given the impression that the right to life cannot be qualified. In the next paragraph, however, Nowak says that the right to life is not absolute, that it only prohibits “unjustified” interference. But he doesn’t explain the connection. For instance, he does not explain that any infringement meeting the balancing test in ICCPR art. 4(2) would not be an "arbitrary" or unjustified balancing decision under the right to life in ICCPR art. 6. That is to say, the set of all state actions coming under the art. 4(2) test is a subset of “not arbitrary”; art. 6 is a context-dependent right, and the public emergencies referred to in art. 4(2) are merely one particular context: thus the “arbitrary” qualification is a built-in derogation clause, so to speak.
give a formal interpretation of the Convention." The qualification “formal” is crucial since a treaty-monitoring body cannot conduct a dialogue with States if its members haven’t given some meaning to a right, and everyone is entitled to interpret a legal text as part of their freedoms of opinion and expression. By “formal,” Mr. Kolosov means the authority to make an official or definitive interpretation, one that is binding on the Parties. And the plural “parties” is equally important. Each Party must take responsibility for applying the rules of legal interpretation when it interprets a treaty provision, but each Party does not have the right to unilaterally decide what the definitive meaning is.

In addition to recognizing the rights of individuals, Parties to a human rights treaty make legally binding promises to each other, so each State is both a right-holder and a duty-bearer to each other State in respect to the obligations imposed by those rights. It is ultimately for the State Parties collectively to determine what the rights mean, including the setting of limits to discretionary judgment in the fulfillment of context-dependent obligations, the determination of violations, and ensuring accountability for compliance. The various mechanisms that they create, like the treaty-monitoring committees, the Sub-Commission, and the special rapporteurs, play important support roles, but the final authority rests with the States collectively, within the frameworks of the treaties and the UN Charter.

When one reads the human rights literature, it is easy to come away with the impression that the definitive interpretation of the rights in the UN treaties is a matter for judges, treaty-monitoring committees, and other actors, rather than, as Mr. Kolosov explained, the State Parties collectively. But over the years, confusion has set in throughout the entire field of international human rights law. One of the sources of misunderstanding is the relative inaction of States. By missing opportunities to set the record straight as to where final authority rests, and by not engaging vigorously enough in the collective processes that are necessary to arrive at a consensus about the meanings of the rights, States have failed to fully assert their authority. And as other actors fill the void, they affect the public’s perceptions of the role of States.

Nevertheless, the mainstream understanding is that States, acting collectively under the frameworks of the Charter and the treaties, have the final authority to hold their co-equal partners accountable for complying with international law.

Summary of Chapter 2: Putting the Issues in the Context of International Human Rights Law

The rest of this book will discuss three kinds of violence against babies, all of which fall under the scope of the UN Study, since the Study uses the Convention on the Rights of the Child as its principal frame of reference. The right to life (article 6), and freedom from violence (article 19), are context-dependent rights that require balancing decisions; States have the sovereign right to make these decisions, but their judgments are subject to accountability to other States through a variety of mechanisms. One of these mechanisms is UN Study on Violence Against Children.

At present, it appears that the authors of the Study have not wanted to discuss infanticide, euthanasia, and the intentional termination of the lives of children during the pre-natal period of life. But regardless of what is in the Study, States have rights and duties of accountability, as UN Member States and as Parties to the CRC. In any UN forum in which the Study is relevant, they have the duty to open themselves to accountability, and the right and the duty to hold others accountable for how the CRC rights of babies are being respected. And as co-equal members of the community of states, each State has the right and the duty to work with each other State to advance the realization of all human rights, including those of babies.

37 UN Doc. CRC/C/191/SR.14 (Oct.9, 1991), at para. 28. Mr. Kolosov is a professor of international law, and has served on several treaty-monitoring bodies.
38 In the same discussion, Marta Santos Pais said “the Committee was not empowered to interpret the provisions of the Convention.” Id., at para. 29. She must be understood as meaning a formal or binding interpretation, agreeing with Kolosov’s remarks.
Chapter 3

Infanticide and Euthanasia

A. A summary of the main reasons for infanticide and euthanasia

Infanticide

The mere fact that our language contains the word “infanticide” tells us something important. The term refers to the “killing of an infant.”

But our everyday language contains no similar term that refers to the killing of the members of any other demographic group. The word “homicide” refers to the accidental or intentional killing of any person, and a few decades ago “genocide” was coined to refer to killing that is aimed at eliminating an entire group of people because of their race or ethnicity. But the deliberate killing of infants has been a unique feature of human society – a practice so old, and widespread, and enduring – that it has always needed its own term.

Infanticide is unique not just because it pertains to an age-defined demographic group. The practice is unique because it entails double standards.

In the first place, the reasons actors use to justify the killing of babies are not considered legitimate as reasons for killing adults, adolescents, or even older children. While there are no global statistics on the incidence and causes of infanticide, the four most likely precipitating reasons are: (i) The baby possesses an undesirable characteristic. In particular, (a) the child is the “wrong” sex, or (b) the child has a physical disability, (c) deformity, or (d) mental impairment. (ii) The baby is an economic burden. (iii) The baby is a psychological or social burden. For instance, the existence of the baby will expose the parent(s) or family to social stigma, such as when the child is born to parents who are not married, or when a baby is conceived as a result of forced sex. Social attitudes like these can induce the parent(s) to feel intense shame and guilt, as well as hostile feelings towards the infant. In addition, societal attitudes can result in social exclusion of the parent(s), and can also extend to other members of the family. And (iv), the baby has a terminal illness that is causing great suffering, so the actor considers killing the baby to be act of mercy.

Most of these motives can play some role in the killing of adults, as in the case of honor killings, for instance. But infanticide is still a unique phenomenon. When adults intentionally terminate the lives of other adults, it is usually because the targeted person is seen as posing a physical threat, or for some other reason that is seen as deserving of death. Examples include the killing of soldiers in combat, pay-back killings between social groups, gang fights, self-defense, and capital punishment. When it comes to infanticide, by contrast, the child is innocent of wrongdoing and poses no threat to the life of the adult who is doing the killing.

Another way infanticide exhibits a double standard is that many countries make infanticide a separate crime, a crime that is less serious than murder. In UNICEF’s *Innocenti Digest*, the issue on “Children and Violence” complained of this aspect of the double standard:

Infanticide remains defined in many legal systems as a lesser crime than murder, although it involves the intentional killing of a baby. The rationale is to provide a special defense for mothers suffering psychological trauma as a result of birth. However, in many of the same legal systems, there are generally recognized defenses of “diminished capacity” to charges of murder which could be applied in special cases. It therefore seems clear that the roots of the special status of this crime lie in regarding an infant’s life as of less worth than that of an older person.

The *Innocenti Digest* devotes a page to the issue of infanticide, which is to be welcomed since the topic is usually not raised in the CRC literature, and, on the occasions when it is mentioned, it tends to get less than a sentence’s worth of attention. As the purpose of this book is to serve as a resource to States, it may be helpful to make a few remarks about the Digest’s discussion.

The Digest is making three points. The first is that defining infanticide as a separate and less-serious crime is a double standard, a differential valuation of the lives of babies. That is also what this book has said.

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40 There are other motivations as well. Some of the less frequent ones are: (v) Killing the infant is a way to inflict injury on another person or community. (vi) The baby is killed in a ritual sacrifice or as part of a cultic practice. (vii) The life of the infant is intentionally terminated for the purposes of “eugenics” – the aim is to improve the race, the community, or the family line by making sure that children will be above average with respect to certain desired characteristics. (viii) The person doing the killing is mentally ill. In countries where infanticide is statistically infrequent, this last factor will account for more of the cases.
The Digest’s second point is that “the roots of the special status of” the crime of infanticide is the differential valuation of the lives of babies. While the thrust of the second point is undoubtedly correct, it lacks nuance. Saying that “the roots” of any given social problem lie in just one place leads the reader to think that there are no other causes worth thinking about. But all social problems have multiple causes, each interacting with the other. Undoubtedly, the lower valuation of the lives of babies is the main reason why infanticide is a separate and less-serious crime, but there are also other factors, as will be touched upon below.

The Digest’s third point follows from the second, but it is implied rather than expressly stated. If a legal system allows for the crime of murder to be reduced to a lesser crime when the defendant’s disturbed mental state has reduced the person’s culpability (or moral blameworthiness) for the killing, then it is wrong to make infanticide a separate, less-serious crime. Or to put it simply, the crime of infanticide must be abolished, and the state must prosecute the defendant for murder.

The full criminalization of infanticide – treating it the same as murder – is an “ideal” solution. Making the intentional killing of babies a less-serious offense not only reflects their differential valuation, it serves to perpetuate that devaluation from generation to generation. Calling the intentional killing of a baby “infanticide” rather than “murder” leads people to think of the act as something other than murder. However, even though full criminalization may be the ideal solution, it is not always appropriate to apply an ideal solution to an imperfect human society.

In addition to the lower valuation of the lives of babies, there are probably several other factors that lead parliaments to treat infanticide as a less serious crime than murder. For one thing, most penal systems in the world are not well equipped to handle female prisoners in pre-trial detention or while serving prison sentences. Prison officials do a poor job in protecting male inmates from abuse, and the level of protection of female prisoners is often worse.

For another, the laws of most States treat murderers harshly. There is a strong emphasis on deterring murder by the threat of tough punishment, and on protecting the society from murderers by locking them up. Rehabilitation and social reintegration is not given much priority. But when it comes to the murder of babies, the typical perpetrator of “infanticide” does not fit the profile of other murderers. Their rehabilitative needs, and their future danger to society, are significantly different than in the case of other categories of murderers.

Also, the Digest suggests that justice can be done by allowing the mother, or more accurately, the ex-mother, to raise the defense of diminished capacity based on psychological trauma. However, the human and financial resources needed to put on such a defense, the skilled attorneys, psychiatrists, and so forth, and the difficulties that judges and jurors have in evaluating that type of evidence, are often lacking in even the most highly developed legal systems.

In short, when one considers the realities of the criminal law system, it becomes much more understandable why legislators might want to make “infanticide” a less serious crime: the special status of the crime provides a way to divert this category of defendants from the harshness of the penal law.

An even more serious problem is that the Digest’s discussion lacks nuance, since it treats criminal law as the solution to a complex human problem. The criminal law is a very blunt instrument at best, and in too many places in world the criminal justice system is far from being adequate. The humaneness of the criminal law system differs widely between countries, but the system always inflicts harm on people. A criminal law system – police, jails, courts, and prisons – is inherently “violent.” It is a “necessary evil” of organized society, and must be used with caution, and always in combination with other modes of social control.

In light of the inability of ideal solutions to meet the needs of an imperfect world, the Digest’s second and third points are noted, but not endorsed.

To summarize: The differential valuation of the lives of babies is the principal causal factor in infanticide, and treating infanticide as a less-serious crime than murder reflects, and probably contributes to, the marginalization of the lives of infants. But one must first define the problem before defining the solution, and each solution must be tailored to meet the needs of the society in question. A step-by-step, progressive approach is often a faster route to a just solution than trying to immediately achieve an ideal.

Euthanasia

“Euthanasia” refers to the “act or practice of killing a suffering individual, esp[ecially] painlessly, for reasons considered merciful.” There are three situations in which it is common. The person who is killed: (i) has a terminal illness or injury; or (ii) is in a prolonged coma with no significant hope for recovery; or (iii) wants to commit suicide but is not physically able

to do so. In each of these situations, the person may have expressed the wish to be killed, or such a desire might be assumed or imputed to him or her. In addition, since the “for reasons considered to be merciful” element can be taken to refer to the actor who is doing the killing, “euthanasia” in ordinary language could be used to refer to the termination of life even when the person has expressly objected to being killed.

Euthanasia is thus different from infanticide, although there can be situations of overlap where both terms could be used to describe the same act. If an infant is suffering terribly from an illness, injury, disability, or deformity, then many people will consider either of the two terms to be applicable.

Confusion sets in, however, when the motivation for the killing stems less from the present physical suffering of the person, and more from the anticipated “suffering” of living a life that is profoundly restricted by the person’s disability. In the latter situation, calling the killing “euthanasia” stretches the ordinary meaning of the word. When “euthanasia” is felt by society to be legitimate in a certain class of cases, putting the label “euthanasia” on a case that falls outside of those situations is a linguistic ploy. It attempts to “borrow” the legitimacy of one act and give it to another act, one that society does not perceive as being equally permissible. The labeling begs the question about the legitimacy of the particular act of killing that is in question.

Euthanasia is also conceptually different from assisted/encouraged suicide, although here too there can be overlap. The difference lies in the degree of involvement: whether one is a “principal” or an “accessory” to an act – the perpetrator of an act or the one who aids-and-abetsthe perpetrator – depends upon the role that the actor plays in causing the event to occur. The term “euthanasia” is ordinarily used for situations where the actor plays either the exclusive or the dominant role in causing another person to die. “Assisted or encouraged suicide” is more appropriate for the situation where the person plays a helping role. Buying the drug for the other person to use to commit suicide would be an example of aiding-and-abetting.

B. Case examples: The United Kingdom and the Netherlands implementation reports

United Kingdom

As mentioned previously, the UK’s implementation report contains no meaningful information under the section on article 6 (the rights to life, survival, and development). This is no different from the typical implementation report, which illustrates the earlier point that the Committee’s guidelines have been a source of marginalization of the right to life.

The UK report is also noteworthy for a more specific reason. UK authorities allow, and perhaps even encourage, infanticide and euthanasia of young children, but the Committee was given no information about these permitted acts of intentional deprivations of the right to life.43

Infanticide and euthanasia are not unusual in hospital settings around the world when newborn children have major physical impairments, and authorities in the UK have tried to bring a measure of transparency and accountability to what are often hidden practices. By publicly disclosing these rules, the authorities have acted in conformity with generally accepted good governance and the rule-of-law principles at the national level.

But the rules concerning the intentional termination of the lives of post-natal children have not been reported on within the framework of the CRC. Thus the UK report did not contribute to the development of international human rights standards with respect to the right to life in article 6(1), and a particular type of violence against children was not subjected to international accountability.

Netherlands

By contrast, Netherlands’ implementation report informed the Committee of its new legislation allowing euthanasia and assisted/encouraged suicide involving children and adolescents between the ages of 12 and 18 years.44

As a result of the party’s candid disclosures, the Committee was able to conduct a dialogue with the Government. The Committee concluded that the law lacked sufficient safeguards, and made a number of recommendations for improved respect for the right to life.45

In making these two comparisons, it is not the intention to fault the United Kingdom. The point here is simply that the reporting guidelines do not require information on infanticide and euthanasia, and, since it is impossible to report on everything that is being done, the UK Government,

43 “Guidelines for letting children die,“ The Daily Telegraph (London), Sept. 25, 1997. “Doctors are being told they can withdraw treatment, including food and water, from sick or handicapped children in carefully defined circumstances.” Id., at 1-2.
like all other governments, had to make its own decisions about what to include. And since infanticide and euthanasia are not on the international agenda, or even the agenda of the children’s right movement, one cannot criticize a State for not giving information that the Committee has not indicated that it really wants to receive.

Chapter 4
Violence Against Babies During the Pre-Natal Period

A. The main reasons for terminating the lives of babies during the pre-natal period

The issue of violence against children also raises the question of violence against babies during the pre-natal period of their lives. This is another place where the rights of babies have been marginalized in the CRC literature.

Three of the main reasons for infanticide also lie behind the termination of the lives of babies prior to delivery. (i) The baby possesses an undesirable characteristic, such as being the “wrong” sex, or having a physical disability or other impairment. (ii) The baby will be an economic burden if permitted to live. (iii) The baby will be a psychological or social burden to the parent.

On the other hand, there is one reason for terminating the life of a baby prior to delivery that is not also a reason for infanticide: (iv) The mother will die if the pregnancy is allowed to continue, but medical technology cannot end the pregnancy and at the same time save the life of the baby. In this relatively rare medical situation, a choice must be made between preserving the life of the adult or the life of the baby.

B. State Party practices reflect the first vision of the human family

The three visions

As described earlier, there are basically three visions of the human family relating to legal recognition of human life. (1) A child is a member of the human family prior to being born. This was the view taken by the 1959 Declaration of the Rights of the Child, and by the American Convention cited earlier. According to those international agreements, children in the pre-natal period of life have the same right to life, at the abstract level, as any other member of the human family. The state must protect their enjoyment of the right to life at the concrete level, just as it protects other human beings’ concrete enjoyment of that right. (2) A child becomes a member of the human family at the moment of his or her birth, the second vision that is represented by the editor of the Innocenti Digest. Before the moment of delivery, the parents have, or should have, the right to kill their child as they wish. (3) A child is not a member of the human family until some period of time has elapsed after the delivery process, as
advocated by Peter Singer. Before that time, parents have, or should have, the right to kill their child as they see fit.

The CRC implementation reports

The first vision is the one adopted by the UN lawmakers that wrote the CRC, and it is reflected in the practice of the State Parties. Of those countries that have submitted implementation reports, 85 States have expressly spoken of the child having the right to life prior to birth. For instance: “The protection of the right to life begins with the protection of intra-uterine life”\(^{46}\); state law “recognizes the right of life of the unborn child”\(^{47}\); and national law “protects the right to life from conception onwards.”\(^{48}\) An additional 43 States have implicitly recognized that the CRC applies prior to birth by stating, under the sections on article 1 (Definition of the Child) or article 6 (Right to Life), that national law protects the lives of unborn children.\(^{49}\) In other words, of the 176 States that have filed reports, 128 have said that the CRC protects children during the pre-natal period of their lives. Moreover, while the other 48 States have been silent on the matter under these two sections of their reports, they often implicitly recognize that the CRC covers pre-natal children under other sections.\(^{50}\) What is more, no State Party report expressly denies that the CRC applies prior to birth (although some States made ambiguous statements at the time of ratification).\(^{51}\)

State Parties have consistently expressed one view: the CRC covers children prior to birth. It is true that a minority of States have not directly addressed the matter. And it is also true that there is significant diversity within the States that have said that babies have human rights prior to delivery, as will be discussed in Chapter 6. Just as one would expect with any vision or point of view on almost any subject, there will be nuances of difference among the positions of States’ concerning their visions of the human family. But with that said, State Parties have expressed just one view: children are right-holders even during the pre-natal period, which is, in essence, the first vision of the human family.

C. Taking children’s rights seriously requires legal interpretation

As the International Save the Children Alliance has observed, it is “difficult for many to accept children as right-bearers.”\(^{52}\) The

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\(^{46}\) China, CRC/C/83/Add.9 (2\(^{nd}\) report, 2004), para. 56 (under the article 6, Right to Life section).

\(^{47}\) Italy, CRC/C/70/Add. 13 (2\(^{nd}\) report, 2002), para. 360 (under the sub-heading on The Right to Life).

\(^{48}\) El Salvador, CRC/C/3/Add.9 (1\(^{st}\) report, 1993), para. 72 (under the right to life section). See also the following reports in Appendix C: Albania, Angola, Argentina, Austria, Bahamas, Belgium, Belize, Bolivia, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, Chile, China, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominica, El Salvador, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Greece, Grenada, Guatemala, Haiti, Honduras, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Jordan, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Madagascar, Maldives, Mali, Malta, Mauritania, Mexico (ambiguous), Monaco, Morocco, Mozambique, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Oman, Pakistan, Palau, Panama, Paraguay, Peru, Philippines, Poland, Romania, Rwanda, Saint Lucia, San Vincent and the Grenadines, Seychelles, Slovakia, Syrian Arab Republic, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Vanuatu, Venezuela, and Zambia.

\(^{49}\) See the following reports in Appendix C: Australia, Bhutan, Bosnia and Herzegovina, Brazil, Bulgaria, Croatia, Denmark, Ecuador, Egypt, Estonia, Fiji, Finland, France, Georgia, Germany (preamble), Iceland, Indonesia, Iraq, Kazakhstan, Kyrgyzstan, Latvia, Luxembourg, Marshall Islands, Micronesia (Federated States of), Namibia, Norway, Papua New Guinea, Portugal, Qatar, Russian Federation, San Marino, Saudi Arabia, Singapore, Solomon Islands, Spain, Sri Lanka, Sudan, Suriname, Switzerland, Turkey, Uruguay, Yemen, and Zimbabwe.

\(^{50}\) In Appendix C, see, e.g., Botswana (article 34), Republic of Korea (article 24), and Ukraine (article 24).

\(^{51}\) See Appendix C for all of the relevant excerpts from the implementation reports. Several Governments made statements at time of ratification or ascension that give grounds for argument. For example, the United Kingdom said that it “interprets the Convention as applicable only following a live birth.” UN Doc. CRC/C/2/Rev.8 (collecting CRC ratifications, declarations, and objections), at 41-2. But later the Government told the Committee that this statement "does not amount to a reservation." United Kingdom, 2\(^{nd}\) report, UN Doc. CRC/C/83/Add.3 (2002), at para. 1.8.2(a). There is an important difference between an interpretation and a reservation. An interpretation is an opinion, and it can be wrong, and subsequent officials can revise and rescind it. Moreover, the meaning of a right or a jurisdictional clause is the same for all Parties, absent a valid reservation, and it is determined by legal interpretation under the VCLT, not by political judgments, and is finally determined collectively by the Parties, not by the opinions of any one Party. The only way for a Party to deny CRC rights to pre-natal children (or any other class of children) is to file a reservation to article 1, and the denial will only be legally effective if the reservation is valid. But as the United Kingdom admitted, it did not make a reservation. The legal situation is the same for Hong Kong, Id., at 16-17.

Several other Governments made statements in their instruments of ratification, but the particular manner in which they are framed — a declaration, an interpretation, as applying to article 6 rather than article 1, for instance — do not constitute a pointblank exclusion of pre-natal children from being right-holders. See statements of Botswana, China, Indonesia, Malaysia, and Tunisia. Id., at 15, 16, 25, 28, and 40. Moreover, these statements need to be read in light of the subsequent implementation reports.

\(^{52}\) The
implementation reports show that State Parties consider the CRC as applying during the pre-natal period, but state practice itself does not constitute a legal analysis. Taking the human rights of children seriously requires us to interpret the CRC in strict accordance with the rules of treaty interpretation, as laid down by the Vienna Convention on the Law of Treaties (VCLT).

Vienna Convention on the Law of Treaties

The primary rule of interpretation is the “ordinary meaning rule.” Under VCLT article 31(1):

A treaty shall be interpreted [a] in good faith [b] in accordance with the ordinary meaning to be given to the terms of the treaty [c] in their context and [d] in light of its object and purpose.” (Brackets added).

Once an interpretation has been arrived at, a corollary to this rule allows the legislative records to be used to confirm the reading. But the records cannot be used to alter or override the interpretation: the ordinary meaning rule requires that the interpretation be based only on the text of the treaty, and the commonsense inferences that can be drawn from the text.

If it is impossible to arrive at an interpretation using the ordinary meaning rule, then the secondary rule of interpretation, the “legislative history rule,” comes into play. Under article 32, the “preparatory work,” or legislative history, can be used to “determine the meaning when the interpretation according to article 31 [either] (a) leaves the meaning ambiguous or obscure; or (b) leads to a result that is manifestly absurd or unreasonable.”

Although State Parties have been paying attention to the legal interpretation of the CRC, as evidenced by their implementation reports, commentators in the CRC literature have not. The only one who has dealt with the matter in any substantial manner is Professor Philip Alston. When the CRC was still in the draft stage, Alston wrote an article expressing his view that the Convention should not be interpreted as applying to babies until “the moment of birth.” However, in arriving at this conclusion, Alston did not follow the rules of legal interpretation in the Vienna Convention on the Law of Treaties. So there is a gap in the legal literature, and it needs to be filled if one is to take seriously the idea that young children are right-holders.

The next section will apply the VCLT to the Convention on the Rights of the Child in order to answer the following questions: Does the Convention apply during the pre-natal period? If so, does it apply from conception onwards? If not at conception, when does CRC protection begin?

The jurisdictional clause and the rights

The treaty’s jurisdictional clause defines the right-holders. CRC article 1 reads, in full:

For the purpose of the present Convention, a child means every human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier. (Emphasis added.)

Article 1 is not a right, but a statement of the class of individuals who hold the rights that are defined in the other provisions: any “human being” who has not reached 18 years (or the age of majority) is a right-holder. In speaking of babies during the pre-natal period of life, the rights of most obvious importance are the right to life (article 6(1)) and the right to pre-natal health care (article 24(2)(d)). But other rights are also important, like the right of non-discrimination (article 2(1)) and freedom from violence.

\[^{53}\text{Children’s Rights: Reality or Rhetoric? (International Save the Children Alliance), at 288.}\]


[^54]: VCLT article 32: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31. … ” (emphasis added). This provision may not be used to replace or alter the meaning arrived at under the ordinary meaning rule, however. It is a corollary to the ordinary meaning rule, and must not be confused with the legislative history rule, which is discussed below.

[^55]: Brackets added. Article 32 reads in full: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order [A] to confirm the meaning resulting from the application of article 31, or [B] to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or
(article 19); indeed, when the Convention is examined carefully, almost half the rights are relevant to babies prior to being born.57

But pre-natal children only have these rights if they come under the scope of article 1, so the primary task is to interpret the jurisdictional clause.

Under the ordinary meaning rule, everything must be read in context. For instance, we cannot talk about realization of the right to health in article 24 without knowing who the right-holders are under the jurisdictional clause. On the other hand, the right to health might be relevant to interpreting article 1. And when it comes to the questions we have posed, article 1 has to be interpreted because it makes no express mention of either conception, or the pre-natal period, or birth, or, for that matter, to any post-birth event and stage of development: it simply says human being.

In the next section, the main text discussion will only apply the ordinary meaning rule, since, as it will be argued, that rule is sufficient to render an interpretation. The footnotes will discuss the legislative history solely for the purpose of confirming the conclusions in the main text, and they will also discuss Professor Alston’s handling of the issues. (Appendix B discusses Alston’s journal article in more depth, and Appendix A gives a detailed analysis of the legislative records.)58

57 For instance: CRC art. 7(1) (acquire nationality, and know and be cared for by parents), art. 8 (preserve identity and family relations), art. 9 (separation from parents), 11 (combating illicit transfer), art. 16 (privacy and home life), art. 18 (assisting parents in child-raising), art. 20 (adoption and alternative care), art. 21 (adoptive adoption), art. 23 (care for disabled children) art. 24 (medical treatment additional to pre-natal care for the mother, environmental health, preventive health measures, and promotion of breast feeding), art. 27 (adequate standard of living), art. 23 (protection from drug abuse), art. 35 (sale of children), and art. 37 (inhumane treatment). All these rights require the State to take action while the child is still in the pre-natal period. Certain measures will help the pre-natal child in the here-and-now. (For example, babies are harmed by toxic substances entering their bodies by way of the mother’s body, like mercury in fish and poisons from cigarettes, and their well-being is jeopardized by the poor health of the mother when she does not receive material assistance to alleviate poverty). And certain measures must be taken now to protect the future interests of the child. (Obtaining information about a parent’s identity, and having systems of health care and alternative placement ready to assist the child immediately after birth, for instance.)

58 The footnotes and Appendix B will also discuss Manfred Nowak, Article 6: The Right to Life, Survival, and Development: A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff, Leiden, 2005) [hereafter, Article 6], which became available after the first edition of Violence Against Babies was submitted to the UN Study.

D. The CRC applies to babies during the entire pre-natal period

The nine important points

There are nine points that need to be considered when applying the Vienna Convention to the CRC on the question of pre-natal rights. Some readers may find that just one of the points standing on its own is sufficient to reach the conclusion that the CRC recognizes that children are right-holders from conception onwards. However, all of the considerations are related to each other, and it is suggested that final judgment should be reserved until they have all been considered and reflected upon.

Point 1: The human lifecycle includes the pre-natal period

The first consideration pertains to the fundamental facts of child development. Recently, the Committee on the Rights of the Child held a discussion day on early childhood development. The Outline prepared by the secretariat to the Committee makes this basic point: “[e]arly childhood is a crucial period for the sound development of young children; and [] missed opportunities during these years can not be made up at later stages of the child’s life.”59 This is often called the “lifecycle” approach to human dignity and human rights.

The lifecycle approach recognizes that the foundation for a person’s life-long health status and overall wellbeing is laid during the first nine months of life. A boy or girl who does not receive proper care and assistance during the pre-natal period will probably not be able to enjoy all of the rights that form the vision of human dignity reflected in international human rights law. For instance, the right of a child to develop “to the maximum extent possible” (article 6(2)), to experience “the highest attainable standard of health” (article 24(1)), and to develop the “personality, talents, and mental and physical abilities to their fullest potential” (article 29(1)(a)), all depend upon the child’s being able to fully enjoy the rights to life, survival, and development (article 6(1& 2)) during the entire pre-natal stage of life.

The lifecycle approach to human dignity is not only a commonsense understanding of human life, it is a basic principle in the work of intergovernmental agencies. For instance, an influential World Bank publication begins by saying: “As it is currently used internationally,
early childhood is defined as the period of a child’s life from conception to age eight.⁶⁰ UNICEF has also championed the lifecycle approach.⁶¹

Summing up Point 1: To speak meaningfully of “human rights,” we cannot act as if a human being springs to life at birth, overlooking the fact that “birth” is a process within a cycle of life that goes from conception to death; and when speaking of a specific human right, we have to recognize that the ability to enjoy the right at any particular moment depends upon what has happened in prior stages of the individual’s development.⁶²

**Point 2: “From the moment of birth” was rejected**

Second, the lawmakers did not restrict CRC coverage by adding “from the moment of birth,” or some similar phrase, to article 1, and the commonsense inference from the absence of any restriction is that the Convention is not to be restricted to post-delivery children.

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⁶¹ E.g., “[G]ender-based discrimination begins in early childhood (indeed, in some cases even before birth) and takes its toll across the entire life cycle. Thus, making advances in the fulfillment of the rights of women also means defending the rights of and creating opportunities for girls. This is why the ‘life-cycle’ approach has been so important for UNICEF’s key focus on the girl child.” UNICEF Statement: Day of General Discussion on “Implementing Child Rights in Early Childhood,” Committee on the Rights of the Child, 17 September 2004 (conference paper), at 2.

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

⁶² Neither Alston nor Nowak adopt a lifecycle approach. Alston recognizes that “the unborn child” has “interests,” and even concedes they can have “rights,” but “the child” is treated as an abstraction. *Unborn Child*, at 174, 178. His systematic use of “the fetus,” rather than “human fetuses,” has a similar dehumanizing effect.

Is his commentary on the right to life, Nowak often takes a holistic, developmental approach, like, “If their health needs and requirements are not satisfied during early childhood, this will have serious effects on their future physical and mental survival, development and life,” *Article 6*, at 42. But in a fifty-page essay, he says nothing about the developmental needs of children in the pre-natal period, or about services that States provide to ensure their development, or about how what happens during this period affects the subsequent development.

CRC article 1 is the jurisdictional clause of the treaty: it defines the holders of all of the rights that are set out in Part I (i.e., articles 2 to 41) of the treaty. Article 1 has not placed any qualification on CRC coverage in respect to babies.

For the purposes of this Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

It is simply inconceivable that the lawmakers wrote a treaty on children’s rights in the period from 1978 to 1989 without having made a policy decision about the applicability of the Convention during the pre-natal period. And the absence of a restriction leads us to make an inference.

Let’s put this into historical context. In the first place, many States participated in the creation of the CRC, and the domestic laws of those States protected babies prior to birth. The precise details of those laws contain numerous variations, but the prevailing, and indeed, uniform, State practice was to subject the termination of the lives of babies prior to birth to legal regulation. Those laws reflected their society’s attitudes about the value of the life of children prior to birth, or the first vision.

In the second place, many States had been debating whether to change these laws during the period that the CRC was being written, and widespread media coverage ensured that the controversies in those countries were known throughout the world. The delegates who negotiated the CRC formulated the rights in the treaty with those moral and political controversies in mind.

In light of the historical context, the fact that article 1 does not expressly limit CRC rights “from the moment of birth,” or any other specified time, gives rise to a strong inference: the framers made the policy decision to extend the Convention to babies during the pre-natal period. If the framers had intended to restrict the class of right-holders to children after birth, or some later time, they would have said so; the absence of any such limitation simply could not have been an accidental mistake: it must have been deliberate. And the deliberate absence of a restriction leads to the inference that the lawmakers intended to include pre-natal children under article 1.

Moreover, this is such an obvious conclusion that the lawmakers could not have failed to see that people would read article 1 in that way. The only way to stop people from doing that, if the framers did not intend that interpretation, would be to insert a limitation clause. In short, there is
only one reasonable conclusion to draw from the absence of a restriction: no restriction was intended.

This is only an inference, not absolute proof; but it is a strong inference, and we can take it into account as we consider the remaining seven Points in the legal analysis.

But before we move on the next Point, we can check to see if we are on the right track. We are applying the ordinary meaning rule to the CRC, and the preceding discussion was based solely upon the text and commonsense inferences drawn from the text (pursuant to VCLT article 31(1)). But there is a corollary rule that allows one to use the records of the negotiations to confirm an interpretation (VCLT article 32[A]).

It is important to keep in mind the precise relevancy of the travaux préparatoires in the course of an analysis. There is a crucial distinction between the ordinary meaning rule (with its corollary), and the legislative history rule (VCLT article 32[B](a & b)); between using the records to confirm an interpretation arrived at solely on the text, and using them to produce an interpretation in a case where the ordinary meaning rule has failed. For instance, using the records to verify the soundness of the inference in Point 2 will not terminate the legal analysis; if subsequent considerations give us a reason to reject the conclusion, then it will be set aside, but until then it forms one of the bases for a final interpretation of the scope of the jurisdictional clause.

The discussion of the negotiation records is placed in margins in order to emphasize that it is being used here for the limited purpose of confirming that Point 2 is on the right track. And when readers check the records, they will find that the inference is correct. 63

To sum up Point 2: The lack of any lower age or developmental restriction in article 1, in particular, the absence of a “from the moment of birth” limitation, gives rise to a strong inference that the UN lawmakers intended for the CRC to protect children during the pre-natal stage of life. And the corollary to the ordinary meaning rule has allowed us to confirm that the inference is correct. 64

The two points we have just discussed are based on the text of the CRC, and commonsense understandings. But nothing in the text examined so far explicitly says that babies have rights prior to birth. There are, however, two provisions in the Convention that do expressly refer to the rights of babies during the pre-natal period of their lives. These are discussed in Points 3 and 5.

**Point 3: Article 24 (right to health) applies to the pre-natal period**

Third, the right to health was carefully written to recognize that babies have human rights throughout the entire pre-natal period. Article 24 reads, in part:

63 At its first meeting in 1980, the Working Group adopted Poland’s “Revised Draft Convention on the Rights of the Child” as “the basic working document.” (The “Revised Draft Convention” (October 5, 1979) is reproduced in, A Guide to the “Travaux Préparatoires,” at 94-5.) Draft article 1 adopted the second vision: “According to the present Convention a child is every human being from the moment of his birth ….” (emphasis added). A Guide to the “Travaux Préparatoires,” at 94. Soon afterwards, in the third meeting, a motion for deletion was made and debated, and the restriction was removed. Id., at 115, paras. 29-31. There were two arguments for the deletion, first, from the moment of birth was “contrary to the legislation of many countries,” and second, CRC rights must “include the entire period from the moment of conception.” Id. Equally important, no delegation denied the factual assertion in the first argument, (see also, “They again argued that all national legislation included provisions for the protection of the child before birth,”id., at 102). And no State denied that the removal would have the legal effect contemplated in the second argument. (The records are discussed in detail in Appendix A.) So the records conclusively establish that the inference in Point 2 is correct.

On a technical note, it is ambiguous whether the corollary rule can be used to confirm the correctness of an intermediary interpretative step, as we have just done, or whether it applies only to the final interpretation at the end of the entire process. Any reader who feels that the present use is not permitted under the VCLT is free to ignore the records at this juncture. But either way, the inference in Point 2 remains the same.

64 Alston and Nowak do not address the question of what inference is to be drawn from the lack of a restriction. Alston agrees that, in determining the human rights of an “unborn child” (his term), the interpretation of article 1 is “of central importance to the entire enterprise,” Unborn Child, at 162. But Alston does not apply the rules of legal interpretation, so he does not conduct a textual analysis of the jurisdictional clause, or of any other article. Alston promises to analyze the draft CRC “from the perspective of the relevant provisions of international law.” Id., at 157. While this can give the impression that he will follow the rules of legal interpretation, read carefully, there is no actual promise to do so. The loophole is the ambiguity of “provisions.”

Nowak expressly promises to apply the VCLT to interpret the right to life, Article 6, at 3, but even though he has a long section on “Abortion,” he never conducts a legal analysis of article 1. (The matter is discussed at the end of Point 4.)

Alston and Nowak both refer to the legislative records, but they are selective: they do not tell their readers about the from the moment of birth restriction in the revised draft, or about the motion and debates, or that the limitation was deleted.
1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health … .

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: …
   (d) To ensure appropriate pre-natal care for mothers. (Emphasis added.)

There are two important things about article 24. First, it expressly says that babies have human rights during the pre-natal period. Paragraph (1) speaks of “the right of the child to the enjoyment of the highest attainable standard of health.” Paragraph (2) then specifies a number of measures that the State must take for the “full implementation of this right” (emphasis added). In sub-section (d) of that paragraph, the State is obligated to ensure pre-natal care. Pre-natal care is therefore a component of the child’s right to health. Since pre-natal care by definition only applies prior to birth, children prior to birth have CRC rights.

Sub-paragraph (d) identifies the recipient of the pre-natal care as the mother, which is understandable since what is typically done for the physical wellbeing of the developing child is done through the medium of the mother’s body. Although the State fulfills the right by providing care to the mother’s body, the right-holder is the child.

Many human rights are fulfilled in a similar way: X’s rights are realized by the actor doing (or refraining from doing) something to person or object Y. For the realization of economic and social rights in general, the action that the State takes does not make physical contact with the right-holder’s body. Environmental rights are an obvious example. In CRC article 24, sub-paragraphs (c) and (e) recognize a child’s right to environmental health, that is to say, the right to have the State take reasonable measures to ensure such things as “clean drinking-water,” clear air, and “environmental sanitation.” To fulfill the child’s right to clean water, the State directs its actions to the water, not to the youngster’s body.

With respect to babies in the pre-natal and post-natal periods, the preeminent environment is the mother, followed in importance by the physical environment. Let’s take the hypothetical case of a baby named Bob. In order for the State to fulfill Bob’s right to health when he is one year old, it must direct action towards a wide variety of people and physical objects (like health care to his mother if he is nursing, or to the public water supply if he is bottle fed), rather than to Bob’s body. And for fulfilling Bob’s right to health when he is in the pre-natal period of his life, the action must be direct to the mother and her body.

The CRC takes a rights-based approach to human dignity, which includes physical well-being and healthy development. For a baby to enjoy the right to life and the right to health care before and after birth, physical action will have to be directed to the mother. But the right-holder is the child, regardless of the type of action that is required to fulfill the right. And that is what the text of CRC article 24 says.65

If the framers had wanted to impose an international law obligation to ensure that mothers receive pre-natal care for their children but without making this a right of the child, then it would have been very simple for them to draft the treaty to do just that. For instance, article 24 could have been written so that all of the child’s health rights are defined in paragraph (1), and then the obligation to provide pre-natal care is defined in paragraph (2) using language that excludes the child as the right-holder. There are a number of ways to do this. For example, paragraph (2) could have said: “In addition to the obligations to ensure the rights of the child as specified in paragraph (1), State Parties recognize that the child’s mother has the right to receive pre-natal care.” But the framers of the treaty chose not to define the obligation to ensure pre-natal care as separate from the child’s rights. Instead, they expressly defined the State’s obligations to ensure pre-natal care in terms of the child’s human rights.

The second important thing about article 24 is that the child’s right to pre-natal care is not limited to only a part of that period. The pre-natal

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65 To put it another way, there is one right-holder under the CRC – the pre-natal child --, and two beneficiaries – the child and the mother. (The mother’s right to health care is defined elsewhere, as in the ICESCR.) The duality in beneficiaries is often recognized in the human rights literature. E.g., Advancing Safe Motherhood Through Human Rights (World Health Organization, Geneva, 2001), WHO/RHR/01.5, at 54 (“The interdependence of mother and child is recognized in [CRC] Article 24(2)(d) … . The full realization of these rights is vital for the reduction of maternal mortality, as well as for the children’s survival and health.”); A. Glenn Mower, Jr., The Convention on the Rights of the Child (Greenwood Press, Westport, Conn., 1997), at 29 (“An even clearer indication that the obligations assumed by states parties in regard to the child’s inherent right to life extend to the unborn child is given in [CRC] Article 24, Paragraph 2(d), which commits parties to ensuring appropriate prenatal care for mothers.”).
period runs from conception to birth. But the right is not qualified by “starting from the third week after conception,” or any other such restriction.

Point 3, in summary: the right to health in article 24 was carefully written to recognize that children have human rights during the entire pre-natal period of their lives.66

Point 4: Defining the right-holder as a “human being” gives rights from conception onwards, when read in conjunction with the right to health

Four, the jurisdictional clause in article 1 defines the CRC right-holder by the expansive term “human being,” and, when read in connection with the right to pre-natal care in article 24, it makes “the child” a right-holder from conception onwards.

Article 1 says:

For the purposes of this Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. (Emphasis added.)67

Careful attention must be given to the interpretation of article 1 since the legal issue at hand – Who are the right-holders under the CRC? or more specifically, Are children right-holders during the pre-natal period of their lives? – is essentially a jurisdictional issue.

There are six important things about the jurisdictional clause: (i) The operative term is “human being,” not “child.” And since that term is not defined, it has to be interpreted. (ii) “Human being” is the broadest term possible for inclusion in the human family. (iii) People commonly use “human being” to refer to the new being that comes into existence at conception. (iv) “Human being” in article 1 has to be read in connection with the right to pre-natal care in article 24. (v) The UN lawmakers did not place any limitation on the meaning of “human being.” And (vi), “child” in article 1 is a legal fiction.

(i) The operative term in article 1 is “human being,” not “child.” In articles 2 through 41, the Convention speaks of the right-holder as a “child,” and article 1 gives instructions on how to interpret that word: “child” is defined as a human being who is under 18, or the State Party’s age of majority if it is less than that.

One can think of the right-holders under the CRC as being the members of a set that is made up of “(a) all the human beings (b) who are under the age of majority or under 18 years, whichever occurs first.” This can be illustrated as two concentric circles:

A = all human beings
B = under 18 (or age of majority).

Jurisdictional clause of article 1

The outer Circle A contains all the human beings in the State’s jurisdiction. The inner Circle B contains all human beings under 18, or the age of majority, whichever occurs first. Every member of set B is therefore a “child,” and every “child” is a CRC right-holder. In other words, to have CRC rights, one must first be a human being (a member of set A), and then be under 18 or the age of majority (a member of set B). So first and foremost, the right-holder must be a human being.

Since it is so obviously true that the operative term is “human being,” it may seem unnecessary to have belabored the point. However, most commentators in the human rights literature who hold the second view of the human family stay clear of discussing the operative term. They keep the reader’s attention fixed on “the child” or “childhood,” staying as far away as they can from talking about the rights of pre-delivery children in terms of “human beings.”68 But since the Vienna Convention requires that

66 Alston does not address this point; indeed, he neither quotes nor mentions CRC article 24(2)(d). Furthermore, the precise ways that Alston avoided this right raise some serious questions about his essay, and they are discussed in detail in Appendix B.

Although Nowak promised to apply the VCLT, Article 6, at 3, he does not address the connection between the right to pre-natal care and the interpretation of article 1. Indeed, even though his section on article 24 is one of the longest in his commentary, and even though he often makes holistic statements about developmental, he does not discuss article 24(2)(d), and he doesn’t say anything about pre-natal development or care.

67 To be precise, the jurisdictional statement is spread over two provisions, article 1, and article 2(1) which stipulates that the child must be “within [the State’s] jurisdiction.” For simplicity, the discussion will ignore the article 2(1) part of the jurisdictional clause, unless it is directly relevant.

68 See, e.g., Rebecca Wallace & Kenneth Dale-Rusk, International Human Rights Text and Materials (Sweet & Maxwell, London, 2001) (“Article 1 was left deliberately vague so as to allow each Contracting Party flexibility in [sic]
the interpretation be conducted “in good faith,” the operative term must be
discussed.

Article 1 does not give a definition of the operative term, so it has
to be interpreted, and this takes us to the other considerations.

(ii) “Human being” is as all-inclusive a term as the lawmakers
could have chosen. A being, as opposed to an inanimate object; human, in
contrast to any other species of plant or animal life. According to the
dictionary, a human being is “any individual of the genus Homo, esp[ically]
a member of the species Homo sapiens,” or more simply, “a member of
the human race.” As Micheline Ishay writes in The History of Human
Rights, “Human rights are rights held by individuals simply because they
are part of the human species.” To be an “individual” or a “member” of
a species does not call for any age or developmental test. “A new individual
is created when the elements of a potent sperm merge with those of a fertile
ovum, or egg,” as the Encyclopedia Britannica explains. The new
individual is a member of the same species as the parents; it can’t be
otherwise. And when the new individual is the offspring of a human
mother and father, the individual is human, is a member of the species Homo
sapiens.

The framers of the CRC could not have chosen a broader word
than “human being” as the basis for defining the right-holders. It is certainly
broad enough to be consistent with the first vision of the human family,
starting from the time the new individual comes into being at conception.

Of course, just because it is consistent with the first vision does not
end the task of interpreting article 1: human being is not a term that can be
applied mechanically, like one can with the definitions of meter or liter. But
the fact that the human race.70 As Micheline Ishay writes in The History of Human
Rights, “Human rights are rights held by individuals simply because they
are part of the human species.”71 To be an “individual” or a “member” of
a species does not call for any age or developmental test. “A new individual
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Of course, just because it is consistent with the first vision does not
end the task of interpreting article 1: human being is not a term that can be
applied mechanically, like one can with the definitions of meter or liter. But
the fact that the UN lawmakers chose to define the CRC right-holders by a
broad and less-than-precise term is something that can, and must, be taken
into account in interpreting the jurisdictional clause.

(iii) It is an established practice for people to use “human being” to
refer to the developing human during the entire pre-natal period. For
example:

In the CRC implementation reports, one State said: “The Law ‘For
the Interruption of Pregnancy’ guarantees respect for each and every human
being right from the beginning of his life, hence, after he is conceived.”
Another State told the Committee that article 1 “must be interpreted to the
effect that a child means every human being from the moment
of
conception up to the age of 18.”74 And another State referred to the special
“vulnerability of the human being from conception up to approximately six
years.”75 These examples of word usage are highly relevant since they occur
in a forum devoted to the CRC, and come from the duty-bearers
themselves.76

73 Albania, UN Doc. CRC/C/11/Add.27 (1st report, 2004), at para. 43 (Definition of
the Child section).
74 Argentina, UN Doc. CRC/C/70/Add.10 (2nd report, 2002), at para. 2 (Definition of
the Child section).
75 Brazil, UN Doc. CRC/C/3/Add.65 (1st report, 2003), at para. 283.
76 While the preceding three examples are sufficient for the present purposes, there
is a danger that citing a few examples from the implementation reports will give a
false impression of State practice. To avoid confusion, a few remarks are in order.
First of all, of the first 176 State Parties to file reports with the CRC Committee, 128
have said expressly or by inference that CRC rights are held during the pre-natal
period, and, given the operative term in article 1, a State cannot recognize these
other words that commonly appear in the reports – like, “right to life,” “babies,”
“human person,” and “children” – treat the pre-delivery being as a member of the
human family, and, since the State is reporting on CRC rights, the State is
recognizing them as “human beings.” See, e.g., Austria, UN Doc. CRC/C/83/Add.8
(2nd report, 2004), at para. 146 (“The right to life is in principle subject to absolute
protection; however, this is infringed by the ‘abortion limit.’”); Burkina Faso, UN
Doc. CRC/C/65/Add.18 (2nd report, 2002), at para. 18 (national law “protects the
right to life from conception onwards”), and UN Doc. CRC/C/3/Add.19 (1st report,
1993), at para. 18 (the “law grants the right to life even to babies in gestation”);
Burundi, UN Doc. CRC/C/3/Add.58 (1st report, 1998), at paras. 67 & 69 (national
law “affirms the sacredness and inviolability of the human person. … [the law]
outlaws the practice of abortion.”); Canada, UN Doc. CRC/C/83/Add.6 (2nd report,
2003), at para. 898 (the Government “addresses the needs of families and children
who are at risk (conception to 3 years old)”; Central African Republic, UN Doc.
CRC/C/11/Add.18 (1st report, 1998), at paras. 75 & 76 (“Abortion constitutes the
primary violation of physical integrity. … [There are cases where] the life of the
child is cut short at conception … .”); Chad, UN Doc. CRC/C/3/Add.50 (1st report,
1997), at para. 64 (“The provisions described below take into account the interests
of children. … (a) Induced abortion is penalized ….”).
We can also step outside of the CRC forum for examples of usage: A member of the Commission on Human Rights, in the course of negotiating the Covenants in 1950, spoke of the “rights of the unborn human being.”

The American Convention on Human Rights is a particularly important example since it is the only treaty that makes the meaning of human being clear. While the American Convention does not give a formal definition of the term, it does provide a de facto definition when two provisions are read together.

Article 1(2). For the purpose of this Convention, ‘person’ means every human being.

Article 4(1). Every person has the right the have his life respected. This right shall be protected by law, and, in general, from the moment of conception.

The Parties to the American Convention obviously consider the offspring of a human mother and father to be a “human being” from the moment of conception onwards.

There are a number of reasons for paying particular attention to the usage in the American Convention. In the first place, it is common practice in the field of human rights to use the definition in one treaty as a source for interpreting an undefined word in another treaty. For instance, the word discrimination in CRC article 2(1) and the ICESCR article 2(2) is routinely interpreted by borrowing the definition of racial discrimination from the ICERD. When a large number of States have spent considerable effort to hammer out a definition, and when the definition pertains to the field of human rights so that the general context is the same, this type of borrowing is only natural. There is nothing in the text of the CRC that compels one to do this, and it is not done mechanically (indeed, the ICERD definition has to be adapted), but when one human rights treaty sets down a definition, it establishes a clear usage for the international community. Attorneys trained in international human rights law study the regional human rights treaties along with the UN treaties, and the actors – the States, the intergovernmental bodies, and the international NGOs, – as well as the issues they work on, form a single field of international human rights law. A definition adopted in one treaty creates a common reference point for the entire field.

In the second place, the American Convention has played a generative role in the formation of the UN human rights treaties. Adopted in 1948, the American Convention was the first comprehensive human rights treaty, and it established precedents for subsequent regional and UN treaties. Moreover, States from throughout the Americas played an especially active role in the creation of the UN treaties, including the CRC.

There is more importance, when lawyers and diplomats from countries covered by the American Convention participate in treaty creation in other forums, one can expect that they will press for the norms in their regional treaty to be adopted, and that they will be consistent in their word usages. To be specific: in the negotiations for the Convention on the Rights of the Child, one would expect that a delegate representing a party to the American Convention would be using “human being” consistently with the usage in the American Convention. In the first place, it is common practice among other things, placing its own definition on record, and making a reservation. The delegates are not borrowing a meaning (as in the preceding paragraph); they are carrying their meanings with them when they enter the new forum.

These illustrations show that people – specifically, State officials in international forums – use human being to refer to the new individual.

77 Mr. Valencia (Chile), UN Doc. E/CN.4/SR.149, at para. 11. The context of this remark is interesting. Mr. Malik, representing Lebanon, introduced a proposal for the draft covenant that said: “Human life is sacred from the moment of conception.” UN Doc. E/CN.4/398 (1950), at para. 1. Mr. Valencia argued that “the adjective ‘sacred’ should not be introduced into a legal text. That word has a metaphysical meaning that certain States Members might very well not be in a position to accept.” UN Doc. E/CN.4/SR.149, at para. 10. He also said: “The Commission was trying to ensure that human rights would be respected. The rights of the unborn human being were not universally recognized. On the other hand, it was recognized everywhere that those rights began with physical birth.” Id., at para. 11. The Lebanon proposal was finally voted down, 8 to 3, with 2 abstentions. Id., at para. 16.

78 Although Alston quotes ACHR article 4, he neither quotes nor refers to article 1(2). Nor does he mention the ACHR’s use of “human being” to refer to the new individual from the time from conception. Unborn Child, 174-75. Nowak refers to ACHR art. 4, but not to art. 2, or its use of “human being.” Article 6, at 26.

79 For instance, the Human Rights Committee defined “discrimination” in its General Comment No. 18 by adapting the definitions in the ICERD and CEDAW.

80 The following States participated as delegates or observers to the working group that negotiated the draft CRC: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, United States of America, and Venezuela. A Guide to the “Travaux Préparatoires,” at 644-57.

81 For an example of this happening, see the statement of Mr. Valencia, in footnote 73. A prudent lawyer who is representing or advising a Government that wants a different norm, or that is using terminology differently, would have to take appropriate steps to either get the other States to adopt its position, or to preserve its position from being overridden by customary or treaty law. This would include, among other things, placing its own definition on record, and making a reservation. But the legislative records of the CRC do not show any State giving its own definition of “human being,” and no State made a reservation (or declaration) setting forth a more restrictive definition for the operative term in article 1.
from conception onwards, when the individual is an offspring of human parents. These examples are not metaphors in poetry, humorous plays on words, or single instances of idiosyncratic utterances. They are exemplars of an ordinary usage of *human being*.

But to say that that usage is an ordinary meaning of the term is not the same as saying that it is the meaning of the word in CRC article 1. All words have multiple meanings. Or to be precise, words don’t have meanings, people have meanings that they convey by words – by verbal and written symbols. And since people use the same word – the same symbol – to convey a variety of meanings, one must normally determine which meaning the speaker intends by the context.

And that is exactly what the ordinary meaning rule in the Vienna Convention requires: the term *human being* in article 1 must be interpreted in the context of the entire CRC. This takes us to the next consideration.

(iv) *Human being* in article 1 has to be read in light of the right to pre-natal care in article 24.

As we have seen, article 24 says that the “child” has a right to pre-natal care (Point 3). But a “child” can have a right to pre-natal care only if *human being* in article 1 is interpreted to cover the entire pre-natal period of life, a period which runs from conception to delivery.

So the logical consequence of defining the right-holder in terms of a “human being,” in a treaty that recognizes a right to pre-natal care, is to make “the child” a right-holder from conception onwards.

(v) If the UN lawmakers had not intended this logical consequence, then they would have put a limitation on the meaning of “human being” in article 1. They could have said, for instance: “a child means every human being from the age of [x] weeks after conception to below the age of 18 years, unless ….” But they didn’t do this.

Or, the framers could have left it up to each State Party to decide for itself who counts as a human being. For instance, article 1 could have said: “a child means every human being (a) starting at the age set by the applicable law, and (b) below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.” But no such language appears in article 1.

To put it another way, the clause, “unless majority is attained earlier,” can reduce the size of Circle B (by permitting the Party to restrict membership on the basis of a lower maximum-age rule). By contrast, adding the clause, *starting at the age set by the applicable law,* would reduce the size of Circle A (by allowing each Party to restrict membership in the class “human being” on the basis of its own minimum-age rule, set at some point after conception). Writing article 1 so as to authorize each State to have its own definition of “human being” would have been a dramatic departure from the principle of universality of human rights, of course. But the framers placed no such authorization in the jurisdictional clause.

In short, when article 1 is read in conjunction with article 24, “the child” is a right-holder from conception onwards. That is the logical consequence of defining the right-holder in terms of a “human being” when at the same time recognizing a right to pre-natal care – and when there is no time or developmental limitation on either the right or on the term *human being*.

(vi) The word “child” in the CRC is a placeholder, or legal fiction. While this fact does not add anything new to the interpretation of “human being,” the fictional meaning of “child” has caused so much confusion in the CRC literature that the matter needs to be clarified in this discussion.

“Child” is not being used in the ordinary way in the Convention; it is an artificial usage, or term-of-art. This is because the CRC stretches the word’s ordinary meaning in two directions: it includes human beings that are older as well as those who are younger than the normal age range of the term. So “child” in the CRC has two fictional dimensions.

First is the stretching upwards in time. In ordinary usage, *child* refers to a person who has not yet reached puberty. A human being enters a new stage of development upon reaching puberty, and is then called an *adolescent*. Moreover, sixteen and seventeen year-olds are also commonly referred to as *young men* and *young women*. To put it simply: Adolescents are not “children.” (Indeed, teenagers consider it offensive to be called a “child.”) So the lawmakers created a legal fiction by expanding the CRC’s meaning of “child” to include adolescents.

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82 See, e.g., Mosby’s Medical, Nursing, & Allied Health Dictionary (6th ed., Mosby, St; Louis, 2002) (“prenatal development [is] the entire process of growth, maturation, differentiation, and development that occurs from conception to birth”), at 1393.


84 The possibility of accommodating diversity through reservations is discussed in Point 7, below.

85 CRC art. 1 is not saying that everyone under 18 is a child, but is giving instructions for how the word “child” is to be interpreted when reading the
The framers of the CRC also stretched the term downwards in time. Both child and baby are used in ordinary language to refer to what biologists and medical personnel call the fetus (or foetus, in British English). These specialists use fetus to refer to “the young of an animal in the womb or egg, esp[cially] in the later stages of development when the body structures are in the recognizable form of its kind.” And when referring to human beings, they use fetus for “the unborn young from the end of the second month” (or perhaps third month) after conception. Below that time, the scientific terms are embryo and zygote, and lay people often use those words as well, rather than “child” or “baby.” So when article 24 speaks of “the child’s” right to pre-natal care, child in article 1 is (arguably) a legal fiction since the word is not usually used for the first stages of the lifecycle.

In short, the framers made “child” in article 1 a term-of-art, or legal fiction, by expanding it upward in time to include adolescents, and by expanding it downward to include the entire pre-natal stage of life.

Legal fictions require people to have a double-consciousness. In order to avoid getting confused, or causing others to become confused, one must be aware that the word they are thinking, reading, writing, speaking, or hearing has two different meanings – the ordinary usage, and the artificial, term-of-art usage. And since this book is about the violence against children from the perspective of the CRC, it is using “child” in accordance with the Convention to refer to the new individual human being from the moment of conception, unless otherwise indicated.

**Some additional remarks about word usage**

*Human being* is not a technical word like *meter*, but a word that people use to show valuation. When people refer to the new individual that has come into being at conception as a “human being,” they are indicating how they feel about human life at that period of the human lifecycle. They are saying that they value that life in a way that goes beyond their valuation of other forms of life; they are expressing a feeling of being connected to, of caring about, of respecting those lives, those beings. In some undefined and inexpressible way, they are saying that the individuals that they are speaking of are a part of the human family. What that means is not at all precise; in fact, it usually has no tangible meaning because it is an expression of a feeling of valuation, of connectedness.

Many of our words are terms of valuation. Whether someone addresses a sixteen year-old female as a “girl” or as a “women” is determined by what feelings the speaker wants to express, and what the speaker wants the young person to feel in return. A dictionary will not give the social norms that govern the uses of valuation words, but to truly understand the meaning of a word – what users are communicating when they use particular symbols in particular instances – one must take into account the social norms that govern those communications.

Human rights vocabulary is sensitive to the value dimensions of words. Human beings are members of the species Homo sapiens sapiens, and they are animals. The first term is a scientific one, in the sense of being part of a taxonomy developed in certain scientific fields, and the second is semi-scientific, and all educated people use those two words to refer to human beings from time to time. But they do so only in limited situations, and they certainly don’t use those terms when they want to express valuation.

For example, the first sentence of the Universal Declaration speaks of “the inalienable rights of all members of the human family,” and the first sentences in the CRC and the Covenants do the same. The UN Member States would have been technically correct had they written, “the inalienable rights of all Homo sapiens sapiens,” or “of all human animals.” But they would never use words like that in such a context. Members of the human family is intended to express and to invoke feelings of connectedness, feeling that those other words are not capable of communicating. The General Assembly was not denying the value of other forms of life, of course. Rather, it was saying that what happens to each particular human being in society will depend on how much we value each other, and on how well we live up to our values, and, likewise, the future of humanity will depend on how we treat them, since the human race is simply the sum total of all those individuals.

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86 See, e.g., *The New Encyclopedia Britannica* (15th ed., 2003) (using “fetus,” “baby,” and “infant” synonymously), at vol. 26, p. 684; and Dr. Benjamin Spock, *Baby and Child Care* Hawthorn Books, N.Y., 1976), at 6 (“Before birth, babies are not only enveloped and warmed and nourished by their mothers, they participate in every bodily movement their mothers make.”); see also, *id.*, at 25 (apparently using “baby” to refer to the new individual from conception).


71
In all societies in the world, there are people who value human life during the first nine months of the human lifecycle, and all societies protect human life during the pre-natal period by a combination of social mores and laws. In light of this, it should not be surprising that so many people – including state officials in international forums – use human being when speaking about the developing human in the first period of life. That is the essence of what is being expressed in the above examples taken from the CRC implementation reports and the other human rights forums.  

But that conclusion must be taken as provisional only, since all relevant points must be considered before the interpretation process is finished.

**Point 5: The preamble recognizes the right to pre-natal protection and care**

Five, the preamble of the CRC expressly asserts that a child needs rights prior to birth. This is a clear reflection of the first vision of the human family, and confirms the conclusions that were reached in the previous Points.

The preamble (ninth paragraph) says: * Bearing in mind * that, as indicated in the [1959 United Nations] Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.” (Second and third emphasis added.)

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State Parties have recognized multiple meanings; see, e.g., India, UN Doc. CRC/C/28/Add.10 (1st report, 1997), at para. 66 (“The word ‘child’ has been used in various legislation [in India] as a term denoting relation; as a term indicating capacity; and as a term of special protection.”). Although the report does not say it, the motivations for the special protection in the third usage are the attitudes of valuation and the feelings of connection (love, respect, etc.) towards the developing human being.

Alston admits that the interpretation of article 1 is the critical legal task in this essay, *Unborn Child*, at 162, but he does not subject it to a legal analysis; in fact, he does not even discuss the meaning of “human being.” He keeps focused on “child,” instead, *i.e.*, at 169-70 (“there is no obvious reason why the preamble would be resorted to in order to interpret what would otherwise appear to be a natural and ordinary meaning of the term ‘child’”). As discussed in Appendix B, Alston is aware that the operative term is human being, and his avoidance of that term must be intentional. Finally, he effectively concedes that it refers to the new individual from conception onwards, as shown in Appendix B.

In his section on “Abortion,” Nowak is obviously aware of the relation between article 1 and article 6. But, as mentioned earlier, he makes no attempt to conduct a legal analysis of the jurisdictional clause. He does, however, make a declaratory statement about article 1: “[A] Since also the definition of the child in Article 1 of the CRC deliberately leaves open the starting point of childhood, [B] it is left to the States Parties to decide for themselves the conflicting and interests involved in such issues as abortion ….” *Article 6*, at 27 (brackets added). Nowak begs the legal issue in the unsubstantiated clause [A], and [B] confuses the issue of who the right-holders are with questions about their rights. Moreover, “decide for themselves” confuses the inherent need for a State to make balancing decisions for context-dependent rights with the limitations on, or accountability for, those discretionary judgments that come with being a Party. And the plural “States Parties” compounds the confusion. Each State decides for itself? Yes – in the first instance, since only the State can write a law. Decide without any limitations? No – the Parties collectively decide, through a variety of channels, what constitutes abuse of discretion on all context-dependent rights, including article 6. Lastly, Nowak doesn’t touch the meaning of “human being,” keeping the attention riveted on “childhood.”

The 1959 Declaration is reproduced in *A Guide to the “Travaux Préparatoires,”* at 642-44.
The assertion that the “child” needs “legal protection” “before birth” is the same conclusion that was reached in Points 1 to 4, so the preamble is direct textual evidence that confirms that the prior analysis is correct.

A preamble does not create rights, of course. Instead, lawmakers use the preamble for the purpose of guiding the treaty’s interpretation. The ordinary meaning rule of the VCLT requires that all provisions of a treaty be read in light of all of the other provisions, and this includes the preambular statements.93

There are three important things about the preamble’s ninth paragraph.

First of all, paragraph nine has to be seen in context to fully appreciate its significance. Paragraph nine is a quotation from the 1959 UN Declaration of the Rights of the Child. The immediately preceeding paragraph of the preamble already mentions the 1959 Declaration, and, all together, the preamble names nine UN treaties and human rights agreements. But there is no quotation from any of the other named agreements; the framers only quote that one statement from the 1959 Declaration; and the quotation from the Declaration makes up the entire content of the ninth paragraph. This leads to the conclusion that the UN lawmakers placed a great deal of emphasis on the point contained in that quotation.

The second important thing is the actual content of the quotation. There are five important ideas contained in paragraph nine: (i) The paragraph asserts that the “child” needs special care and assistance in the pre-natal period of life. This is important because the CRC would fail to ensure such care and assistance if CRC rights were limited to “the moment of birth,” or to some stage between conception and delivery. (ii) Care and protection are not limited to only a part of the pre-natal period. There is no “starting from the [x] week” qualification, for example. The preamble refers to the entire pre-natal period, which starts with conception. (iii) Pre-birth children not only need pre-natal care, as reflected in article 24, they need protection as well. This is the holistic, lifecycle approach to human dignity. For pre-birth children, the most significant protection that goes beyond

93 Alston fully agrees: “the preambular paragraph can be considered to form one part of the basis for interpretation of the treaty,” Unborn Child, at 169; “the preamble serves to set out the general considerations which motivate the adoption of the treaty,” id., at 168, quoting UN Doc. E/CN.4/1989/WG.1/CRP/.1 (1989), at paras. 44 & 47; and a preambular provision can constitute “the moral and political basis of the legal provisions” of the treaty, id., at 169, quoting Nguyen Quoc Dinh et al, Droit International Public 122 (3rd ed. 1987) (International Court of Justice) (referring to the UN Charter’s preamble).
supply us with any other explanation for why the framers would have inserted that particular language. There is no reason for paragraph nine other than for giving article 1 the broad interpretation.

To sum up Point 5: Paragraph nine is direct textual evidence that the framers intended for the CRC to be interpreted as applying to children throughout the pre-natal period of their lives. Preambular paragraph nine is relevant to the analysis primarily because it confirms that the conclusions of the all the prior Points are correct.94

**Point 6: International law already covers the pre-natal period**

Six, at the time the CRC was being negotiated, international human rights law already recognized obligations to protect the lives of babies during the entire pre-natal period, so we can expect that the framers would not have lowered the standards in the CRC by excluding pre-delivery children.

94 For examples of state practice in using the preamble to interpret the CRC, see, e.g., El Salvador, UN Doc. CRC/C/65/Add.25 (2nd report, 2003), at para. 51 (Under the Constitution, “every human being is recognized as a human person from the moment of conception. The amendment was adopted in response to the letter and the spirit of the preamble to the [CRC].”); Germany, CRC/C/11/Add.5 (1st report, 1994), at para. 10 (“In the Federal Republic of Germany, the necessity of ‘appropriate legal protection before . . . birth’ (para. 9 of the Preamble to the Convention) is thus acknowledged.”); Lebanon, UN Doc. CRC/C/70/Add.8 (2nd report, 2000), at paras. 55, 70, & 75.

As for the “meaning and significance” of the ninth preambular paragraph, Alston concludes that “its significance is to endorse” State Parties taking measures “to protect[] the fetus.” *Unborn Child*, at 172; see also, id., at 169 (preamble is a “basis for interpretation of the treaty”). Despite admitting its significance, Alston never uses the preambular paragraph to help interpret article 1, or any other article. Curiously, although he devoted nineteen of his own paragraphs to the preambular (in contrast to three paragraphs on article 1, two on article 6, and nothing on article 24), he avoided using the preamble to interpret any of the articles.

Nowak does not mention this preambular paragraph, even though it is not possible to give a legal commentary on the right to life with taking it into account. But then Nowak does not apply the ordinary meaning rule (or the legislative rule) to any issue, despite his promise to follow the VCLT.

For an interesting example of selective quoting, see Barry E. Carter & Phillip R. Trimble, *International Law: Selected Documents* (2nd ed., Aspen Publ., New York, 1999). In reproducing the text of the CRC, these editors completely eliminated the ninth preambular paragraph. *Id.*, at p. 464. However, the deletion does not coincide with the editorial policy stated in the preface: “[E]ach document [is] usually printed in full. When deemed peripheral, however, materials have been omitted – for example, some of the preambles and the final paragraphs containing mere formalties.” *Id.*, at xvii. Paragraph nine is clearly not peripheral.

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**American Convention**

The American Convention on Human Rights, adopted in 1948, subjects a State’s treatment of babies during the entire pre-natal period to international accountability, and it does so in terms of the child’s “rights.” As we have already seen, ACHR article 1(2) says that, “For the purpose of this Convention, ‘person’ means every human being.” Then article 4 states:

Right to life. 1. Every person has the right the have his life respected. This right shall be protected by law, and, in general, from the moment of conception.

Not only is this the all-inclusive vision of the human family, the American Convention equates “human being” and “person” with “from the moment of conception.” The American Convention adopts the first vision of the human family.

The CRC does not expressly refer to the American Convention, but CRC article 41 incorporates it indirectly: “Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: … (b) International law in force for that State.” Moreover, many of the States that helped write the CRC and that voted for it at the General Assembly were parties to the American Convention. And the States that were not a party to the American Convention would have been aware of the obligations that it imposes on their future co-parties to the CRC.95

**The Civil and Political Covenant**

An obligation to protect human life from conception onwards is also contained in the right to life in article 6 of International Covenant on Civil and Political Rights. While ICCPR article 6 does not ban capital punishment totally, paragraph (5) absolutely forbids it when pre-natal life is involved: “Sentence of death shall not be imposed for crimes committed by persons below the age of eighteen years of age and shall not be carried out on pregnant women.” (Emphasis added.) The human being that article 6(5) aims at protecting is the pre-natal child; the mother’s life is protected only to the extent that it is instrumental for safeguarding the baby’s life. And article 6(5)’s protection runs for the entire pre-birth period.

95 For an example of state practice linking the ACHR to the CRC, see, Argentina, 1st report, CRC/C/8/Add.2 (1993), at para. 31 (‘Argentina ratified the [ACHR] (‘Pact of San Jose, Costa Rica’) . . . which refers to a “human being, generally from the time of conception”’); excerpted in Appendix C.
The ICCPR not only protects human beings during the pre-natal period of life under paragraph (5), it protects them as *holders* of human rights. The provision must be read in context. Article 6(1) says that, “Every human being has the inherent right to life,” and paragraph (5) is a particularized application of that right to children in the pre-natal period when the mother is facing the death penalty. ICCPR article 6(5) implicitly recognizes that the right-holder is the new being that has come into existence at conception. Paragraph (5) recognizes a human right, and the right is held by the child.96

The framers of the CRC had the ICCPR in mind when they wrote the Convention, as can be seen in the references to it in the CRC’s preamble.97 But even without being specifically mentioned, the framers would have had to take it into account because it is a part of international law.98

96 The preamble of the ICCPR speaks of the “rights of all members of the human family,” and it also says that, “these rights derive from the inherent dignity of the human person” (first and second preambular paragraphs, respectively, emphasis added). These are broad enough to cover the new individual who comes into being at conception. And by inference, article 6(1) applies to all children prior to delivery; the difference between paragraphs (1) and (5) is that the later is an absolute right concerning a highly specific situation, whereas the former applies in all situations and is context-dependent.

97 State Parties have considered the protection of pre-natal children in criminal cases involving mothers to be important in interpreting and implementing the CRC. In their reports, at least fourteen States have referred to their national laws prohibiting the execution or imprisonment of pregnant women. For instance, in the section on the right to life, one State said it “protect[s] the child from conception until birth and throughout childhood. Reference may be made to: the non-applicability of the death penalty to a pregnant woman prior to childbirth … .” Cameroon, UN Doc. CRC/C/28/Add.16 (1st report, 2001), para. 43. The subject of this protection is the individual in the pre-natal period of life, not the mother, and that individual is considered a “human being” (the operative term in article 1), and thus a right-holder (under article 6). See also the reports of Armenia, Bulgaria, Burundi, Korea (Republic of), Dominican Republic, Haiti, Honduras, Jordan, Kenya, Laos, Qatar, Sudan, and Venezuela.

98 Alston makes no reference to the prohibition in ICCPR art. 6(5), and Nowak fails to mention it in his discussion of “Abortion.” Also, Nowak makes an astonishing claim about the connection between the ICCPR and the CRC:

“A [Art. 6] It is [ ] clear from the travaux préparatoires of Article 6 of the CCPR that [B] the life of the unborn was not (or not from the moment conception) to be protected. This restricted understanding of the ‘inherent right to life’ [C] also applies to Article 6 of the CRC, as States agreed [D] at a relatively early stage of the CRC drafting process ‘not to reopen the discussion concerning when life begins’. *Article 6*, at 26-7 (brackets added).

Nowak is claiming that CRC art. 6 does not apply to unborn children because the CRC framers decided not to reopen a matter settled in the *creation of the ICCPR* -- that unborn children don’t have a right to life. First, Nowak makes an erroneous argument by linking [D] to [A], because “reopen” refers to earlier matters in the CRC process, not the ICCPR process. (And Nowak plays upon an ambiguity, because the CRC records are not clear whether the matter being referred to was a particular topic of discussion, like the philosophical question, “When does life begin?”, or a particular decision, like the deletion of *from the moment of his birth.*) Second, [A] and [B] contradict what Nowak says in his treatise, *CCPR Commentary*. (And [B] flies in the face of ICCPR art. 6(5)’s protection of pre-natal children, and his “was not (or not from … )” is self-contradictory.) Third, Nowak broke his promise to apply the VCLT by avoiding a textual analysis.
vision that is reflected in the protecting the life of a developing child when his or her mother has been sentenced to death in a criminal case.99

In other words, the framers of the two Covenants and the American Convention have made the same policy decisions: human life is to be valued during the pre-natal stage; and a state’s respect of pre-natal life is a fit subject for international scrutiny in general, and, in particular, for the language, standards-setting processes, and accountability mechanisms of human rights law. Not only are these three treaties part of the background that we can take into account in interpreting the CRC, article 41 expressly links CRC rights to these other treaties.

To sum up Point 6: Interpreting article 1 as covering human beings only after birth – either immediately after (the second vision) or at a later point (the third vision) – would lower existing standards; reading article 1 as covering human beings from conception onwards harmonizes the CRC with the other three treaties.100

**Point 7: Rights must be interpreted in the context of a framework treaty**

Seven, the provisions of the CRC under discussion need to be viewed in the context of how States write framework treaties on human rights.

The legal protection of life throughout the pre-natal period is a controversial subject in many States, and some people may be surprised that an international consensus could have been reached to write the CRC so that it recognizes that human rights are held prior to birth. So one can ask, “Is it plausible that the framers of the CRC could have intended article 1 to apply from conception onwards, as the previous six points have all suggested?”

99 Preventing still-births also falls under the duty to protect pregnant women under ICESCR article 10, where the mother is the corresponding right-holder. So action to prevent still-births serves two beneficiaries, with the right-holder being the mother in article 10, and the child in article 12.

100 Alston and Nowak do not consider the arguments raised in Point 6. Alston recognizes the importance of CRC article 41 by devoting an entire section to that provision. *Unborn Child*, at 164. However, it consists of only two sentences, both of which pertain to the legislative records, so his discussion is not about ICCPR article 6(5), ICESCR art. 12(2)(d), ACHR articles 1(2) and 4, or any other law which CRC article 41 might be concerned with. Alston therefore acknowledges the legal relevance of article 41, at the same time that he passes over everything that makes it relevant. Moreover, while CRC art. 41 is expressly about “the rights of the child,” Alston oddly calls it a “savings provision” that “fully preserve[s]” the rights of the mother to privacy, and so forth. Id., at 178.

If our analysis of the text of the CRC has lead to an implausible conclusion, then something is wrong. We might have made an illogical jump in our reasoning, for example, so we would have to go back over the prior Points, like a student would rework a math problem. But if we still come up with an illogical interpretation, then we would be forced to abandon the textual analysis. Under the Vienna Convention on the Law of Treaties, if the ordinary meaning rule “(a) leaves the meaning ambiguous or obscure, or (b) leads to a result that is manifestly absurd or unreasonable,” then (and only then), we can turn to the records of the negotiations to interpret the treaty.101 In other words, if it appears that the framers failed to write a text that accurately reflects their policy decision, then we can look through the travaux préparatoires to try to find out what they meant by the words they used in the provision in question.

But is the conclusion suggested by all of the previous Points taken together really implausible? Hotly contested issues frequently come up when treaties are being negotiated, and, by the end of the process, the text of a controversial provision will have to favor one position over another; some factions will end up being pleased, while others will be disappointed, and some people may even be outraged at the lawmakers’ “mistake.” In creating the CRC, the policy question was whether or not to subject to international scrutiny and standard-setting processes the state’s treatment of human life during the first period of the lifecycle. The final text would end up reflecting one of three visions of the human family, and no matter which view prevailed, some people would be objecting.

When we consider how treaties are created, then the framers’ adoption of the first vision is not implausible; in fact, as we will be seeing, all of the things that move the drafting process forward favored the most expansive definition of right-holders in article 1.

1. The maximizing versus the minimizing approach

Many controversies arise during the creation of framework treaties on human rights, and they are typically resolved in one of two ways: the delegates will either agree on a text that tends to maximize the right, or agree on one that tends to minimize it.

In the minimizing scenario, the delegates frame the right so as to reflect the lowest common denominator. Since right-holders get only a minimum amount of protection, there is little or no evolution of human rights in the treaty itself. A State Party will still be free to be “generous” by giving its people a higher degree of protection through its own domestic

101 VCLT art. 32.
laws, of course. But it will also be free to be “stingy” about the legal protection that it grants its subjects since the treaty has set an international standard at a low threshold. When the controversy is resolved by the minimizing approach, human rights will have to evolve through a subsequent amendment or protocol to the treaty, or through regional treaties, or in some other way.

The controversy over the minimum age of military recruitment is an example of the minimizing approach. In writing CRC article 38(3), the framers stuck to 15 years of age, which was the standard set decades before in the Geneva Conventions on the laws of war (or international humanitarian law, as it is often called). Most States had strongly disapproved of that age limit for the CRC, but they nevertheless caved in to it as a result of the consensus rule. The losing faction then went to work to raise the standard, eventually creating an Optional Protocol. And since some States want to see a total ban on under-18 recruitment, there is still room for further evolution of human rights law.

In the maximizing approach, on the other hand, the framers define the right so that it gives the broadest scope of protection that is politically possible under the circumstances. A State that feels it cannot live with such a high standard has the option of filing a specifically tailored reservation at the time it ratifies the treaty. This is often the preferred way to reach a consensus on a text.

The framers of the CRC usually took the maximizing approach on the issues before them, as, for instance, on a minor’s right to be kept separate from adults in detention, on the right to appeal, and on freedom of religion.

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Now let’s relate this to the creation of the jurisdictional clause in the CRC (as it intersects with the substantive rights and the preamble).

The question of recognizing that human beings have human rights during the pre-natal stage of the lifecycle poses an issue that is different than most that come up during the creation of human rights treaties. Occasionally, there is a controversy over whether to recognize a particular right, and sometimes there is a dispute over who should be protected, but usually the dispute is about the scope of the right, with the delegates having to choose between the maximizing and the minimizing approaches. The framers of the CRC were faced with a more fundamental question: Who counts as a member of the human family? This is the deep question that runs through the entire history of the evolution of human rights. It is a question that was squarely faced in creating the right to life in the American Convention, and partly faced in the explicit ways that the ICCPR protects human beings prior to birth in capital punishment cases, and the ICESCR requires the reduction of still-births. And it was a question that could not be avoided in creating a treaty devoted to the human rights of children.

The maximizing approach would have the CRC apply from conception onwards (the first vision). A less extensive variation of this approach would start coverage at a latter stage, but still prior to completion of the birth process. The minimizing approach would have the CRC apply at some stage after birth (the third vision), and a less-minimal variation would begin coverage immediately after birth (the second vision).


104 The right that is perhaps the most heavily resisted is the minor’s right to be kept separate from adults while in detention. The States making reservations to CRC art. 37 include: Australia, Canada, Hong Kong, Cook Islands, Iceland, Japan, Netherlands, New Zealand, Singapore, and the United Kingdom. The state doesn’t usually disagree with the principle that minors should not be placed with adult prisoners. Rather, it refuses to agree to a strict prohibition because of balancing decisions about the costs involved. Numerous reservations have also been made to CRC art. 40, as to either the right to representation in a penal case or the right to appeal: Belgium, Denmark, France, Germany, Monaco, Netherlands, Norway, Republic of Korea, Switzerland, and Tunisia. Many reservations have also been made to CRC arts. 14 (with respect to changing one’s religion), and 21 (adoption). The reservations to the CRC are reproduced in UN Doc. CRC/C/2/Rev/8 (1999).


106 UN treaties define the State’s obligations to the human beings who are within its jurisdiction, thereby making a distinction between people inside and outside the State. ICCPR, art. 2(1), and CRC, art. 2(1). But this is a commonsense limitation, and in no way implies that those outside are not human beings. ICESCR article 2(3) was widely (if perhaps incorrectly) viewed as giving developing countries the option to deny economic rights to non-nationals, and thus sparked one of the fiercest disputes in the history of UN treaty creation on human rights. Unfortunately, the delegates in the debates failed to make the critical distinction between the abstract and concrete levels of context-dependent rights, which is what all the substantive rights are in the ICESCR (i.e., the rights in Part III). Article 2(3) allows States some latitude to deprive non-nationals of their human rights at the concrete level of actual entitlements. This was a highly controversial provision because it can give the impression that a non-citizen is a second-class human being. Moreover, there was no technical necessity for the provision in light of the wide discretion that States have to balance competing interests in article 4. But still, that provision does not raise the deep question about membership in the human family that Poland’s revised draft raised.
We have already looked at one source of pressure for the broad approach: adopting the minimizing approach – either the second or the third vision of the human family – would mean that the CRC would provide a lower level of protection and care than the ICCPR, the ICESCR, and the American Convention, and lower than the domestic law of the Member States of the United Nations (Point 6). But there were also four other factors that would tend to push the negotiation process in the direction of maximum CRC coverage, and these will be discussed in the next section.

(2) Four things that favored the maximizing approach to article 1

(i) The consensus rule

The Working Group that produced the basic draft of the CRC proceeded by the rule of consensus rather than by majority vote.\(^{107}\) The drawback of the consensus rule is that treaty-creating process can come to an end if all the delegates are unable to agree upon a text: one holdout can kill the treaty-making process. This creates an unequal bargaining situation. If one faction of States feels so strongly about a particular issue that they would be willing to see no treaty at all rather than lose that political battle, then the consensus rule puts them in a superior bargaining position.\(^{108}\)

The protection of human beings prior to birth is certainly an issue that people feel strongly about. And given that all States were already providing legal protection to human life during the pre-natal period, and given that the two Covenants and the American Convention already extended human rights treaty law to protect pre-natal human beings, it is easy to imagine some State delegations willing to sacrifice a new children’s rights treaty if the draft excluded pre-natal children as right-holders. (And we can verify that this is what actually happened by consulting the legislative records, or informally by asking people who were present at the time.\(^{109}\))

(ii) Safety-value One: Reservations

There are two basic ways that international human rights law accommodates diversity of cultures, political systems, and beliefs. One safety-value is the freedom of States to make reservations.

In the maximizing approach, human rights evolve by States making formal pronouncements of “rights” framed in broad and vigorous language, which is then followed by many years of work to change attitudes and practices so that States will actually live up to those formal statements. First comes an agreement on the ideal, then comes the hard work of trying to live up it. And the ideal nearly always represents the maximizing approach. Commentators in the human rights literature, and human rights advocates in general, typically take a hypercritical view of reservations, but the right of States to make reservations is an essential factor for allowing human rights law and practice to evolve towards our ideals.\(^{110}\)

The CRC, the two Covenants, and most other UN human rights treaties, allow reservations subject to a highly abstract qualification.\(^{111}\) This gives the maximizing faction a powerful argument: “If you still feel the same way about this right by the time the treaty is finally adopted by the General Assembly, then, when you go to ratify it, you can consider making a reservation. But for now, do not undermine the treaty-drafting process by blocking consensus.” The dissenting factions often give in to this argument. The reservation option avoids the need to achieve a real consensus on a controversial matter, conveniently postponing the question of a reservation’s validity to a future time, subject to ill-defined substantive rules and procedures. Moreover, as governments change and civil society works on the issues, a dissenting State may change its mind and ratify the treaty without a reservation to the right that had been the subject of such earlier contention. (And that is what happened on numerous issues during the


\(^{108}\) All words have multiple meanings, and *consensus* has a specialized usage in these types of international forums. Whereas *consensus* usually means that everyone is in agreement, that is not what it means in UN forums. *Consensus* only means that any dissenting States have refrained from making a formal objection at the time of adoption of the proposal, because a formal objection, (e.g., “Our delegation does not agree to this text.”), would stop progress on that provision, and if the provision is crucial, it could stop the treaty-making process altogether. In other words, *consensus* means that a dissenting State has agreed not to block acceptance of the proposal. That is different from saying that the State has agreed to the provision – agreed to both the substantive content of the text, and to its verbal formulation.

\(^{109}\) As Alston describes the situation, “a stalemate that would jeopardize the entire Convention loomed,” *Unborn Child*, at 166-7. Indeed, the crisis was more serious than Alston depicts it. A number of States did threaten to derail the convention if the “before birth” clause was not added to the ninth preambular paragraph. See the “nuclear option” discussion in Appendix A.

\(^{110}\) By contrast, Sandra Bunn-Livingstone, *Juncultural Pluralism vs.a.-vs Treaty Law* (2002), shows in meticulous detail the vital role that reservations play in the creation and ratification of treaties in a diverse world.

\(^{111}\) E.g., CRC, art. 51(2) reads: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted.”
creation the CRC, when States did not follow up on their objections by a corresponding reservation.)

By writing the CRC’s jurisdictional clause (in conjunction with the substantive rights and the preamble) so as to provide human rights throughout the pre-natal period, the treaty gives the maximum amount of protection, and the highest level of international accountability. Any State that feels that it cannot live up to this standard, either as a matter of principle or of domestic politics, is free to make a reservation, the validity of which will be subject to flexible rules and procedures. The reservation might be aimed at restricting the jurisdictional clause, or at limiting the content of one (or more) of the substantive rights. These options made the maximizing approach a highly plausible policy choice for the framers of the CRC.\footnote{A number of states made statements when ratifying the CRC that could be relevant to the question of the termination of the lives of children during the pre-natal period. \textit{E.g.,} Argentina, Botswana, China, France, Holy See, Indonesia, Luxembourg, Malaysia (subsequently withdrawn), United Kingdom. UN Doc. CRC/C/2/Rev.8 (1999). In general, three questions are pertinent to such statements: (i) Is it a reservation, a declaration, an interpretive statement, or some other type of statement? (ii) What does the statement mean, that is to say, how should its content be interpreted? (iii) If it is a reservation, is it valid? While the subject of reservations is beyond the scope of this paper, suffice it to say that none of the above statements regarding the CRC expressly say that children are excluded as right-holders prior to birth, or to any other moment or event. Moreover, they do not appear to be reservations upon close inspection. \textit{See, e.g.,} United Kingdom, UN Doc. CRC/C/83/Add.3 (2nd report, 2002), at para. 1.8.2(a) (“it does not amount to a reservation”); France, UN Doc. CRC/C/3/Add.15 (2nd report, 1993), at para. 171 (“France made an interpretive declaration under article 6.”). And the ratification statements of Argentina and the Holy See expressly affirm the pre-natal rights of children.

From the outset, the CRC Committee made a distinction between its authority to monitor the treaty and the authority of State Parties to decide questions of validity; see, e.g., UN Doc. CRC/C/191/SR.14 (Oct.9, 1991), at para. 17 (Klein-Bidmon, Representative of the Secretary General, advising the Committee: “It was for the States parties to decide on that matter [the validity of reservations] ….”); para. 28 (Kolosov: “The rule was that only States parties were entitled to give a formal interpretation of the Convention,”); para. 29 (Santos Pais: “The fact that the Committee was not empowered to interpret the provisions of the Convention should not prevent it from making recommendations ….”); but see para. 19 (Hammarberg: “The question of who was permitted to decide [questions of validity] was not as clear as it might seem.”).}

(iii) Safety-valve Two: Context-depend rights

The other way that international human rights law accommodates diversity is by making a right context-dependent. As discussed earlier (in Chapter 2), the hallmark of context-dependent rights is the need for the State to make balancing decisions as it translates the abstract statement of the right into concrete legal entitlements. Balancing decisions have to be made in the context of all the relevant circumstances in which the entitlement is to be enjoyed, and they always hinge on value judgments. Commentators and activists alike typically ignore the need for governmental discretion, the need for trade-offs, and the role of values, either by speaking in absolutist language, or by giving only token recognition to these realities. But no right is cost-free, no human decision is value-neutral, and the central task of government is to make decisions about the proper relation between competing interests.

Since only the State can write its own laws, each Party has a great deal of authority to make discretionary judgments about what constitutes the most just and practical trade-off among competing interests. And when a State becomes a party to a human rights treaty, it recognizes that its sovereign judgment is not as “absolute” as it was considered to be in by-gone eras. The modern day understanding of international law subjects the State to various means of accountability, even to forms of interference and intervention, for how it treats the human beings within its jurisdiction or power.

But the prominent role of the State in making its own balancing judgments, subject to international accountability in a system in which it is a co-equal sovereign, gives all States enough freedom that they are often willing to agree to the broad, vigorously-worded rights in the UN treaties.

To bring this to bear on the CRC, article 1 defines who the right-holders are, and articles 2 through 41 define their rights. The maximizing decision was to make all “human beings” under the age of majority – from conception to 18 years – right-holders. With the exception of freedom from discrimination (article 2(1), which included sex discrimination), all the rights that have practical significance for human beings in the pre-natal period are context-dependent. The right to life (article 6(1)), the right to pre-natal care (article 24(2)(d)), and freedom from violence (article 19) are the most obvious ones, but many other rights also have tangible meaning – like the rights to medical treatment, identity, relations with parents, and support for the family.\footnote{The scope of all of these context-dependent rights at the abstract level is the same for everyone, everywhere, but concrete entitlements require the duty-bearer to make context-specific balancing judgments.}

The fact that each State Party is in the driver’s seat of its own car is a major factor that allowed the framers to have a consensus on a CRC text
that reflects the first vision of the human family. The drivers are not free to drive in any way they please, of course, disregarding human dignity whenever they feel like it. Their judgments on context-dependent rights are subject to accountability. But the State’s prominent role in governing its own country in respect to these rights is an indispensable safety-value for accommodating diversity.

(iv) Accountability to society

While sovereign States are accountable to each other under the modern rules of international law, state officials are accountable to their societies, though the legal and social process of that country. Throughout the world, people value human life from conception onwards, and they have demanded that their governments regulate the protection and care of human life during the pre-natal period. These demands have resulted in national policies and laws for the benefit of children in the pre-natal period, and they shape the conduct of government officials in international forums, including those that create human rights agreements. When the Universal Declaration speaks of the “conscience of mankind,” and the CRC says that the framers took account of the “traditions and values” of societies, and that children need “safeguards and care, including the appropriate legal protection, before … birth”, we see States taking account of the views of civil society. In light of the fact that States represent their societies, it is implausible that the General Assembly would have accepted a children’s rights treaty that adopted either the second or the third vision of the human family.

Society’s opinions about the protection and care of pre-natal human life guide what States do in other forums as well. At the UN Conference on Women in 1995 in Beijing, for example, public concern about terminating the lives of girls during the pre-natal period – “sex selection” – found its way into a number of paragraphs of the Declaration and Plan of Action. For instance, States and civil society are called upon to eliminate all forms of discrimination against the girl child which result in harmful and unethical practices such as pre-natal sex selection, … [and] enact and enforce legislation protecting girls from all forms of violence, including pre-natal sex selection. This is not just a call for action to stop a practice that could eventually destabilize a country, as might happen if there is a serious demographic imbalance between men and women. Nor is it just about stopping a practice that reflects and reinforces the devaluation of women and girls. By using the words “child,” “girl,” and “discrimination,” the victims of the pre-natal sex selection are being accorded the status of human beings, as members of the human family. And States give them this status because their citizens are demanding it.

Certainly the perception that a pre-natal child is a member of the human family did not arise in 1995, but existed when the CRC was being written. And thanks to the maximizing approach, sex discrimination against pre-natal girls is covered by the Convention: both State Party practice and the Committee on the Rights of the Child address “sex selection” as a violation of the child’s human rights, whether it happens prior to birth or afterwards.

To sum up Point 7: The CRC is a framework treaty, and we cannot address violence against pre-natal children as a legal question under the Convention without taking that fact into account. Treaties help facilitate the evolution of international law by, among other things, combing provisions that allow balancing with those that do not. On the one hand, the framers advanced human rights law by extending CRC protection from conception onwards in a jurisdictional clause that admits to no trade-offs between competing interest groups. The evolutionary step lay not in protecting human beings prior to birth, since this has already been done (Point 6); the step forward was, first, the deliberate decision to reject the second vision (Point 2), and second, framing pre-natal care and protection in terms of the

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114 Universal Declaration of Human Rights, second preambular paragraph.
115 CRC, twelfth preambular paragraph.
116 Preambular paragraph nine, quoting the 1959 Declaration on the Rights of the Child.
118 Id., at para. 283d. See also id., at para. 115 (“acts of violence against women also include pre-natal sex selection”), para. 124i (“enact and enforce legislation against the perpetrators of practices and acts of violence against women, such as pre-natal sex selection”).
119 E.g., in reporting to the CRC Committee, the Government of India referred to the “brutal murders of girl-children in the womb,” quoting the National Commission for Women, in India, UN Doc. CRC/C/93/Add.5 (2nd report, 2003), at p. 73 (Box 3.3, under the section on article 2).
120 E.g., India, UN Doc.CRC/C/28/Add.10 (1st report, 1997), at para. 84 (reporting, under article 2 and the heading “Discrimination against the girl child,” that “the female child is aborted and not allowed to live”), para. 85 (“selective abortion of the female foetus”), & para. 91 (“female foeticide”); Concluding Observations, India, UN Doc.CRC/C/15/Add.15 (2000), at para. 32 (“discriminatory social attitudes and harmful traditional practices against girls, including female infanticide, selective abortions”).
developing child’s human rights, rather than leaving it implied as was done
in the two Covenants. On the other hand, the framers made the right to life
and freedom from violence context-dependent, and they provided for
reservations, subject to a flexible test, thereby allowing for genuine
consensus on pre-natal protection questions to evolve over time, just like
they did with other human rights issues.121

Point 8: Arbitrary distinctions must be avoided

The eighth point to consider in interpreting the CRC returns to the
lifecycle understanding of human beings, but this time with a closer focus.
The one theme that runs throughout international human rights law is that
the State must not act arbitrarily.122 This presented the UN lawmakers with

121 Alston does not interpret draft article 1 in the context of the evolution of human
rights law. This oversight is significant because throughout his long and
distinguished career he has championed the evolutionary, dynamic approach to
human rights law. But on the subject of the human rights of pre-delivery human
beings, he resists not only the development of the law but even the status quo, which
he does by downplaying the significance of existing protection of pre-natal human
life under international law (Point 6). Alston’s about face on evolutionary and
expansive interpretations are discussed in Appendix B.

Nowak also fails to situate legal questions about pre-natal rights within the
context of a framework human rights treaty. But while he does discuss sex selection,
which Alston overlooks, his commentary needs close examination. In his section on
“Abortion,” Nowak correctly notes that the Committee’s concluding observations
have disapproved of abortion as a method of family planning, and of discriminatory
abortion against girls. But then he says that the “Committee is not fully consistent on
its interpretation of Article 6,” implying that the Committee has said that the
intentional termination of the life of a pre-natal child (or “abortion”) is not a CRC
issue. Article 6, at 30. Wrong: the Committee has never made such a statement.

Nowak’s assertion is misleading because, first, he confuses the actions of the
Committee – a body that issues statements after reaching a consensus or taking a
vote – with the actions of individual members. While some past or present members
might hold the second vision of the human family, and even resist applying the CRC
to children prior to birth, the Committee has never adopted those views. Second, he
blurs the distinction between giving a legal interpretation and monitoring. If Nowak
had said that the Committee has not been rigorous in monitoring article 6, or that it
has never issued an interpretation of article 6, then he would have been correct (and
he would be correct if he said that about article 1 and all the other rights). A legal
interpretation requires a serious effort of analysis, and the issuance of a
pronouncement of the resulting conclusions, normally with the supporting reasons.
And this has never happened.

Interestingly, Nowak downplays the Committee’s treatment of pre-natal sex
selection as a children’s rights issue by quoting its recommendation to “undertake
studies” of sex selection (in para. 49 of its Concluding Observations), but omitting
to quote or even cite its rights-based condemnation in paragraph 32 (quoted in the
preceding footnote). Article 6, at 29.


a challenge when they set about creating a convention to be framed in terms
of the “rights” of a “child.” They had to take a holistic view of human
beings, one that includes the lifecycle understanding of existence, and at the
same time not draw arbitrary lines.

Human rights law is, at its core, about preventing the state from
acting arbitrarily when exercising its power. Each of the rights in the UN
human rights agreements protects people against arbitrariness in a particular
way. In addition, principles have been developed to protect people against
arbitrariness when a State translates context-dependent rights into concrete
entitlements, such as the principles of proportionality or equal protection.
For instance, governments sometimes inappropriately treat two different
sets or groups of people in the same way, disregarding their different needs.
And sometimes States inappropriately divide people into two or more
groups, even though there is no valid distinction between them. Courts often
strike down lines that legislatures have drawn when the lines cannot be
justified. The various tests that judges use may be formulated differently in
different jurisdictions, but they are all based on the principle of non-
arbitrariness: people who exercise governmental authority must not act
arbitrarily, or unreasonably, or disproportionately.

The lifecycle understanding reminds us that the foundation of a
person’s entire life is set during the pre-natal period. But the lifecycle
approach to human dignity also reminds us that human life is a continuous
process of change. “Although organisms are often thought of as adults, and
reproduction is considered the formation of a new adult resembling the
adult of the previous generation, a living organism, in reality, is an
organism for its entire life cycle, from fertilized egg to adult, not just for
one short part of that cycle,” as the Encyclopedia Britannica puts it.123 Once
the mother’s and the father’s DNA combine, a new life begins: from
conception to the person’s death, which could be sixty, seventy, or more
years later, forces entirely within the organism produce a seamless
continuum of change. In some species, conception and the first stages of
development take place entirely outside of the female’s body; in some
species the early development takes place inside the male’s body; and in
other species it occurs within the female’s body, as in our species. But the

appreciate that the lifecycle is the history of the same individual over time, Elaine
Morgan points out that, “Every human female is born with around a million eggs
lying dormant inside her. No more are produced after birth.” The Descent of the
Child (Oxford Univ. Press, 1995), at 5. In fact, Morgan’s speaking in terms of “born
with” and “after birth” obscures her point. The eggs are created not long after
conception, not at birth. So when a twenty-five year old woman becomes pregnant,
the egg that is fertilized is one that she has carried with her since her earliest days in
her own mother’s body.
physical space in which these events occur does not alter the fundamental facts of life: “a living organism, in reality, is an organism for its entire life cycle, from fertilized egg to adult, not just for one short part of that cycle.” The new individual comes into being at the time of conception, regardless of which animal species it belongs to.

From the perspective of a lifecycle, the pre-natal stage of human life lays a foundation for the individual’s entire life, just as childhood lays a foundation for adolescence, and adolescence lays a foundation for adulthood, and adulthood, in turn, is made up of its own stages of life. But all of this foundation-laying is about the life of the same individual organism. The lifecycle of an individual human being is the history of how a single organism changes, from the beginning of its existence as an individual entity to its end in death.

In a human rights perspective, moreover, one does not value the life of an individual child because that child has the potential to develop into an adolescent who has the potential to develop into an adult. One values the life of the child because one values human life. And since life is a process, the UN lawmakers were faced with the problem of trying to make distinctions about the protection of human life that are not arbitrary.

The human rights problem faced by the CRC framers

As Professor Geraldine Van Bueren has written in The International Law of Children’s Rights, “minimum ages are inevitably arbitrary.”[124] Peter Singer’s three-month grace period for an absolute right to terminate the life of a child is a minimum age rule. “From the moment of birth” is also a type of age test, and so is any test framed in terms like, “from the [x] week after conception.” If the framers of the CRC had adopted either the second or third vision of the human family, the Convention would have adopted arbitrary distinctions between children.

Since it is not unusual to see commentators in the CRC literature speak of children having rights “from the moment of birth,” the following discussion on arbitrariness will focus on that age test. In addition, since advocates of the second vision do not define what “the moment of birth” means, the discussion will assume that it refers to the instant when the baby’s body has completely separated from the mother’s body (without trying to define when that “instant” actually occurs).

Let us say that Alex and Bob are identical twins, and that Alex is born first. If we assume a line drawn at “the moment of birth,” Alex will acquire all human rights at the precise instant that his feet emerge from the birth canal, while his twin brother Bob will have absolutely no human rights at all. Alex’s life is fully protected by international human rights law at that exact moment, but the genetically identical and equally developed Bob is not a “human being”: so he – or “it” – could be intentionally killed for any reason whatsoever, as far as the CRC is concerned. Since Bob is still in the process of being born, notions like “human dignity” and “member of the human family” would be meaningless in his case, and feelings of compassion and respect towards him (“it”) would be non-existent, simply because it has not yet passed beyond the line. So Bob is not a human being while his twin brother is, even though Bob’s birth would be only seconds later.

This raises the obvious question: No two human beings could be more alike than identical twins, so why aren’t Alex and Bob treated equally as holders of CRC rights? Bob has the same interest in living as Alex does, but since he does not hold the same status of “being completely separated from his mother’s body,” he – “it” – is treated as if its life is not worthy of any respect whatsoever. From the point of view of baby Bob’s interest in living, it is arbitrary to deny him CRC rights while giving them to his twin brother.

The commentators in the CRC literature who take the “from the moment of birth” position do not attempt to defend that status distinction between children (and they don’t tell us when “the moment” occurs). And it is not difficult to see why they have kept silent: as Van Bueren says, any minimum age test is “inevitably arbitrary.”

Not only did the framers of the Convention reject a “from the moment of birth” limitation on human rights (Point 2), the lifecycle approach to early childhood development reminds us that the same problem of arbitrary line-drawing occurs anywhere on the life continuum, right down to conception (Point 1). Once the new organism has been formed, its life is driven onwards by a continuous flow of microscopic and sub-microscopic forces, making it impossible to draw non-arbitrary distinctions for the purposes of human rights protection. As Van Bueren says, any attempt at “subdividing childhood” by age is “inevitably artificial,” and “arbitrariness” will always result.[125] It is precisely because no one has found a way to draw a non-arbitrary line that the world is bedeviled by moral, political, and legal controversies over the protection of human life through the pre-natal period and the birth process (and sometimes beyond, as represented by Peter Singer). That is the inescapable problem that the UN lawmakers faced when they wrote the Convention on the Rights of the Child.

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The CRC framers found a solution to the problem

The UN lawmakers did not run away from the need to avoid arbitrary line-drawing. They faced the problem and solved it: they decided that “the child” shall have CRC rights during the entire first part of the human lifecycle – the prenatal, infancy, childhood, and adolescence stages –, which are all of the dependency periods that proceed adulthood. They drew no line within this part of the lifecycle that would “sub-divid[e] childhood” into right-holding and non-right-holding children: they rejected the possibility of making babies right-holders starting from “the moment of birth” (Point 2); they expressly recognized that rights are held throughout the pre-natal stage of life (Points 3 and 5); and they defined the right-holder by the unrestricted, all-inclusive word “human being” (Point 4). Moreover, they did not pass the buck by giving each State Party the freedom to draw its own line as to who counts as a member of the human family. Any such line would be arbitrary, and arbitrariness is contrary to the international human rights project. An arbitrary line would have violated the principle of universality. By ensuring human rights protection from conception through the entire dependency period, they satisfied the requirements of both non-arbitrariness and universality.

Equally important, their solution did not create a new arbitrariness problem; it does not result in any logical contradictions with other rights. As discussed earlier and as will be elaborated on later, the framers did not make the rights to life and to health, the two most important rights during the pre-natal period, absolute. Like most rights, they are context-dependent. Translating context-dependent rights into concrete entitlements always calls for balancing decisions. These decisions necessarily take into account all of the relevant factors, and they must give each factor its appropriate weight. And in this balancing process, the decision-makers must respect the human dignity of all those who will be impacted. In consequence of this, context-dependent rights give rise to countless ethical and political controversies. The framers of the CRC did not solve these balancing questions; they simply left them to the evolutionary process of international human rights in which each State exercises a broad scope of discretion, subject to international accountability under the framework of the CRC, and the other UN mechanisms.

But the lawmakers did solve the crucial problem of avoiding arbitrary distinctions in respecting of human life under article 1. CRC rights are held throughout the first dependency period of the human lifecycle, from the start of the new life at conception to the person’s eighteenth birthday or age of majority.

To sum up the eighth point: by refusing to “subdivide[e] childhood” by any minimum age test for being a right-holder, the framers met the fundamental requirement of human rights law – they avoided arbitrary lines. This solution does not eliminate the need for States to make balancing decisions, but it does ensure that the balancing will occur within a human rights perspective, which includes respect for human dignity, and international accountability.126

126 Alston does not address the issues in Point 8. Moreover, since he makes no effort to define either the operative term human being or his the moment of birth, he avoids facing the tough cases, like twins, and babies in incubators. A premature baby in an incubator is like a baby in the womb, in some respects, while in other respects, such a baby is like one who has been born. And Alston provides no basis for rejecting a CRC interpretation reflecting Singer’s vision. As Singer himself argues, birth is an arbitrary starting point for legal protection. A standard way that lawyers approach legal problems is to identify the ethical and other principles that lay behind the definitions and rules that govern the easy cases, and then apply those reasons to the in-between or difficult cases. See, e.g., Cass R. Sunstein, Legal Reason and Political Conflict (Oxford Univ. Press, 1996). But Alston neither defines his terms, nor gives his underlying principles. Since twins, premature babies in incubators, and infanticide are commonplace occurrences in life, a bone fide legal interpretation of CRC article 1 has to address them.

Nowak also fails to address the problem of arbitrariness in defining the right-holders. The attentive reader may be wondering how Van Bueren’s remarks relate to the fact that states have many age-based laws, such as a minimum age for attending school, and about the age of 18 as the cut-off in article 1. First of all, domestic minimum age laws often have provisions that allow individualized exceptions in meritorious cases, and secondly, age laws are constantly being challenged, debated, and revised. Indeed, the CRC has had a major role in stimulating such reassessments. As for the CRC’s cut-off age: (i) Article 1 does not say that the person ceases to be a human being at 18, and can be killed at will. (ii) Half of the CRC rights are virtual clones of the rights in the UDHR and the two Covenants, with the other half being derivable from them, and, upon reaching 18, the person is fully covered by those other agreements. (iii) The CRC was created because children and adolescents need “special” assistance due to where they are in the lifecycle, and it is not arbitrary to cease special treatment when the need for its ceases. Moreover, since article 1 leaves the practical consequence of the cut-off to the discretion of each state, subject to international accountability, there is ample room to mitigate any residual arbitrariness. By contrast, Alston’s “moment of birth” vision of the human family, and his reading of the CRC, raise the arbitrariness problem in its full force. Another way to approach to the arbitrariness problem is through non-discrimination. See, e.g., Poland, UN Doc. CRC/C/70/Add.2 (2nd report, 2002), at para. 93 ("Polish law has also eliminated discrimination against unborn children, so that children are given full protection from the moment of conception.").
**Point 9: The interpretation must be in “good faith”**

According to the Vienna Convention: “A treaty shall be interpreted [a] in good faith in accordance [b] with the ordinary meaning to be given to the terms of the treaty [c] in their context and [d] in light of its object and purpose” (brackets and emphasis added). The good faith requirement is not given much attention in the legal literature, although it is an important rule.

And it is an especially important rule when it comes to interpreting the CRC with respect to the human rights of children during the pre-natal period of life. Since granting impunity for the intentional termination of the life of a child prior to delivery gives rise to passionate feelings on all sides of the issue, feelings which are often rooted in strongly held ideological beliefs, the good faith requirement in VCLT article 31(1)[a] is crucial.

**Two approaches to legal interpretation**

There are basically two ways that people approach the task of reading a legal text. One way is to try to determine the intentions of those who wrote the document – the legislators in the case of statutes, and the contracting parties in the case of contracts, for instance – so that the interpretation will implement their intentions, or policy decisions. This is the way that people usually expect judges to approach the task of interpretation. The other way is to start with one’s own view as to what the policy decision should have been, and then devise arguments that will support that view. This is the way that lawyers approach the task when they represent their clients.

The Vienna Convention on the Law of Treaties adopts the first approach. The rules of interpretation in the VCLT come from the domestic practices of states, and over the years these practices have been incorporated into customary international law. The States that created the VCLT codified existing international practices, clarifying, systematizing, and, to some extent modifying, the existing rules.

In domestic law, the addressees of the rules of legal interpretation are the officials that are authorized to render binding legal rulings, which includes judges, most notably, as well as an assortment of other public servants who play judge-like roles. These judicial officers are expected to implement the policy decisions made by the legislative and executive branch authorities, as those decisions have been laid down in the law; they are not expect to act like legislators, making their own political or policy judgments.

The ordinary meaning rule, the first rule of interpretation, requires judicial officers to deduce policy judgments from the face of the legal text. If that procedure fails to yield a reasonable solution, the legislative history rule permits them to turn to documentary materials to try to deduce the lawmakers’ intentions. Many jurisdictions in the world do not permit judicial officers to use these materials when interpreting its constitution or statutes, so the VCLT’s secondary rule is a major departure from the domestic jurisprudence in those countries. The inclusion of the legislative history rule was the most difficult part of the negotiations over the Vienna Convention precisely because of this departure. But since customary international law already had incorporated that rule, agreement was finally reached to codify it in the VCLT.

What is important in the present discussion is that the first and second rules of legal interpretation have the same aim: the judicial officers are to deduce the lawmakers’ intentions, so that the legal interpretation implements the lawmakers’ policy decisions. Under the VCLT, judges are not to substitute their own policy judgments for those of the States that wrote the laws.

**Two dimensions of a “good faith” interpretation**

There is both a private and a public dimension of the rule that an interpretation must be made “in good faith.” The private dimension pertains to the thinking processes of the judicial officer, and the public dimension is about the reasons that the judge gives for the interpretation.

The private dimension is the one that has already been referred to. When a judge tries to deduce the lawmakers’ intention from the text or the legislative records, the judge will have to set aside, as much as possible, any personal opinions about what the lawmakers should have done. There is always a subjective element in legal interpretation, of course; it is not a mechanical process, since the making of inferences is rarely a matter of pure logic: judicial officers are human beings who will often have personal beliefs about what constitutes good public policy. All that can be required is that the people who have been authorized to issue official legal interpretations make a good faith effort to try to deduce the lawmakers’ intentions. The private dimension of the “good faith” requirement calls upon the judge to make an honest effort not to substitute his or her beliefs about what constitutes the appropriate policy or political judgment – about what the lawmakers should have intended, had they made the wisest policy judgment.

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127 VCLT, art. 31(1).
This is to be contrasted with the approach followed by lawyers who are serving as advocates for clients. The lawyers start with what their clients want the law (or contract) to say, and then construct legal arguments to “prove” that their clients are right. The lawyers on the other side of the case will do the same thing, taking their client’s position as the “correct” interpretation. The attorney does not argue the case based on what he or she really believes the lawmakers intended, any more than they would argue a criminal case based on their personal beliefs as to whether or not the client committed the crime. The lawyers are always “result-oriented”; they start with the legal conclusion that best serves the client’s interests, and then invent arguments that they hope will persuade the judge. The attorneys on both sides of the case know that the judges will be (or should be) applying the rules of interpretation, and they shape their arguments accordingly.

To put it another way, the lawyers are not themselves bound by the good faith requirement. An attorney who works for a human rights NGO, for example, does not “violate” the Vienna Convention by first adopting a position on what a particular treaty should say, and then constructing an argument to advance acceptance of that position. The advocate is not the addressee of the rule, and, moreover, private actors are not the duty-bearers of international legal obligations, including those in the VCLT.

On the other hand, an attorney who does not set aside preconceptions of what the law should be is not interpreting the legal text in conformity with the Vienna Convention. The attorney is not giving a “legal interpretation” in the sense used in the VCLT. The attorney is making an argument. Whether one calls it a political argument or a legal argument, the “interpretation” is advocacy for a pre-determined position of what the lawmakers should have intended, with “should” being based on what the client wants.

The public dimension of the good faith requirement pertains to how the judicial officers explain their rulings. There is general acceptance of the principle that judges should give the reasons for their decisions. Good governance requires transparency and accountability, and this applies to judicial officers as much as to any other government official.

The good faith requirement in legal interpretation applies to the way judicial officers explain their reasons. Judges do not simply give a factual description of the thought process that led them to their conclusions. There is always some element of advocacy when they give their explanations. Judges want to promote acceptance and compliance with their rulings, they want to demonstrate the justice and soundness of their decisions, they want people to believe that they have done their job correctly. Judicial officers present their explanations with these goals in mind.

The public dimension of the good faith rule requires judicial officers to give honest explanations, rather than contrived ones. If a particular consideration influenced their decision, they should say so in their explanation. Withholding a part of their reasoning from public scrutiny is not a “good faith interpretation.” Or claiming that a particular consideration influenced them, if they do not sincerely believe in the validity of that fact or argument, would not be a “good faith interpretation.”

The public dimension is also to be contrasted to the way that an attorney represents a client. While lawyers can be required not to outright lie or fabricate evidence, no one expects them to sincerely believe everything they say on behalf of their clients.

The differences between the two ways that people read legal texts are also found in everyday life. Everybody has seen a person fight to prove himself right. And everyone has seen a person trying to reach the truth of a matter, even when the truth will be painful — painful because the conclusion arrived at will conflict with the person’s beliefs or material interests, for instance. The differences in the two approaches lie both in the person’s thought processes, and in the person’s explanations.

The good faith requirement in the present context

The present task is to determine who the right-holders are under the CRC, and to do so pursuant to the rules of legal interpretation contained in the Vienna Convention. Most people who consider this legal question will probably already have a personal view about who counts as a member of the human family, and, as a consequence, how the UN lawmakers should have defined the class of right-holders under CRC article 1. And anyone considering the legal question has a choice between the two approaches to reading the CRC. A person can say to himself or herself:

- Although I am not a judge sitting on an international court with this issue before me, I will apply the Vienna Convention in my interpretation of the CRC. I will act as a judge would be expected to act. Yes, I do have some opinions about human rights applying during the pre-natal period, but I will do my best not to allow personal feelings to
influence my interpretation. I will base my interpretation on what the text of the CRC says, together with any commonsense inferences that flow from the text. Or,

- I know what I want the CRC to say about human rights applying prior to birth, and I’m going to interpret the text so that it conforms to that view. Or, in a less intense version,

- I have an opinion as to whether human rights should apply during the pre-natal period, and I will take it into account as I interpret the CRC. I am not saying that I will automatically reject any interpretation that conflicts with that opinion. I don’t know at the present time what conclusion I will come to since I haven’t finished thinking about all of the relevant points. It’s possible that I may accept an interpretation that conflicts with my personal feelings, and, who knows, maybe I will end up changing my views. All I am saying is that I will not try to keep my opinion about who the right-holders should be from influencing my legal interpretation of CRC article 1.

A person who takes the first position will be conducting a legal interpretation in conformity with the good faith requirement. A person who takes either the second or third position will not be “interpreting” the CRC in the sense used in the Vienna Convention, because the good faith rule is not being complied with.

The second and third person will not be doing anything illegal, of course, provided that he or she is not acting in a judge-like capacity. The person will simply be exercising his or her freedom of opinion and freedom of expression, and there is nothing wrong in that. But that person would be wrong to say, “The CRC means such-and-such, according to the rules of legal interpretation.” The good faith rule is a mandatory requirement in the Vienna Convention, and if it has not been complied with, then neither have the rules of legal interpretation. In the second and third situations, to say that “the CRC means such-and-such” would really be a political claim, since it rests on a political opinion. To qualify as a bone fide legal interpretation, a sincere effort must be made to comply with the rules of interpretation in the Vienna Convention, and this includes both dimensions of the good faith requirement, the private thought-processes and the public explanation.129

129 Alston and Nowak do not mention the good faith requirement, and they do not comply with it since they do apply the other three components of the ordinary meaning rule (ordinary usage of words, context, and purpose). They also make selective use of the legislative records to produce their interpretations. These two problems are the two sides of the same coin: advocacy for a pre-determined position. Conclusion from the Nine Points

When the question of human rights for pre-natal children comes up, people usually just refer to the ninth preambular paragraph, and they say either something like, “Of course the CRC covers unborn children,” or else just the opposite, like, “It’s only the preamble, so it doesn’t change the fact that Convention doesn’t apply prior to birth.” Either way, there is no serious reflection, no attempt to conduct a legal analysis. But as we have seen, an analysis of CRC article 1 that follows the Vienna Convention on the Law of Treaties raises nine points, and the preamble is the least important of all of them.

The fact that the framers used the all-inclusive term “human being,” and did so without placing any age or developmental restriction applicable to the pre-natal period (Points 2 & 4); the fact that they removed the “from the moment of birth” limitation in the working draft, and did this so the CRC would give rights “from the moment of conception” (using the records to confirm Point 2); and the fact that children have the right to pre-natal health care from conception onwards, which could not be possible if they were not “human beings” under article 1 (Points 3 & 4), are enough to decide the legal question. The preamble simply confirms the conclusion that results when the ordinary meaning rule is faithfully applied to the text (Point 9). And the remaining considerations just reinforce the legal conclusion even more (Points 6, 7, & 8).

On the other hand, there is no textual evidence that the UN lawmakers adopted either the second or the third vision of the human family, or that they subdivided the pre-natal period into right-holding and non-righting babies. The two human rights experts who have written the most on the subject give readers the impression that the Convention only applies “from the moment of birth.” But they do not follow the Vienna Convention on the Law of Treaties: they do not explain how “from the moment of birth” can be derived from the text of the CRC, or from the legislative history. (They don’t even tell readers that “from the moment of birth” was removed, or why it was deleted.) In reality, “from the moment of birth” is a personal vision, and their commentaries are best seen as political advocacy for that vision, rather than as legal interpretations.

In short, when the ordinary meaning rule is applied to CRC article 1, and that provision is read in the context of the treaty as a whole, the conclusion is that each “child” is a right-holder during the entire pre-natal period of life, that is to say, from conception onwards. As a consequence,
the question of how a Government treats human life prior to delivery – how it applies the context-depend right to life in concrete situations, for example – is subject to international accountability under the framework of international human rights law.

**Confirmation of the interpretation**

The ordinary meaning rule has a corollary: once an interpretation is reached strictly upon the text, the legislative records can be used to confirm it. As shown in Appendix A, the records of the negotiations not only confirm the above interpretation, they do so beyond any reasonable doubt.  

**Summary of Chapter 4: Violence Against Babies During the Prenatal Period**

There are three basic visions of babies as members of the human family: They are members during the pre-natal period; They become members at birth; or They are members only after some period of time has elapsed after being born. When the Member States of the UN were creating the Convention on the Rights of the Child, the treaty would have to end up reflecting one of these three perspectives on life. The policy decision might be expressly stated in the text, or it might have to be inferred from it, but because these are mutually exclusive visions, one of them would have to prevail in a treaty that defines the right-holders in terms of “human being,” and which takes a comprehensive, “holistic” approach to survival and development.

The overall pattern in the implementation reports is that States have taken the question of pre-natal rights seriously, in the initial reports particularly. They have given meaningful information on their laws for the protection of pre-birth children under the sections on article 1 or article 6 (128 out of 176 States), saying either expressly (85 States) or impliedly (43 States) that pre-natal children have rights. And no State has expressly denied that these children are right-holders. Moreover, States have often made thoughtful remarks showing that they had paid serious attention to legal issues.

So State Parties have expressed just one view, that children are right-holders even during the pre-natal period, which is, in essence, the first vision of the human family. There are significant variations in what the States are actually doing in terms of legal and other protection of pre-natal children, and in terms of a holistic approach to protection and care, as we will be seeing in Chapter 6. And with 46 million intentional acts of deadly violence against children in the pre-natal period of life each year, States are having more difficulty realizing the article 6(1) rights of pre-birth children than with perhaps any other right, and any other group of right-holders in society.

But before trying to offer constructive criticisms, credit must be given where it is due. When one looks at how seriously States have taken the human rights of babies in their implementation reports, and then compares that to all the other categories of human rights actors – academics, children’s rights and human rights NGOs, the various treaty-monitoring bodies, UN agencies, and so forth – States have outperformed them.

With that said, the understanding of the legal issues is not where it should be. The implementation reports sometimes reflect the standard misconceptions about the Convention and its coverage of pre-natal children, for example. And outside of their reports, States are having considerable difficulties in addressing the protection and care of pre- and post-natal babies as human rights issues, just as the other actors are having difficulties.

But a State cannot perform its duties in making balancing decisions at the national level, or in making decisions about accountability at the international level, until it has resolved all of the key legal issues to its satisfaction. The detailed discussion of the nine points is intended as a resource to Governments to aid them in addressing the CRC rights of children prior to birth.

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130 According to Alston, “the ordinary meaning [sic] of Articles 1 and 6 … is relatively clear and could not be characterized as either ambiguous or obscure.” *Unborn Child*, at 170. His legal conclusion is correct (if one adds, “when read in the context of the CRC as a whole”). However, he and Nowak use the records to produce an interpretation, in contrast to confirming an interpretation arrived at by a textual analysis. And both use the records in a highly selective manner. Moreover, Alston bases much of his argument on things that fall far outside of the legislative history rule. E.g., *Unborn Child*, at 160n.23 (a 1964 seminar), id., at 163 (“accounts by participants” relies on gossip, rather than documentary sources), and id., at 178n.91 (citing a book on the Canadian Charter). For additional problems, see Appendix B.
Chapter 5

Three Sources of Confusion

This chapter will discuss the three main sources of confusion when people are debating the rights of babies prior to delivery under the Convention on the Rights of the Child, or other human rights treaties: (i) The word abortion has two different meanings, and this causes serious miscommunication when trying to discuss the human rights of babies; (ii) There are misunderstandings about the role of discretionary judgments in respecting the right to life; and (iii) Prominent commentators holding the second vision have planted seeds of confusion in the CRC literature. It will help to clear up these three misunderstandings before taking up the pragmatic issues in the last chapter (Chapter 6).

A. The word abortion has two meanings

The first source of confusion is language. All words have multiple meanings, and in political controversies, especially, it is not unusual for words to take on new meanings. The confusion often arises because different people can use the same word to refer to different things, and yet not be aware that their meaning differs from that of their interlocutor.

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

Medically speaking, abortion refers to a biological fact, the “termination of [a woman’s] pregnancy before the fetus is viable;” it does not necessarily refer to the termination of the life of the baby (or the fetus, embryo, zygote, or other medical category reflecting the stage of pre-natal development).131 In political debates, however, people have given the word a new meaning. In the new usage, abortion refers to the intentional termination of the life of the baby.132

In the medical usage, the referent entity is the mother, and the referent action is the ending of the condition of her being pregnant. It is the mother who is “aborted.” In the political usage, the referent entity is the baby (or fetus, etc.), and the referent action is the ending of the life of that entity: it is the child who is “aborted.” Aborting the child kills the baby (second meaning), while aborting the mother does not kill her, it only ends the condition of her being pregnant: if the pregnancy is terminated in such a way that the child lives, it is still correct to say that the mother has had an abortion (first meaning).

Confusion arises in the political debates because the new usage of “abortion” obscures the difference between two sets of interests: the mother’s well-being or autonomy, and the baby’s well-being. The legal and political arguments over “abortion” are about the balancing of conflicting interests, but the language of the political debate is unable to distinguish between them. The political usage of the term slants the debate in one particular direction, making it difficult to perform a true balancing judgment. The language almost makes the judgment for us. It “almost makes the judgment” because the new, political meaning of “abortion” virtually eliminates one half of the balancing equation.

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

Let us say that Jones has a garden, and the kids next door trespass on it, destroying his beloved flowers. Jones has a right to protect his interests. The trespassing causes him material injuries because those flowers

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131 *Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing, & Allied Health* (5th ed., W.B. Saunders, Philadelphia, 1992), at 12. *See also, Mosby’s Medical, Nursing & Allied Health Dictionary* (6th ed., 2002) (defining abortion as “the spontaneous or induced termination of pregnancy before the fetus has developed to the stage of viability”), at 6; *Stedman’s Medical Dictionary* (26th ed., Williams & Wilkins, Baltimore, 1995) (defining abortion as, “Expulsion from the uterus of an embryo or fetus prior to the stage of viability at about 20 weeks of gestation”), at 4; *Henry Alan Skinner, The Origins of Medical Terms* (2d ed., 1961) (“In a medical
are conceptually different. Military targets are lawful targets during war, the course of destroying the military target, those deaths will be lawful under international law, provided that the “collateral damage” to the civilians is proportionate to the importance of the military objective. The proportionality requirement is a balancing judgment, and it can only be done when the decision-makers are able to keep both sides of the balancing scale clearly in mind. The same is true when the limits of technology would end the life of a baby during the course of ending a pregnancy: balancing the mother’s interests and the baby’s interests against each other will require a clear sighted and fair minded appraisal of the well-being of the two individuals involved.133

To sum up. The medical meaning of abortion allows us to keep the two sets of competing interests, the mother’s, and the child’s, clearly in mind; the political meaning makes it difficult.134

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

134 An illustration of how the human rights of children can disappear is found in Lawrence LeBlanc, The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights (1995). LeBlanc writes about the negotiating histories of the ninth preamble’s paragraph and article 1. He puts his discussion in the chapter on “Survival Rights,” under the heading of “Abortion and the Rights of the Unborn Child.” Id., at 66-73. So far so good. But as his discussion proceeds, he loses sight of the babies and their rights. Here is how he characterizes the conflict that the framers of the CRC had to resolve. He describes one side of the conflict as, “if they favored abortion rights,” and the other side as, “if they opposed abortion rights.” Id., at 73. LeBanc has framed both sides of the controversy in terms of “abortion rights.” The word “right” is obviously referring to the mother’s rights, and we can infer that he is using the political meaning of “abortion.” In other words, LeBanc is saying that one side was against, and the other side in favor of, “the right of a mother to end the life of her baby.” There are three problems with LeBanc’s choice of words. First, he has lost sight of his subject. Whereas the chapter heading speaks in terms of “the Rights of the Unborn Child,” he ends up switching to the rights of the mothers. Second, his choice of words misrepresents the legislative history. As the review of the legislative records shows in Appendix A, the delegates that prevailed wanted the CRC to cover children prior to birth, period. They did not say that a mother could never end a pregnancy; in fact, they recognized that there may be circumstances where “abortion” could be permissible. Drafting the CRC so that the right to life applies to babies prior to birth only ensures that the State will have to take the baby’s interests into account when it writes and implements its laws pertaining to the termination of pregnancies. And third, by framing the debate in terms of “abortion rights” – meaning, “the right of a mother to end the life of her
Case illustration: “partial-birth abortion”

A real-life example will help illustrate both the contrasting word usages, and the point about keeping sight of the competing interests.

The term dilation and extraction, or D&X for short, is the name that its developer, Dr. Martin Haskell, gave to a surgical procedure that the media has come to refer to as partial-birth abortion.135

D&X operations make up a significant part of Dr. Haskell’s business, and he has educated fellow practitioners in its use. Following Haskell’s protocols, the physician “introduces a large grasping forcep” into the uterus, grasps “a lower extremely” [leg] of the fetus, then “pulls the extremity into the vagina.” [See Figures 1 & 2.]

Figure 1

baby” – LeBlanc has assumed that a mother does indeed have such a right under international law. And this, in turn, presupposes that a baby prior to delivery has no right to life under the CRC. In other words, LeBanc’s choice of language reveals his personal opinion on what international law should say, whereas his stated purpose is to give a factual description of the negotiations.135 Martin Haskell, “Dilation and Extraction for Late Second Trimester Abortion” (paper presented at the National Abortion Federation Risk Management Seminar, Dallas, Texas, Sept. 13, 1992). The paper can be found at www.nrlc.org.

Figure 2

Next he “uses his fingers to deliver [to give birth to] the opposite extremely [the other leg], then the torso, the shoulders and the upper extremities.” He stops when “the skull lodges at the internal cervical os [opening].” All of the baby’s body is now outside of the mother’s body except for the head and part of the neck. [Figure 3.]
Then the doctor
takes a pair of blunt curved scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.

The surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull [i.e., the doctor has not cut the mother], he spreads the scissors to enlarge the opening. [Figure 4.]

Language issues
First come the language issues. Calling the D&amp;X procedure a “partial-birth abortion” is not using “abortion” in accordance with medical terminology. To begin with, in medical usage abortion refers to a termination of a pregnancy. But the referent activity in “partial birth abortion” is the killing of the baby, not the aborting of the mother.136

In addition, the medical usage refers to “termination of pregnancy before the fetus is viable.”137 While the D&amp;X procedure is probably used most often when the baby is not developed enough to live outside the mother’s womb, it was invented to be, and is used, on babies who could survive, provided they receive post-natal medical care. And when the

137 Emphasis added; see the medical definitions in the previous footnotes.
“aborted” baby could probably survive (in medical jargon, is “viable”), the medical term abortion does not apply.\textsuperscript{138}

There is an additional terminology issue. Since the baby is fourth-fifths through the birth process under Haskell’s protocol, is D&X better described as “feticide” or “infanticide?

Ending the life of the baby through D&X is neither infanticide nor feticide in the strictest, traditional understandings of those two words. Rather, D&X is an in-between case, and it has come about because of developments in technology, as well as because of shifts in social attitudes and commercial pressures.

Society usually adapts the existing vocabulary to cover innovations by extending the usage of words to cover things that are analogous. “Web page” and “email” have extended words from the old paper-based technology to the new electronic-based technology, for example.

While “partial birth abortion” is also an expansion of an existing word to cover a new situation made possible by technology, there is a political dimension to the new usage. Since the D&X procedure is an in-between case, neither abortion nor infanticide in the traditional senses, which of those words should be adapted to cover D&X? Is Dr. Haskell’s protocol closer to infanticide, or is it more analogous to abortion?

An objective basis for selecting the most suitable label would be the percentage of the child’s body that has been born prior to the initiation of death. And since almost all of the baby’s body is outside the mother’s body, D&X is very close to infanticide, just a couple of inches, a few moments, away. It would seem that “partial-birth infanticide” is more factually descriptive than “partial-birth abortion.”\textsuperscript{139}

But there is considerable stigma attached to infanticide, while for many people abortion is a very positive word, as in, “I have a right to an abortion.” The decision about which word to expand to cover the new D&X procedure will not be made on the basis of the closest analogy.

The sociological principles for word-transformations are different during political controversies. Euphemisms, code words, and the inversion of meanings – a political actor uses a word to mean the opposite of its established meaning – are commonplace. This brings us back to the original observation that the second, popular meaning of “abortion” has evolved during the course of political conflicts. The media’s use of “partial birth abortion” is just a further extension of the political meaning of “abortion,” and one would not expect editors and journalists to say “partial birth infanticide” because that would antagonize proponents of the procedure. But using “partial birth abortion” to describe what Dr. Haskell is doing creates a false factual impression, and obscures the interests at stake in the balancing decisions.

\textbf{Identifying the interests at stake}

After the language issues comes the need to separate out the conflicting sets of interests. There is an important difference between the label for a concept and the concept itself. In order to conduct a balancing of interests, it is very useful to have good labels – ones that are accurate descriptively, and free from the encumbrances of political overtones – in which to think while making the balancing judgments. However, language is a social affair, and the authorities who must make the decisions about trade-offs have to work with the language tools that society gives them. So regardless of the inadequacies of the labels, it is vital to identify the interests that are in conflict since the political task is to strike a balance between those interest-holders, and to do so within the boundaries of international human rights law.

\textbf{(1) Life}. The first interest is the interest in living. This is the most basic of all interests, and it is protected by the right to life in ICCPR article 6, CRC article 6, and Universal Declaration article 1. If that interest is not secured, there is nothing left to talk about.

With respect to the interest in living, the starting place is recognizing that the D&X procedure actually involves two different decisions. There is a decision to end a pregnancy prematurely, and then a decision about the method that will be used. When the baby is viable, there is the choice between (i) the D&X procedure that ends the life of the child, and (ii) a procedure that would allow the baby to live, that is to say, vaginal delivery or cesarean delivery. In other words, because it is technically possible for the baby to be prematurely born alive in some real-life D&X cases, the termination of the child’s life is not an inevitable, unavoidable,

\textsuperscript{138} It’s helpful to keep in mind that “viable” is a term-of-art. Virtually all pre-natal children who are aborted (second meaning) are “viable” in the ordinary sense, since they would live if not interfered with. For instance, if Neil Armstrong had been forcibly removed from the protective environment of his space suit while walking on the moon, he would immediately die. But that does not mean that he wasn’t “viable,” in the ordinary sense. And it doesn’t mean that he was not a human being, or that NASA was permitted to intentionally terminate his life at will.

consequence of ending the mother’s pregnancy. D&X is not used just to terminate the pregnancy, but to terminate the life of the child as well. So “partial-birth abortion” involves two human beings, the baby who is almost ready to be born, and the mother, and two separate decisions, ending of the mother’s condition of being pregnant, and ending the life of a baby who could be born alive and survive.

The separating out of the lives and the interests is especially important in light of the types of situations in which “partial-birth abortions” are performed. As for the criteria of patient selection under Dr. Haskell’s protocol, there is no requirement that the mother’s life be in danger if the pregnancy were to continue, or any other factor pertaining to her well-being. Nor is there any criterion pertaining to the baby; for instance, there does not have to be any deformity or health problem. Selection criteria often involve such things as, “previous C[aesarian]-section,” “obese patients (more than twenty pounds over large frame ideal weight),” “twin pregnancy over 21 weeks [of gestation],” or “patients [pregnant for] 26 weeks and over.” In popular terminology, the criterion of patient selection is essentially “abortion on demand,” with abortion being used with the second, political meaning, not the strictly medical one. The child’s life is terminated simply because “it” is not wanted.

(2) Pain. Pain is another of point of comparison. The scientific evidence supports the conclusion that babies at the age where D&X is performed can feel pain.¹⁴⁰

Under Dr. Haskell’s protocol, the mother is given an anesthetic, but not the baby. What the baby feels in the process of being killed is not a relevant factor in the “partial-birth abortion” protocol.

There are other interests at stake

The discussion thus far has simplified matters by only considering the interests of the child and the mother. But there are other interests as well.

For one, Dr. Haskell is paid to perform the D&X procedure, so any restrictions on “partial-birth abortions” will affect his financial interests.

Presumably, Dr. Haskell would end pregnancies in a way that would also preserve the lives of the babies, in all the case where this would be technically feasible, if he were paid to do so. But since he is being hired by the mother rather than the child, his material interests are tied to terminating the lives of babies, when that is what his client pays him to do.¹⁴¹

In addition, there are the ego interests. A surgeon’s skills can be used to make money performing many different kinds of procedures, so the types of cases a doctor works on must ultimately depend upon the sense of personal satisfaction that the doctor receives from the work. Since Dr. Haskell makes the voluntary choice to perform his D&X procedures in lieu of a wide variety of alternative choices for equally lucrative employment, there is no other conclusion but that he enjoys his work. In other words, when a balancing decision about “partial-birth abortion” is spoken of in terms of “medical ethics,” the framing of the issue obscures the doctor’s financial interests, as well as the more elusive interests pertaining to any derived personal satisfaction.

Finally, every human being has an interest in the life and well-being of every other human being. Whether it is providing famine relief, or armed intervention to stop genocide, or ensuring fair terms of trade, or any other situation in which one person feels a concern for the life of another person, it is the same feeling of being connected to the human family. In the language of international human rights law, “All human rights are universal, indivisible and interdependent and interrelated.”¹⁴² Irrespective of any financial or political agenda, a complete stranger has an interest in the well-being of the pregnant mother, and another interest in the well-being of the child she is carrying.

Conclusions about the language

Neither “partial-birth abortion” nor “D&X” are accurate descriptions of what is taking place. The expression “partial birth abortion” has a positive connotation for many people. It can bring to mind the destruction of a tiny organism soon after conception, non-viable outside the mother’s body, as the price to be paid for saving the mother’s life, even though this is not an accurate factual image in “partial-birth abortions.” On the other hand, “D&X” seems more neutral. But on closer inspection, the


¹⁴¹ See, e.g., Martha Minnow, Making All The Difference (Cornell Univ. Press, 1990), at 327 (referring to “career and reputation interests” as motivations of doctors who intentionally terminate the lives of babies).

medical jargon dehumanizes the act, and any amount of dehumanization robs a term of neutrality and accuracy.

One must conclude with a general observation first: Language can obscure meaning just as easily as it can illuminate it. In political controversies, the rhetoric of an argument often conceals the realities of what people are arguing about. And then with a specific observation: the word *abortion* has multiple meanings, with the original medical usage often giving way to a series of politicized meanings. In human rights discussions, the multiple meanings of *abortion* have created endless confusions.  

B. Confusions about discretionary judgments in human rights law

As discussed in Chapter 2, a considerable amount of confusion is caused by the tendency of people to use absolutist language when speaking about rights, even though very few rights are absolute. The problem is that the habit of speaking in categorical, black-or-white, all-or-nothing language, obscures the critical role of discretionary judgments. This section will discuss the various types of state discretion that arise in connection with the right to life in CRC article 6(1), and in ICCPR article 6, as well. (In the course of the discussion, it’s important to keep in mind that CRC article 1 is an all-or-nothing rule that defines the right-holders, while article 6 is one of the rights that every “child” holds.)

At the abstract level

As a context-dependent right, the right to life is universal at the abstract level. This means that all human beings hold the right during the entire pre-natal stage of life, starting from the time of conception when the new human comes into being. (When coverage under CRC article 6(1) ends at 18 years of age, the international protection of human life continues under ICCPR article 6.)

Reservations

Of course, a State has the discretion to file a reservation to article 6 at the time it ratifies the CRC, with the validity of the exercise of that discretion to be judged by international law. So a State is sovereign in the matter of reservations, but not an absolute sovereign. Whether the right in question is the right to life, or freedom from torture, or any other right, the situation is the same: A State is “free” to make the political decision about the need or desirability of a reservation; it is “free” to compose the text of

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143 When the CRC was being written, delegates confused each other, and themselves, by talking in terms of keeping the convention “neutral on abortion.” See the review of the legislative history in Appendix A.

144 But even though such a balancing judgment may not be a discretionary decision for the purposes of international accountability, it can still be a discretionary act for
When it comes to the right to life in article 6 of the Convention, each State Party must make countless decisions in order to translate the abstract right into concrete entitlements. For instance, if a State permits “honor killings” – either by not enforcing its criminal code, or by a formal exception in those laws – then these discretionary acts are subject to international accountability.

Three types of decisions

A State that permits infanticide, euthanasia, or the intentional termination of the life of a child during the pre-natal period – “abortion,” in its political meaning – is making discretionary judgments about the right to life at the concrete level, and each such judgment will have been arrived at through balancing decisions. Putting this into the context of state discretion, one can say the following:

- **First**, a State Party has discretion to file a reservation to CRC article 6(1) with respect to these three types of termination of human life. But the validity of those judgments is subject to international law.

- **Second**, every child, from conception to a maximum of 18 years of age, holds the right to life at the abstract level (absent a valid reservation), pursuant to article 1. The State Party has no discretion to deny the right at the abstract level after ratifying the Convention.

- **Third**, the State Party has discretion to make balancing judgments about the scope of a child’s concrete entitlements (or actual enjoyment) of the right to life, just as it has the discretion to make balancing decisions about any other context-dependent right. But every exercise of such discretionary judgment is subject to international accountability, and an abuse of discretion constitutes a violation of human rights.

When a State engages in the balancing of conflicting interests, it should go without saying that the Government officials involved must sincerely respect the human dignity of the right-holders who will be affected. If a decision-maker does not consider the right-holder to be a member of the human family, or looks upon the right-holder as an inferior or second-class member of the human family, then the decision will constitute an abuse of discretion: one cannot make a valid balancing decision about human rights if one does not fully respect the human dignity of the right-holder. The attitudes and values of the actors who conduct the balancing judgments are obviously critical to their decisions, and the State Party is at all times responsible for ensuring the integrity of the decision-making process.

C. Confusing and misleading statements in the human rights literature

The third major source of confusion about the right to life comes from commentators in the CRC literature. Authors tend to speak of the meaning of the various rights in the CRC as if they were making statements about facts, whereas they are merely giving personal opinions. Moreover, the opinions are nearly always political positions about what the law should be, rather than legal arguments or discussions about what the law is.

A typical example is the UNICEF’s *Implementation Handbook on the Convention of the Rights of the Child*, written by Rachel Hodgkin and Peter Newell. The authors of the *Handbook* begin with an explanation of CRC article 1 (the jurisdictional clause):

> [T]he wording of article 1 of the Convention avoids setting a starting point for childhood. The intention of those who drafted the article was to avoid taking a position on abortion and other pre-birth issues, which would have threatened the Convention’s universal acceptance. Thus [Marta Santos Pais, in] the *Manual on Human Rights Reporting*, 1997, advises:

> “The wording of article 1 does not specifically address the moment at which ‘childhood’ should be considered to begin, thus intentionally avoiding, in view of the prevailing diversity of national legal solutions, a single solution common to all States.”

> “By avoiding a clear reference to either birth or the moment of conception, the Convention endorses a flexible and open solution, leaving

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Hodgkin and Newell make their point in even stronger language in the explanation of article 6 (the right to life):

*Article 1 deliberately leaves open the starting point of childhood, that is, whether it is conception, birth or sometime in between. Thus, the Convention leaves individual States to decide for themselves the conflicting rights and interests involved in issues such as abortion.*

There is nothing in the text of the CRC that says that each State has total sovereign authority to decide for itself the meaning of article 1 or when a child can be intentionally killed under article 6(1), and no Government made any such assertions during the creation of the CRC. Hodgkin, Newell and Santos Pais (the author of the interior quotation) do not make any legal argument or provide any documentation to back up their statements; instead, the reader is expected to accept the correctness of the explanation solely on the basis of their authority as interpreters of the Convention.

These three commentators have an agenda. They hold the second vision of the human family, and, since the text of the CRC, the legislative history, and State Party practice are based on the first vision, they had to find rhetorical devices to shape their readers’ understanding of the Convention. In the discussion below, we will look at six problems in their explanation of article 1: Frivolous legal argument, misstatements, ambiguity, red herrings, self-contraction, and selectivity.

**Frivolous argument**

Their argument boils down to this: because the Convention “avoids setting a starting point for childhood,” the CRC “leave[s] to the national legislation the specification of the moment when childhood or life begins.”

It is important to note that Hodgkin, Newell and Santos Pai have not stated their argument in terms of a legal proposition. But once the underlying legal proposition is articulated, its absurdity becomes clear: The absence of a definition leaves the matter of interpretation to each individual State Party.

There are two obvious problems with that proposition. First, if the absence of a definition gives each State Party total sovereign authority to decide matters for itself, then a Government would be free to adopt the first vision of the human family: CRC rights begin at three months after birth, or one year, or two years, or any other time, just as the State pleases. Moreover, if the State can decide matters entirely for itself, it could set different time periods for girls and for boys, or for different races or religions, for instance.

And second, if the absence of a definition leaves the matter of interpretation to each individual State Party, then there is no such thing as international law. Every State would be free to do as it likes. It should be recalled that neither of the two Covenants define any of their terms. The ICERD defines “racial discrimination,” but not the word “race.” The Convention Against Torture defines “torture,” but not “severe pain or suffering.” And the only term defined in the CRC is “child,” and that is a legal fiction in which the operative term is not defined.

**Misstatements**

According to the *Implementation Handbook*, “[T]he wording of article 1 of the Convention avoids setting a starting point for childhood.” That is not correct. The right-holder is defined as a “human being,” so the starting point for CRC coverage is when the new individual comes into existence. That is why “the child” has a right to pre-natal care from conception onwards (under article 24).

Nor is it true that, “The intention of those who drafted the article was to avoid taking a position on abortion and other pre-birth issues” (emphasis added). First of all, article 24 expressly says that the child has a right to pre-natal care, which is certainly a “pre-birth issue.” And secondly, the framers did in fact take a position on abortion (second meaning): they subjected it to international accountability. By not putting a from the moment of birth limitation in article 1, pre-natal children are right-holders of all CRC rights (Point 2), including the right to life; and since abortion impacts the child’s life, the State’s discretionary judgments about the implementation of that right at the concrete level are subject to accountability under international human rights law.

**Ambiguity**

146 *UNICEF Implementation Handbook*, at 3. The author the interior quotation, taken from the *Manual on Human Rights Reporting*, is Marta Santos Pais.

147 *UNICEF Implementation Handbook*, at 97.
The Handbook’s explanation is composed of ambiguous phrases: the Convention “avoids setting a starting point for childhood”; the intention was “to avoid taking a position on abortion”; the treaty “does not specially address”; it “endorses a flexible and open solution,” and so forth. The ambiguities leave the reader with the impression that each State can do whatever it likes with respect to the intentional termination of the lives of children, at least prior to birth; that the subject is beyond the scope of the CRC. But Hodgkin, Newell and Santos Pais never actually say that. Each statement they make is true when read narrowly and in isolation, but the impression that the reader is left with is incorrect. Deliberate ambiguity is a form of half-truth, and a half-true statement is untrue.

The best way to sort out the ambiguities, indeed, the only way perhaps, is to draw the distinction between the two levels of context-dependent rights. We have discussed this at length in the previous sections, but it bears repeating here in order to sort the half-truths from the truths and the untruths.

- The scope of CRC article 1 is a legal question governed by international law (in particular, by the VCLT), and not by each State deciding the matter for itself. The UNICEF Handbook is misleading because it incorrectly implies that each State Party has total sovereign authority to define who is and who is not a human being.

- The scope of the absolute rights, and the scope of the context-dependent rights at their abstract levels, are determined by international law, not by each State Party for itself. Interpretations are governed primarily by the ordinary meaning rule, and for words that inherently call for subjective judgments – like “degrading treatment” (in CRC article 37) – the scope of the right is determined through the normal processes of international law, as applied to a framework treaty

- When discussing context-dependent rights, more nuance is required when the topic moves from the scope of the right at the abstract level to what right-holders are legally entitled to enjoy at the concrete level. Deciding what the concrete entitlements are under international law requires a balancing of competing interests. Each State Party has discretion to make the initial judgment in each real-life situation. But its discretionary judgment is subject to international accountability. An abuse of discretion, a balancing decision that falls outside of the appropriate margin of appreciation for the matter at hand, is a violation of international human rights law. Since the right to life is a context-dependent right, the Handbook is correct in saying that each State Party has the right (and, it should be added, the responsibility) to decide the “conflicting rights and interests involved.” But the Handbook is incorrect when it implies that each State has the right to make the final decision on this matter. The implementation of the CRC is always subject to international accountability, and this includes a State’s balancing decisions about the concrete enjoyment of the right to life of children in the pre-natal period of their lives.

Red herring number 1: “When childhood begins”

Santos Pais tells her readers that the CRC “does not specifically address the moment at which ‘childhood’ should be considered to begin.” Santos Pais is a lawyer. She played an active part in the negotiations of the Convention as a government delegate, and she served as a member of the Committee on the Rights of the Child. And it is inconceivable that she really believes that “childhood” is the operative term in article 1. (That word does not even appear in the articles 1 to 41.) Newell and Hodgkin stress upon the reader that the “Convention avoids setting a starting point for childhood.” Although neither of these commentators are lawyers, they are intimately familiar with the treaty. And it is unbelievable that they think “childhood” is the operative term.

All three of these commentators have carefully avoided the word “human being,” the term in article 1 that defines who the right-holders are. Switching the subject to “childhood” keeps the reader from thinking about the meaning of human being, and the function of a red herring is to divert attention. Based on the statements that delegates made during the drafting of the CRC, and upon what State Parties have said in their implementation reports, matters that these commentators know intimately, human being applies prior to birth. And the red herring diverts the reader from the real issue.

Red herring number 2: “The moment when life begins”

The Handbook speaks of the “the moment when … life begins.” In political debates over “abortion” (second meaning), one often hears the phrase “when life begins.” The controversies are not really about the moment in time when human life begins, but about the valuation we – as individuals and as societies – are to give to human life at the first stages of
the human lifecycle. The phrase, “when life begins,” is actually a figure of
speech, since there is no point in time that anyone can actually point to:
procreation is a process, and the process of conception has a built-in
indeterminacy that never can be resolved. But there is no practical need to
resolve it. All that one needs to know to apply the Convention on the Rights
of the Child to a given child is that conception has taken place. Prior to
the completion of the conception process, there is no human being to be a
right-holder: when the process of conception has finished, there is a human being,
and that being is a right-holder.

The phrase, “when life begins,” has caused so much confusion in
the CRC literature that it will be worthwhile to discuss in more detail the
reasons why it is a figure of speech, rather than an actual moment in time.

The CRC refers in two places to the child’s pre-natal stage of life
(points 3 and 5). As the Encyclopedia Britannica explains, “A new
individual is created when the elements of a potent sperm merge with those
of a fertile ovum, or egg.” The merger is usually called “fertilization” by
biologists and “conception” in everyday speech, and the pre-natal period
runs from that time to the completion of the birth process. But
“fertilization” and “conception” can be ambiguous, and the vague word
“merge” does not tell us when “the moment” occurs. To understand where
the indeterminacy is, and why it is irrelevant to the CRC, we first need to be
more precise in the language.

In human reproduction, fertilization is defined by biologists as the
“process by which the male’s sperm unites with the female’s ovum. By this
event, also called conception, a new life is created …. “ Biologists term
this new human organism a zygote, or more generally an embryo, while
international law uses “child.” So the pre-natal stage of life begins when the
zygote is formed, and fertilization is a process. However, it is not a process
where one thing causes something else to happen, like the process of a bat
hitting a ball, or the process in which a factory builds a bicycle. Fertilization
is a special kind of process because one entity transforms into a different
entity as a result of forces within the entity itself. The ovum-in-the-process

of being fertilized turns into a new individual organism, the zygote (or
embryo or child).

The dictionary definition makes it clear that one is talking about a
process, but it is not very helpful to say that “the sperm and ovum unite”
since it is really the combining of the mother’s and father’s genetic material
that is crucial. So in more precise terms, the “intermingling of chromosomes
marks the end of the fertilization process and the beginning of embryonic
development.” When the 23 chromosomes from the father’s sperm fuse
with the 23 chromosomes of the mother, the “new individual” comes
into being.

The indeterminacy arises because of the impossibility of specifying
exactly when the “fusion” takes place. Or rather, when it has finished,
since fusion is itself a process, the very last sub-process of fertilization, and
it ends when the genetic material of the two parents has been joined as the
nucleus of the new offspring. The events that make up the processes of
fertilization are taking place at the microscopic, sub-microscopic, atomic,
and even sub-atomic levels. There are also many other things happening
throughout the ovum during fertilization besides the combining of genetic
material, involving bio-chemical, electrical, and other forces. And somehow
all these events and forces are interconnected. Scientist have learned a
tremendous amount about what is going on, and yet the whole thing is still

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153 The New Encyclopedia Britannica (15th ed., 2003), at vol. 26, p. 664 (a “new individual is created”).
154 There is often a linguistic source of confusion whenever a word refers to any kind of process, however. People tend to use the word for the process to refer also to the end-product of the process, as well as to sub-processes. “Fertilization” and “conception” are usually used as synonyms, and while the referent is usually all of the things within in process, sometimes the referent is the completion of the process, the moment when the united or merged entity, the new individual, comes into existence. So to avoid confusion, the main text discussion sticks with the formal definition: fertilization is a process by which an ovum changes into a zygote: the process of fertilization ends when the new organism comes into being.
shrouded in mystery – “[m]any unanswered questions remain.” But to specify “the moment” would require a complete description of the last few events of the fusion process, as well as the physical relations of the 46 chromosomes, and all of the forces connecting them, that constitute the “fused” nucleus. And this description would have to be so precise that one could point to an ovum-being-fertilized and say, “Look right … there! The fusion is complete … right … now!”

That is impossible to do, of course, but the indeterminacy is of no practical importance. The time span during which the final events of fertilization end and the fusion of the chromosome is completed is only microseconds. Biologists don’t need to define “the moment,” and neither do health professionals. When providing pre-natal care, for instance, the developing child’s age is determined simply by estimating the day on which the conception probably occurred. It is not necessary to know the exact hour, minute, second, and nanosecond of the exact day that “the moment” took place, nor is it possible to know. To put it another way, “the moment of conception” is a figure of speech, not a tangible event that can be precisely defined and actually observed. The point is simply that the mother is pregnant with a new child, a new human being.

Finally, CRC rights do not depend upon knowing the moment when the fertilization process was completed, any more than they depend upon knowing the moment the State came into being. All one needs to know is that the State in question has ratified the CRC, and that there is a child in the pre-natal stage of life within its jurisdiction.

Part of the confusion is that people often inject the question of “when life begins” into political arguments concerning “abortion” (in the popular usage). The United Nations Development Program (UNDP), in its annual Human Development Report, gives an example of how the rhetoric is used.

The UNDP Report takes a strong stand against “the devaluation of women” that is seen in “the physical and psychological violence that stalks them from the cradle to the grave.” It goes on to say: The devaluation begins even before life begins. In some countries, testing is used to determine the sex of the fetus, which may be aborted if it is female.

Thus, according to the UNDP, life begins at birth. During the nine pre-natal months, and while the fetus is moving from the womb through the birth canal, it is not alive.

In bygone eras, Western scientists believed in spontaneous generation. Fungi and other such organisms just sprang to life spontaneously. Non-life turns to life. They believed this theory because they didn’t know about microbes.

Now, in the twenty-first century, the UNPD says that once the feet of the fetus have finally passed beyond the vaginal opening, an inanimate object springs to life spontaneously. Non-life becomes life, at “the moment” of birth.

Certainly no one who works at the United Nations Development Program actually believes that.

In debates over “abortion” (in the popular sense used by UNDP), the issue is never about “when life begins.” The debate is always over the valuation of the lives involved. In its popular usage, “abortion” refers to the intentional termination of the developing offspring at any time from conception to birth. If the zygote (embryo, child, etc.) were not alive, there would be nothing to “abort” (second usage), and no reason for people to be arguing. Instead, the political debate is whether or not it is proper to terminate the new life, and that answer hinges on value judgments. The UNDP Report recognizes this in a limited way by speaking about “devaluation.”

As Susan George observed, in her Oxford Amnesty International lecture: “This is the bottom-line issue of human rights: who has a right to live and who does not?” States have to balance interests in order to govern, and their decisions always rest upon value judgments. Political controversies over “rights” often come down to conflicts over the relative valuation of the lives of those to be affected. The UNDP’s “before life

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157 The implementation reports recognize the indeterminacy; see, e.g., Romania, UN Doc. CRC/C/65/Add.19 (2nd report, 2002), at para. 100 (“The legal time of conception is placed between the 300th and the 180th day before birth ….”); Rwanda, UN Doc. CRC/C/70/Add.22 (2nd report, 2002), at para. 126 (“A child is deemed to have been conceived between the 300th and 180th day before his birth.”).
begins” may be just political rhetoric, but the report is correct when it says that the fundamental issues come down to valuation.160

In short, Peter Newell, Rachel Hodgkin, and Marta Santos Pais have used the unsolvable question, “How can we determine the exact moment that a human being comes into existence?” to shift attention from their failure to address the central issue. The question is: What is the best way to read “human being” in CRC article 1, in the context of the treaty as a whole, and pursuant to the rules of legal interpretation under the Vienna Convention on the Law of Treaties? Answering that question requires analysis, the giving of reasons, consideration of all the arguments pro and con, and, above all, good faith. Their “moment life begins” is a rhetorical device to avoid giving the readers a reasoned argument.

Self-contradiction

The inability to make the second vision fit with the CRC has led Newell and Hodgkin into self-contradiction. They acknowledge that selective “abortion” of girls or disabled children is “discrimination” in the enjoyment of the right to life, forbidden by CRC article 2(1).161 But selective abortion is only a CRC issue if abortion is an issue, and abortion is an issue only if pre-natal children are human beings under article 1. The complaint about the abortion of baby girls and handicapped babies is based on the unspoken premise that they are human beings, and thus CRC right-holders. This causes Newell and Hodgkin to contradict themselves. By complaining about selective abortions, they have not left the matter up to the total sovereign authority of each State Party to (in their own words) “decide for themselves the conflicting rights and interests involved in issues such as abortion.” And while it’s wrong for the law to grant impunity when the pre-natal child has a disability, somehow it’s alright to allow the termination of the lives of pre-natal babies for any reason at all.162

Selectivity

Santos Pais was deeply involved in the writing of the CRC, and she knows that “from the moment of his birth” was removed from the working draft, and knows that the reason for the removal was to extend CRC coverage to “include the entire period from the moment of conception.” (Point 2, in the legal argument above.) But one would never know that from reading the Manual or her other articles on the Convention. And in preparing the Implementation Handbook, Hodgkin and Newell have read the state reports, the summary records, and, it appears, the legislative records. We have already seen that the overwhelming majority of Parties have expressly or impliedly said that children have CRC rights prior to birth (128 out of 176 state reports), and that no State has expressly denied that pre-natal children are right-holders. But one would never know this from reading the Handbook.163

The good faith requirement in the Vienna Convention requires a bone fide effort at political neutrality, as well as accountability and transparency in the presentation of reasoned arguments. (Point 9.) The VCLT approach to interpretation is to be contrasted with agenda-based advocacy for a pre-determined conclusion.

We have spent considerable time discussing a few short paragraphs. But considering the influence of the Implementation Handbook and the Manual on Human Rights Reporting on shaping perceptions of CRC coverage prior to delivery, and considering the prevalence of similar statements in the literature, we hope that our readers will find it useful. Each person must make up their mind on the correct interpretation of the CRC, and to do this properly, readers not only need to see the arguments laid out before them, but also to clear away the confusions that have surrounded the discussions.164

160 The UNDP speaks of “the miracle of life” when talking about maternity. United Nations Development Program, Human Development Report 1995 (Oxford Univ. Press, Oxford, 1995), at 4. Either the UNDP is acknowledging the intervention of a non-material Being in the cosmos, or it is using a figure of speech. But either way, it is referring to the mystery of life. And since life is a mystery, framing an argument about “abortion” (second meaning) in terms of “before life begins” must be seen as political rhetoric.


162 To be precise: CRC arts. 1 to 5 are umbrella provisions that form a part of each of the substantive rights (arts. 6 to 41). While article 1 defines the right-holders, the right of non-discrimination (art. 2(1)) adds an extra layer of protection to the rights they hold: e.g., the State cannot allocate, or allow others to allocate, a child’s enjoyment of the right to life on the grounds of sex. But pre-natal sex-selection is not discrimination unless the victim is a human being under article 1.

163 For instance, the Handbook quotes the United Kingdom’s statement at the time of ratification that it “interprets the Convention as applicable only following a live birth.” Handbook, at 4. But it does not report that the Government told the Committee that this statement “does not amount to a reservation.” United Kingdom, 2nd report, UN Doc. CRC/C/83/Add.3 (2002), at para. 1.8.2(a).

164 As an example of how the CRC literature affects perceptions, the present author can offer a personal illustration. In 1994, in one of his early papers on the CRC, the present author wrote: “During the drafting of the CRC, the abortion controversy was settled by a compromise: unborn children are recognized in the Preamble only (which does not give any rights); Article 6 [sic] does not define ‘child’, so the issue is left to the law of each State.” Bruce Abramson, “Reservations to the Convention on the Rights of the Parties: A Look at the Reservations of the Asian State Parties,” in Rights of the Child: Report of a Training Programme in Asia (International Commission of Jurists, Geneva, 1994), at 314, 327. That one sentence makes all the standard mistakes, and has help perpetuate misunderstandings about the Convention,
Summary of 5: Three Sources of Confusion

This chapter has looked at the three main sources of confusion concerning the intentional termination of a child’s life prior to delivery. First there are the multiple meanings of abortion. In arguments about “abortion rights,” the political meaning, which refers to the intentional termination of the life of the child (the child is “aborted”), makes it difficult to keep the separate interests of the mother and the child clearly in mind. The medical meaning, which refers to the ending of the pregnancy (the mother is “aborted”), makes it easier to avoid the conceptual mistakes.

The second source of confusion is the habit of speaking about rights in absolutist language, when in fact nearly all rights, including the right to life, are context-dependent and must of necessity be balanced against other rights and interests. Whether it’s “The woman’s right to an abortion!” or “The unborn child’s right to life!,” or numerous other claims about rights, advocacy is often pitched in absolutist terms. But the categorical language hides the need for balancing decisions.

And, perhaps more importantly, the rhetoric hides the values of the decision-makers, and the values of the advocates who are pressing their agendas. Value judgments are what tip the balance scale, so absolutist rhetoric tends to avoid transparency and accountability about the values that are at play.\(^{165}\)

The third source of confusion are the misleading statements that have appeared in the CRC literature. The failure of commentators to separate the is of international law from their personal beliefs about the ought of the law, together with their avoidance of the rules of treaty interpretation and the lack of plain speaking, have resulted in many misleading statements about the human rights of children in the pre-natal stages of their lives.

Chapter 6

Practical Implications for the UN Study With Regards to Violence Against Pre-birth Children*

A major aim of the UN Study is to made recommendations on how to prevent or minimize violence against children.\(^{166}\) Since each year there are about 46 million acts of violence against children in the first nine months of their lives that result in death, this problem will need to be one of the main focuses in the Study’s search for solutions.

It probably goes without saying that the single most important thing that States, civil society actors, and inter-governmental bodies can do to prevent violence is to teach everyone to respect the dignity and the rights of all human beings. Of course, many other things will also have to be done to promote a culture of respect for human life. This chapter will discuss some of the other practical matters that the authors of the Study may wish to give attention to as they develop their recommendations.

A. Introduction: The Study can take two approaches

The UN Study is a form of international accountability

Because the right to life is not absolute, a State Party must make balancing decisions before it can turn the abstract right into meaningful protection in concrete situations. Governments are often pressed by adult members of society to permit the intentional termination of the lives of children, whether it is their own children or other people’s children. The Government must decide whether to allow the child’s right to life to be overridden, and if so, under what circumstances. As discussed earlier, three of the main reasons for terminating the lives of children during the pre-natal period of life are also the principal reasons for infanticide. (i) The baby possesses an undesirable characteristic, such as being the “wrong” sex, or having a physical disability or other impairment. (ii) The baby will be an economic burden if permitted to live. (iii) The baby will be a psychological

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* Note to the readers: While the previous chapters have been rewritten to address the State Parties to the CRC, this chapter has been left as it was in the first edition. This has not affected the relevancy of the contents to States, however. The reason for leaving it the same is that some of the issues raised are directed to the authors of the UN Study, and since the Study is conducted under delegated authority, States may wish to review how the Study has dealt with those problems, once the General Assembly has received the final report.

\(^{165}\) In discussions of the proportionality principle, for instance, one often sees commentators and judges talking about “objective justification.” The term is an oxymoron, of course, since “justification” always calls for a value judgment.

\(^{166}\) “Its focus will be on prevention strategies … .” Concept Paper for the Secretary General’s Study on Violence Against Children, UN Doc. E/CN.4/2004/58, Annex, p. 5, at para. 3.
or social burden to the parent. The other main reason for terminating the life of a baby prior to delivery probably accounts for only a minute percentage of the worldwide total, and it is the one reason that does not also apply to infanticide. (iv) The mother is likely to die if the pregnancy is allowed to continue, but medical technology cannot end the pregnancy and at the same time save the life of the baby.

In responding to these political demands, state parliamentarians must strive to ensure that legislation is compatible with the Convention on the Rights of the Child. After the legislators make the political judgments about the balancing of interests, other bodies will play an oversight role. First of all, the state courts may be called upon to assess whether parliament has struck a proper balance under the nation’s constitution, and, depending on the jurisdiction, the judges might also make an initial decision about the law’s compatibility with the CRC.

After the various state authorities have done their job, the State’s actions are then subject to international accountability. Although international oversight of human rights is weak when compared to national and regional judicial mechanisms, this weakness is to some extent offset by the variety of forms that international accountability can take. The treaty monitoring bodies are especially valuable forums. The CRC does not have a complaints protocol, so the Committee on the Rights of the Child promotes accountability through dialogue, by its recommendations, and by bringing transparency to the State Parties’ implementation behavior. By contrast, the ICCPR has a complaints procedure, so the Human Rights Committee can play an additional quasi-judicial role with respect to the right to life.

While there are a variety of international forums for holding States accountable for their human rights performance, the UN Study can itself be a type of international accountability mechanism. The mandate for the Study neither requires that the topic of violence against pre-birth children be excluded, nor does it permit its exclusion. The Study will therefore have to address the laws and practices that encourage or permit intentionally lethal violence against children in the first nine months of their lives.

There is diversity in the balancing decisions that States have made

As the implementation reports show, many States allow parents to terminate the life of a pre-natal child under specified circumstances. There are always two variables in these laws: (a) the grounds upon which the life of a child can be terminated with impunity, and (b) an age criterion that defines the class of children to whom those grounds can be applied. The State’s legalization laws will combine the two variables.

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

The implementation reports show the diversity of judgments that State Parties have made about children’s concrete entitlements to the right to life, although, since the reporting guidelines do not ask for any information on the subject, the precise details are often missing. The following examples are drawn from the reports:

- The child’s right to life is fully protected. (That is to say, there are (a) no authorized grounds (b) with respect to any age category prior to birth: the law treats pre-delivery and post-delivery children exactly the same.)
- The child’s life can be terminated only when necessary to save the life of the mother, with no limit as to the child’s age.
- The mother’s life is in danger, or the child has irregularities that could endanger the child’s normal development, and the child is less than 22 weeks old.
- There is a serious danger to the mother’s life, or to her physical or mental health (other than the normal dangers from pregnancy and childbirth), and the importance of averting these dangers is proportionate to killing the child, without any limits indicated as to the child’s age.
- (i) For any reason whatsoever, until the child is 3 months old. (ii) Thereafter: only if the mother’s life or health is seriously at risk and there is no other way to avert the danger, or if there is a grave risk that the child will be physically or mentally handicapped, or for any reason at all if the mother was under 18 years of age at the time of conception.
• (i) On any grounds up to 10 weeks of age. (ii) Between 10 and 20 weeks: if the life or health of the mother is in danger, or if the child has or will have significant physical or “psychophysical” difficulties, or if the child was conceived following an act of forced sex, underage sex, or incest. (iii) After 20 weeks of age, the child has the same right to life as any other human being.

• (i) For any reason at all up to the age of 11 weeks; and (ii) for medical reasons between the ages of 11 and 23 weeks.

• (i) On any ground up to the age of 12 weeks. (ii) Between the ages of 12 and 24 weeks, if the child has a serious abnormality. (iii) No age limit: when there is a serious risk to the life or to the physical or mental health of the mother, or when the mother was less than 17 years old when the child was conceived and the conception followed an act of incest, forced sex, or other sexual abuse.

• (i) On the grounds of “social reasons,” medical reasons, or forced sex and other sexual abuses, until the child is viable. (ii) After 16 weeks of age: the mother’s life or health would be put in danger, or the child is deformed, has a genetic disorder, or is otherwise damaged.

• There is a substantial risk to the life to the mother (as distinct from her health), which includes a risk of suicide, with no age limit indicated.

• (i) For any reason up to the age of 12 weeks; (ii) thereafter, for medical or “social grounds,” with no age limit indicated.

• When necessary to prevent a serious threat to the life or health of the mother, or for any reason when the mother is under 14 years of age and is unmarried, with no indication of an age limit for the child.

• (i) On any ground, when the child is less than 12 weeks old. (ii) Thereafter, when the physical or mental health of the mother is endangered, or there is a serious risk that the child has or will have a serious illness, physical malformation, or substantial mental impairment, or the child is conceived following an act of forced sex, with no age limit identified.

• Among other grounds, the mother is HIV-positive, without any indication of an age limit for the child.

• Up to the child’s 24th week, with no grounds indicated in the report.

**States say that these balancing decisions have been difficult**

The implementation reports routinely say that the state had difficulty arriving at its decision. The Government might refer to “the special conflict situation” in which the right to life of the pre-birth child “calls into question the protection of the life and health” of the mother, or instance. Or to the “much more difficult question concerning abortion.” Or to the “unique compromise between the right to life of the unborn child” and the mother’s autonomy rights. The report may also refer to the current political debates that are going on over the protection of pre-natal children. Sometimes the State refers to the moral values of society. And sometimes the difficulties are indicated by the seemingly contradictory information in the report.

The language that is used also indicates the difficulties that the states experience in making these balancing decisions. For instance, while some reports speak of “killing” the fetus or child, many of them turn to euphemisms, like “interrupting the pregnancy.” No one would refer to the execution of a criminal as “the interruption of the criminal processes,” of course, and channeling thoughts towards the pregnancy diverts attention from the child who is the subject of the discussion in the sections on articles 1 and 6. So “interruption of pregnancy” is a way to talk about something unpleasant or controversial without directly talking about it, which is the function of a euphemism.

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

**(i) States are taking children’s human rights seriously**

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

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

169 Denmark, CRC/C/8/Add.8, at para. 62 (1st report, 1993); see also Latvia, CRC/C/11/Add.2, at para. 143 (“the much more difficult question concerning abortion”) (1st report, 2002).
170 Macedonia, CRC/C/8/Add.36, at para. 24 (1st report, 1997); see also paras. 37-9, & 142.
But while the reports show that States are taking the children’s prenatal rights seriously, there is not much indication that the political debates themselves are being conducted from a rights-based, CRC perspective. Although the well-being of babies prior to birth is not being ignored, it does not appear that their welfare is receiving much public discussion or acknowledgment within the framework of the Convention on the Rights of the Child.

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

It is within this broader context that one must read the implementation reports. Although the children’s rights movement has made a great deal of progress, the rights of the most vulnerable of the vulnerable have been marginalized, and this is reflected by the absence of indications in most reports that the political debates about “abortion” are being conducted from a CRC perspective.

(iii) Double standards

The third conclusion is that the difficulties pertain to the differential treatment of babies, on the one hand, and adults and older children, on the other. As discussed above, there are two variables in the laws pertaining to the intentional termination of the lives of children before delivery: the criteria upon which impunity is granted, and the class of children to whom these grounds can be applied, which is defined by age. None of the specified grounds in these laws – the a-variables -- is also a ground for impunity when an adult’s life is intentionally terminated. No state allows for the intentional ending of the life of an adult because of a disability, or because the adult is causing the actor to feel mental distress, or just because the actor wants to, for instance. So the presence of the b-variable creates a double standard based on age discrimination. Below the age cut-off, pre-birth children are treated differently than adults and older children; above the minimum-age line, they are treated the same (i.e., the same a-variables for impunity apply to everyone above the line).

It is always awkward to defend double standards, and, as Van Bueren has pointed out, minimum-age rules are inherently arbitrary. It should not be surprising therefore that states have found the subject of children’s right during the pre-natal part of their lives to be such a difficult human rights topic.

The UN Study has two basic ways to approach these issues

General speaking, States have not only taken the balancing decisions seriously, but their reports disclose an openness and willingness to be accountable about these decisions. When the authors of the UN Study on Violence Against Children address the problems of violence against children during the pre-natal period of life, they will have to decide upon the best way to respond to these balancing decisions under a children’s rights perspective.

There are basically two approaches that the authors can take. One approach would be to assume a quasi-judicial role by trying to determine the correct balance under international law. The Study could scrutinize the various a-variables and b-variables contained in the implementation reports, and then render opinions on the legality of each one, for instance. The other approach would be to concentrate on giving support to States, to civil society, and to the international community, in their efforts to provide protection and care to pre-delivery children within the evolving framework of international human rights. Of course, the Study need not limit itself to just one or the other, but could try to combine the two approaches.

The next sections will discuss some of the matters that the UN Study could attend to, with emphasis on the second, supportive role.

B. Attention to the structural problems

To reduce violence of any kind, there must be fewer situations where people are forced to choose between violent and non-violent responses. Every act of violence occurs in a social setting in which “structural” factors have placed the actor into a situation where a choice must be made. Preventing violence of any kind requires measures that are aimed at reducing the number of potentially violent situations. This is just as true of pre-natal violence against children as it is for any other category of violence.
The political rhetoric concerning the pre-natal lives of children is often couched in terms of “choice.” The frame of reference is the mother’s “choice,” rather than the child’s, but, ironically, the rhetoric is oftentimes not really about the choices that women actually face in their lives; it is, instead, only about one specific choice – ending the life of the baby. And yet, when the structural factors that can constrain women are considered, there is often a cruel irony in the rhetoric of “choice.” The pressures from society can be so overwhelming that they seem to block certain avenues, pushing women in particular directions. The end result can be a “choice” to act violently, the “choice” to end the life of the child. But when structural factors restrict other options, one cannot say that the women have had a real or fair choice. The UN Study could attend to these structural factors as it looks for practical ways to reduce pre-natal violence against babies.

1. Avoidance of unwanted pregnancies

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

But while implementation reports frequently refer to pregnancy-avoidance measures, it is usually in connection with the minors’ rights to health (article 24), rather than with protecting children during the first part of their lifecycle. Of course, measures aimed at avoiding the creation of unwanted children are relevant to both articles and to both sets of CRC right-holders. Given this double relevancy, both the implementation of CRC rights and the reports need to take account of both sets of right-holders, and all of the relevant rights.

The UN Study can make a contribution by calling attention to the link between reducing violence against pre-birth children, on the one hand, and empowering men and women to avoid bringing unwanted children into being, on the other. The Study could also encourage the Committee on the Rights of the Child to include this link in its reporting guidelines, its dialogues with the States, and in its concluding observations. (As we will be seeing in the following sections, the Study can make these same kinds of contributions in a number of related areas.)

Education and counseling

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

But, here too, the link is not always made between such counseling and the protection of children during the first part of their lives. And here too is an opportunity for the authors of the UN Study to make recommendations that will call attention to these connections.

Sexual violence and exploitation

When discussing the situations that result in unwanted pregnancies, attention must be paid to sexual violence (rape, forced prostitution, etc.), in which the social situation negates real or free choice. Sexual violence and sex exploitation can easily result in unwanted children coming into

171 See, e.g., United Kingdom, 2nd report, UN Doc. CRC/C/8/Add.3 (2002), at para. 8.4 (Our Healthier Nation says that “a decent education” helps young people “make healthier choices,” including the avoidance of “unwanted pregnancies in the early teenage years.”).
State reports sometimes refer to these types of support services. The Committee on the Rights of the Child also emphasizes the importance of improving the status of girls and women in society, of promoting the inclusion of handicapped people as full members of society, of providing counseling and material support to pregnant teenagers, and of good and safe adoption services. But here again, these matters are normally raised in connection to the minors’ rights to health, or under the specific provisions on adoption (article 21) or disabilities (article 23), without any linking to the rights of children during the pre-natal period under article 6(1).

And once again, the UN Study can make a contribution by focusing on the connection between these measures and the protection of children from violence during the first stages of their lives. 173

3. Social attitudes

The preceding sections divided the discussion into two parts: structural factors that lead to the creation of children who are not wanted, and structural factors that give rise to motivations to end the lives of such children, either during their pre-natal period or after their delivery. Social attitudes are a common denominator in the two sections, and they are so important that they deserve some additional remarks. Indeed, in the broad sense in which “structures” is being used, attitudes are one of the most basic structures in society.

A wide variety of actors are addressing the various structural factors that shape the choices of parents once the child has come into being at conception. As for undesirable characteristics, a great many people are working to promote the equal valuation of females and males in society, and there are many efforts to improve the status of handicapped people. As for economic pressures, many states and civil society actors provide financial support to expectant mothers in need of material resources. Teenaged mothers, who are often unmarried or otherwise unsupported by the child’s father, are frequently the beneficiaries of this assistance. In addition, many states and NGOs provide “crisis pregnancies” services that help the mother to cope with psycho-social problems, and this can reduce her motivation to end the live of the child.

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

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

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

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

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

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

**CRC article 2(2)**

All human rights are based upon respect for the human dignity of the individual person, and this inherently requires the state to treat people as much as possible on the basis of criteria or for reasons that are connected to their actual merits. Actual merits include a person’s needs, desires, and capabilities. It also includes the behaviors that the person has chosen to engage in. But people do not chose to be victims of crimes, and children do not chose their parents, or the circumstances that bring them into being. Depriving an individual of something important because another person has broken a law or a social more is an affront to human dignity. It does not treat the individual according to his or her own merits.

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

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

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

Since paragraph (2) is a principle, it is a context-dependent right: the State must make balancing decisions in order to translate the abstract right into concrete entitlements. Of course, a State cannot totally avoid treating children differently, with respect to their enjoyment of CRC rights, on the basis of their parents’ actions. (For instance, sending a mother or father to jail for a crime will treat the child differently, with respect to enjoying parental care, because of the parent’s behavior.) Treating paragraph (2) as an absolute right would force the State to sometimes do things that would be unreasonable, so article 2(2) must be read as a principle, or context-dependent right. The State has to make balancing decisions to give practical meaning to the principle. It only needs to take appropriate measures.

Article 2(2) gets the most attention in connection to state-imposed or sanctioned discrimination against children who are “born out of wedlock.” But the principle is much broader than this, and it applies to situations where the motive to take the life of a child during the first nine months of life comes under reason (iii) – the child is or will be a psychological or social burden to the parent.

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

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

These types of impunity laws are subject to the principle of CRC article 2(2). One child’s life is fully protected in the pre-natal period, while another child’s life can be ended, simply because the actions of a parent have placed the second child into a different legal category. The State treats the second child differently from the first on the basis of the activities of the child’s parents. The father’s act of forcing the mother to have sexual intercourse constitutes an a-variable that can be applied against the second child, causing that child to receive a lower level of legal protection than the first child. But an innocent child should not be made to suffer because of the wrongdoing of a parent, and so this particular a-variable triggers the protection of paragraph (2).

We need to put article 2(2) into perspective. The right to life is context-dependent, so the State can, and must, engage in balancing decisions, and these decisions can, and must, take all relevant matters into account. Moreover, the ethical principle that people should be treated in accordance with their own individual merits is inherent in all human rights, but since this is a principle, its application to real-life situations always calls for balancing judgments. What, then, does article 2(2) add to the legal picture, given the fact that it is a principle – a context-dependent right – that calls for balancing?

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

But children are frequently treated as appendages of parents, rather than as individuals in their own right, and this has often resulted in their adverse treatment when the parents or relatives have engaged in misconduct, and the stigma against them spills over to engulf the innocent. Article 2(2) serves a valuable purpose because it forces the State to look for these types of situations, and to rectify all unfair laws and practices that are uncovered. First, it makes an implied principle explicit. While the principle that people should be treated according to their actual merits – which necessarily means that they should not be made to suffer for the wrongdoing of others – underlies all human rights, paragraph (2) makes that principle explicit. Second, it provides for accountability. By including the right in the CRC, each State can be held accountable for how it puts the principle into practice. And third, the two working together – being held accountable for an express principle – helps to stimulate the evolution of international human rights law. So article 2(2) does add something tangible to the Convention.

In conclusion, the UN Study can make a contribution to the prevention of violence against children by calling attention to the “overkill” aspects of stigmatization. Protecting children from violence will require numerous changes in attitudes in regards to all of the motivations for terminating the life of a child in the pre-natal period.174

C. Attention to the safeguards: the substantive criteria

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

174 Bhutan, UN Doc. CRC/C/3/Add.60 (1st report, 1999), at para. 50 (in the absence of “social stigmas” pertaining to out-of-wedlock children, mothers are not “pressurized to resort to abortion”); Jordon, UN Doc. CRC/C/70/Add.4 (2nd report, 1999), at paras. 23-24 (fear of scandal and dishonor can be a cause of abortion and infanticide); Korea (Republic of), UN Doc. CRC/C/70/Add.14 (2nd report, 2002), at 236 (improving public perceptions and reducing selective abortions, and pre-natal sex screening is unlawful); Kuwait, UN Doc. CRC/C/8/Add.35 (1st report, 1996), at para. 25 (fear of dishonor can lead to infanticide); Libyan Arab Jamahiriya, UN Doc. CRC/C/93/Add.1 (2nd report, 2002), at para. 87 (protecting honor can lead to infanticide); Lithuania, UN Doc. CRC/C/11/Add.21 (1st report, 1999), at para. 64 (“Attitudes towards abortions are changing within society. An increasing number of people recognize the right to life from the very inception of life,” and the numbers of abortions are decreasing.)
However, these broad terms are not necessarily the ones that are actually contained in the Party’s laws; the authors of the report may have just summarized national law. One does not know for sure what the substantive criteria actually are because the reporting guidelines do not ask for this information. In addition, a State might supplement the legislative criteria with administrative regulations, guidelines, and judicial decisions, and these might not have been included or referenced in the state report.

The lack of concrete information on the a-variables is a barrier to international accountability for CRC implementation, and retards the evolution of international human rights law. The UN Study can make a contribution to the prevention of violence against children in this area. It can recommend the types of information that States should be giving to the treaty-monitoring bodies about the substantive grounds, and it can recommend that the Committee on the Rights of the Child revise its reporting guidelines, for instance.

In addition, while some of the a-variables appear to offer strict safeguards, upon reflection they are actually quite fuzzy. For instance, the mother’s life is in danger, or her health is in danger, can encompass almost every situation. There is no such thing as a pregnancy without some risk to the mother. And since anywhere from ten to thirty-five percent of women who give birth experience postpartum depression, any pregnancy carries a risk to mental health. (And the intentional ending of a pregnancy also entails risks to physical and mental health; indeed, there is just no such thing as a risk-free life.)

Even terms like serious risk are vague, and call for subjective judgments. They are subjective because they require a person to make guesses about the likelihood of future events, and they are subjective because they ultimately depend upon the decision-maker’s personal values. Having a human being’s life hinge on subjective judgments about the “seriousness of a risk” causes arbitrariness in the enjoyment of human rights. Baby Sam loses his life because of what Dr. Jones thinks is a “serious risk,” but he would have been allowed to live if Dr. Smith had made the decision.

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

Identifying gaps in the legal protection of children and proposing measures for strengthening legal standards are two of the objectives of the UN Study. The authors of the Study can help protect children from violence by recommending reductions in vague and overly broad grounds for impunity (i.e., the a-variables).

D. Attention to the safeguards: the decision-makers

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

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

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

There is an additional qualification that the decision-makers need to have when faced with such a task. Since there are three different visions of the human family, and within the third vision there can be different

175 The objectives of the Study include: “Efforts will be made to discern gaps in legal protection at the international, regional and national levels and to put forward specific proposals for strengthening legal standards, policies and programmes.” Concept Paper for the Secretary General’s Study on Violence Against Children, UN Doc. E/CN.4/2004/58, Annex, p. 5, at para. 5.

176 Fiji, UN Doc. CRC/C/28/Add.7 (1st report, 1996), at para. 54 (Allowing “abortions on the grounds of ‘reasonableness’ and a liberal interpretation” of the law have resulted in discrepancies in judgments between doctors in private practice and public service doctors.)
conceptions, it is important that those who make the life-or-death decisions actually see the children as human beings. It is not enough that someone attends a workshop on children’s rights if that person does not truly believe that children are members of the human family throughout the entire prenatal period, and as a consequence are right-holders under the CRC.

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

The state must entrust someone to apply the a- and b-variables of the impunity laws to actual cases. The authors of the UN Study can help to protect children from violence by making recommendations to States, to the Committee on the Rights of the Child and the other treaty-monitoring bodies, and to civil society about safeguards pertaining to these decision-makers.

E. Attention to monitoring

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

Statistical monitoring and reporting is another subject that the UN Study can cover in its efforts to help protect children from violence.

F. Privatization of the right to life

As already noted, a number of States allow children’s lives to be ended for any reason whatsoever when the child is below some particular minimum age. This is a de facto denial of the right to life of all children under that age: in effect, it is a “privatization” of the right to life.

**Privatization**

When people speak of “privatization,” they usually are referring to the transfer of various functions of government from the state to private actors. If a city sells its water delivery, electric power, or bus system to a private company, for instance, then privatization has taken place.

Human rights activists are concerned about privatization because it can endanger the enjoyment of human rights, such as the rights to an adequate standard of living, to the highest attainable standard of health, to freedom of movement, to work, and to education. International human rights law does not forbid privatization per se. While the UN treaties impose economic and social obligations on States, they are obligations of results, or end-goals that the government must work towards. But the treaties do not require the government to do all of the providing. Instead, Governments must to the best they can to achieve the end-results. One way that a Government may choose to strive for the end-goal is to encourage private actors to provide goods and services essential to the enjoyment of human rights.

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


179 Some State Parties have given statistical information; see, e.g., France, UN Doc. CRC/C/65/Add.26 (2nd report, 2003), at para. 123; Lithuania, UN Doc. CRC/C/11/Add.21 (1st report, 1998), at para. 63; Malta, UN Doc. CRC/C/3/Add.56 (1st report, 1998), at para. 63; Russian Federation, UN Docs. CRC/C/125/Add.5 (3rd report, 2004), at 215, and CRC/C/65/Add.5 (2nd report, 1998), at para. 267; Slovenia, UN Doc. CRC/C/70/Add.19 (2nd report, 2003), at 190; and United Kingdom, UN Doc. CRC/C/83/Add.3 (2nd report, 2002), at paras. 8.21.2, 8.21.4, 8.22.1, & 8.23.1 (teenage conception rates, but no abortion data). One State reported an absence of regulations: Luxembourg, UN Doc. CRC/C/41/Add.2 (1st report, 1997), at para. 429 (“The authors of this report do not have any statistics” on abortions “because the law does not provide for notification” and “there is no specific code in the nomenclature of medical acts.”).
Human rights activists are concerned about the practical consequences of privatization. Turning control of public goods over to private actors may decrease the enjoyment of human rights, particularly by the most needy and powerless in society. While there are a variety of specific complaints about the practical effects of privatization, they all boil down to what is seen as a potential abuse of power.

When the government owns and operates the water system, for instance, the economically less well-off are in a position to demand that the state subsidize the services, thereby ensuring that they get enough water. Placing the water system in the hands of private actors, however, allows private persons to control access so as to maximize their own interests, to increase their profits, in particular, even when this means that the vulnerable in society cannot enjoy an adequate standard of living, or even decent health. The state is supposed to look out for the public’s welfare, and especially for the interests of the most disadvantaged and vulnerable, and it is still obligated under international human rights law to ensure the over-all fairness of the way that water is supplied to the public, even after privatization. The fear is that privatization will alter the dynamics of the decision making in a way that will make the vulnerable even more vulnerable.

Some of the impunity laws that we have been looking at are a type of privatization. In particular, privatization occurs when the a-variable allows private actors to terminate the life of other members of society simply because they choose to do so.

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

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

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

De facto denial of the right to life

The right to life is context-dependent, so it exists at two levels. At the abstract level, the right to life is held by every human being, at all times, and in all places and circumstances; it is inalienable, it can never be taken away. But the state still can, and must, make balancing decisions when it translates the abstract right into legal entitlements at the concrete level. Allowing people to kill in self-defense, the allocation of the health budget, and motor vehicle laws all entail trade-off decisions that result in some people losing their lives.

The state also makes a type of balancing decision when the a-variable in the impunity law permits a child’s life to be ended simply because they choose to do so. What makes this particular trade-off decision different from the other situations is that it pertains to the right to life at the abstract level. To say that person A can end the life of person B whenever A wants to, is to say, as a practical matter, that B does not have a right to life.

For instance, if the law were to allow people to terminate the life of members of a particular racial group for any reason whatsoever, there would be a de facto denial that members of that race have the right to life at the concrete level, just as if the person were not a human being.
Moreover, the a-variable under discussion is a \textit{de facto} denial of the right to life because members of the b-variable category are still right-holders under the CRC. Article 1 of the CRC does not say that children under some particular age are excluded as holders of rights, and article 6 does not say that the right to life only applies to right-holders above a certain age. All human beings within the State’s jurisdiction, starting from the time they come into existence at conception, are CRC right-holders, absent a valid reservation to the contrary. And no State Party with this particular a-variable has made a reservation that expressly exempts children under a particular age from the jurisdictional clause, or excludes right-holders under a given age from holding the right to life. Children under the age specified in the b-variable still have the right to pre-natal care, for instance, the only other right that is of practical significance to pre-delivery children. The impunity laws under discussion are therefore best described as a \textit{de facto}, rather than a \textit{de jure}, denial of the right to life at the abstract level of rights, since the child is still a CRC right-holder.\footnote{The phrase, “the right to die,” is now well-established. While there is considerable controversy over the existence or legitimacy of such a right, the concept and the term are here to stay. See, e.g., Alan Meisel & Kathy L. Ceminara, \textit{The Right to Die: The Law of End-of-Life Decisionmaking} (3rd ed., Aspen Publ., New York, 2004). That is to be contrasted with the topic under discussion. In speaking of the impunity laws containing the various a- and b-variables, it would be perfectly correct English to describe them as “a right to kill” children. In this situation, the phrase is not well-established, but the concept and the right are, and the task is to evaluate those national-law rights under the framework of the CRC and other human rights treaties. This book has sought to use language at does not distract the reader from the legal and policy issues that it discusses, and, for this reason, it has used other expressions. But with that said, it is fair to note that State Parties have not shied away from using the word “kill” when referring to pre-natal children. For example: Ireland, UN Doc. CRC/C/11/Add.6 (1st report, 1995), at para. 109 (“kills her fetus”); Jordan, UN Doc. CRC/C/70/Add.4 (2nd report, 1999), at paras. 17, 23, 24 (“to kill the child by resorting to abortion”), & 26 (the “law regards a fetus as a person whom it is prohibited to kill”); Saint Vincent and the Grenadines, UN Doc. CRC/C/28/Add.18 (1st report, 2001), at para. 79 (the criminal “offense of killing an unborn child”); United Kingdom, UN Doc. CRC/C/41/Add. 7, (Addendum to 1st report, 2000), at para. 198 (an offense “to kill … an unborn child”); Vanuatu, UN Doc. CRC/C/28/Add.8 (1st report, 1997), at para. 153 (“killing of the unborn child”).}  

\textbf{The UN Study}  

Rights are very much a matter of expectations. When people have a “right” to something, they have a legitimate expectation that they can do or have whatever the law says they can have or do. A number of States have impunity laws with an a-variable that allows the ending of the life of a child under a specified age at the will of the parents. Numerous people will have formed expectations about their “rights” under these national laws. However, these national laws, and these expectations, were probably created before the CRC, or, if afterwards, without a public dialogue accurately grounded in the rights-based perspective of the Convention.

The authors of the UN Study can make a contribution to the prevention of violence against children by fostering a discussion of the “privatization” of the right to life, that is to say, about granting impunity when the life of a child is terminated at the unregulated discretion of the parents. It is a sensitive topic, to be sure, but this is all the more reason for the Study to address it. The Study will be grounded in a human rights perspective, with particular emphasis of the CRC, and it can take a global view of violence against children, a view that rises above the habits, experiences, and expectations of any particular society or state. This gives the authors of the Study a unique opportunity to contribute to the evolution of international human rights through the promotion of dialogue.\footnote{“It is hoped that the study will be a dynamic force for change and [sic] by fostering advocacy for, and promoting proven interventions to prevent violence against children, and will be a catalyst for the mobilization of resources and political will at the international and national levels that are required to address the problem.” \textit{Concept Paper for the Secretary General's Study on Violence Against Children}, UN Doc. E/3CN.4/2004/58, Annex, p. 5, at para. 5.}  

\textbf{G. Transparency in the UN Study}  

At the request of the General Assembly, the Secretary General has appointed an independent expert to direct the UN Study on Violence Against Children.\footnote{General Assembly resolution 56/103 (2001); \textit{see also}, GA res. 57/109 (2002), and Commission on Human Rights resolutions 2002/92, and 2003/86.} In accepting this assignment, the Independent Expert has taken on one of the most challenging tasks that could be placed on anyone’s shoulders.

The \textit{Jacobs and White} treatise on the European Convention on Human Rights gives an indication of the challenge that lies ahead. The chapter on the right to life under the European Convention concludes by saying, “There is certainly need for more discussion under the Convention concerning ways of balancing the right to life of the unborn child and the fundamental rights of the mother.”\footnote{Clare Ovey & Robin White, \textit{Jacobs and White, The European Convention on Human Rights} (3rd ed., Oxford Univ. Press, 2002), at 54.} While there is no shortage of debate and discussion of the underlying issues within society in general, there has been little reflection on the human rights dimension, within the context of the regional ECHR:
To date both the Court and the Commission have assiduously avoided confronting the difficult questions relating to abortion and euthanasia – from what point does life deserve protection and in what circumstances should the deliberate extinction of life be authorized?\(^{184}\)

Unlike the European Convention, the legal task of interpreting the Convention on the Rights of the Child is a rather straightforward matter. The framers of the CRC went out of their way to ensure that the text of the treaty indicates the policy decision that human beings must be protected throughout the pre-natal period, whereas the situation was different for the ECHR. But the second question – “in what circumstances …?” – is not a matter of legal interpretation: the reconciliation of competing interests – the making of balancing judgments – is a political matter. As for the lack of discussion referred to in the first quotation, the most important factor is probably the political sensitivity of the issues.

One way to gauge the magnitude of the political sensitivity is by statistics. Each year 46 million children lose their lives during the first nine months of their lives. About half of those deaths are lawful under the applicable domestic law, and half are not. None of them are accidents. For the UN Study of Violence Against Children to address a problem of this size and complexity, a number of difficult problems will have to be solved. One of the toughest of all problems is the requirement of transparency and accountability.

1. Interpreting the CRC

The authors of the UN Study will have to adopt an interpretation of the CRC before they can decide if they will discuss violence against children during the pre-natal period of the lifecycle, and violence against them in the first months after delivery. In order to interpret the Convention, they will have to decide which approach to take: Will the authors see themselves functioning in a judge-like capacity, applying the Vienna Convention as judges would, including the requirement to act in good faith? Or will the authors see themselves functioning as political activists, or like attorneys for a client, either making result-oriented legal arguments, or just adopting whatever legal positions they like, without any supporting explanation?

In light of the subject of the UN Study and the source of authority to undertake it, it would seem that the authors should be viewed as acting in a judge-like capacity when it comes to interpreting and applying the Convention on the Rights of the Child. That is to say, the authors should apply the rules of interpretation in the Vienna Convention as judges would apply them.

The authors of the Study are serving under delegated authority of the Secretary General, whose authority, in turn, comes from the Member States of the United Nations. All of the Member States are signatories of the CRC, all but two are parties to the CRC, and all of them are obligated to respect the rules of treaty interpretation that the Vienna Convention has codified. The authors of the Study are acting on behalf of States, through a chain of delegated authority, in order to help those States to more fully realize the human rights of children, working in conjunction with the United Nations Organization, and with civil society.

The Secretary General has appointed an independent expert to direct the Study, and the people who will actually write it will also be acting as “independent” experts under his direction. But no one acting pursuant to delegated authority is “independent” in the sense that a private person is. A private actor is free to adopt any view he or she wishes on the meaning of the CRC, and free to make any argument he or she desires, unconstrained by any rules of interpretation, or logic, or ethical considerations. Instead, the authors are independent in the way that judges are independent; they do not represent, or obey directives from, any government with respect to their interpretation of the CRC. They are free from externally imposed political constraints to be result-oriented in their legal analysis. The authors are free to exercise independent legal judgment in applying the rules of the Vienna Convention, but not free from the rules themselves.

A delicate issue

The role of the authors of the Study in interpreting the CRC raises an awkward question. A comparison will help to illustrate the matter.

If the subject of a UN study were racial discrimination, and if someone working on the study did not believe that people of a particular race were human beings, then it would be inappropriate for that person to make legal determinations about the human rights of members of that race. If the person were to say that members of that race were not right-holders, for instance, or that they do not fall within the scope of the study because they aren’t humans, the opinion would lack legitimacy, given the person’s racial views.

But even if the person were to say that members of that race are right-holders, or that they come under the scope of the study, the legitimacy problem is not solved. It is not just the results that matter; the decision-making process itself must be legitimate.

\(^{184}\) Id., at 57.
The decision-making process would be fatally flawed if someone with personal views fundamentally antagonistic to a group of people were given authority to make statements about the rights of those people. And nothing could be more antagonistic than denying a group of people their status as human beings.

One would not expect that anybody working on a UN race discrimination study would have racially biased views, of course. The example is purely hypothetical. But the situation is different when it comes to violence against children. The diversity in visions about membership in the human family is a fact of life, and a look at the CRC literature will show that many prominent people in the children’s rights movement hold the second view, even though that vision conflicts with State Party practice, and with the CRC. It would therefore be imprudent to assume that every one working under the auspices of the UN on the subject of children and their human rights will all have the same vision of the human family, or that every one’s vision is fully compatible with the CRC.

**The challenge of transparency and accountability**

Given that people hold conflicting visions of the human family, the Secretary General’s Independent Expert will need to find some way, with the principles of transparency and accountability in mind, to ensure the integrity of the process by which the legal issues concerning pre-delivery, and young, post-delivery, children are addressed. In particular, the issues pertaining to the foundational question: Who is covered by the CRC? Who is a “child” for the purposes of the Study on “violence against children”?

2. The other subjects covered in this Chapter

A study on violence against children that uses the CRC as a framework will have to say something about the a- and the b-variables in the domestic impunity laws. And it will need to make recommendations on all of the practical matters that have been discussed in this chapter.

This raises the same delicate issue discussed immediately above. A person holding views about members of the human family that are inconsistent with the views reflected in the CRC and State Party practice could hardly be expected to render appropriate judgments about life-and-death balancing decisions affecting that group. Such a person would also be in a compromised position when making practical recommendations about structural problems that put children’s lives into danger.

The Independent Expert will need to find a way, in conformity with the principles of transparency and accountability, to preserve the integrity of the Study on all of the matters discussed in this chapter.
CONCLUSION

Violence against babies is an important aspect of the UN Study on Violence Against Children. Euthanasia of children and infanticide are problems that need to be addressed, but the intentional killing of children before their birth dwarfs either of them in magnitude, and thus in seriousness as a human rights issue.

VIOLENCE AGAINST BABIES has attempted to conduct a rigorous analysis of the Convention on the Rights of the Child, pursuant to the Vienna Convention on the Law of Treaties, on the question of the CRC’s applicability prior to birth. It has also tried to make practical suggestions for reducing violence against babies.

Finally, the discussion has supported a number of conclusions. These include:

- Pre-delivery children are holders of rights under the CRC from conception onwards.
- States have wide discretion in making balancing decisions pertaining to the intentional termination of the lives of pre- and post-natal children, and that these decisions are matters of international accountability under the CRC, and other human rights treaties.
- States are not only the duty-bearers of human rights obligations vis-à-vis children, State Parties also have right-holding/ duty-bearing relations with each other, and therefore have responsibility for promoting each other’s compliance with the CRC.
- The UN Study is a type of accountability mechanism, through which State Parties help to fulfill their human rights obligations vis-à-vis each other, and to children.
- The validity of the a- and b-variables for impunity raise both substantive and procedural issues.
- Abuse of discretion with respect to any of these variables would be a violation of international human rights law.
- Human rights violations must be viewed from a de facto as well as a de jure perspective.
- Practical measures must be taken for reducing the amount of pre-natal and post-natal violence against babies, recognizing that progress must be made on a step-by-step basis, in light of the complexity of the problems.
- And the dignity of every human being, including every pre- and post-natal baby, is to be respected at all times.
Appendix A

The Legislative Records
The Legislative Records Confirm the Interpretation Arrived at Under the Ordinary Meaning Rule:

The CRC Covers Children Through Out the Pre-natal Period of Their Lives

Bruce Abramson

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Introduction

The legal discussion in Chapter 4 applied the ordinary meaning rule, Vienna Convention on the Law of Treaties article 31(1), to the Convention on the Rights of the Child. The conclusion is that the jurisdictional clause, CRC article 1, covers children through out the pre-natal period of their lives. The ordinary meaning rule has a corollary: VCLT article 32 allows the legislative records to be used “to confirm the meaning resulting from the application of article 31[1]” (emphasis added).

The purpose of the corollary rule is to confirm the interpretation arrived at under the ordinary meaning rule; it cannot be used to alter or over-ride that interpretation. If there appears to be a conflict, then the reading obtained through the ordinary meaning rule must prevail.

It is unusual to have a contradiction between the meaning reflected in the face of a treaty – the reading obtained under the ordinary meaning rule – and the legislative records. A true conflict would mean that the delegates gave official approval to a text that was opposite of the agreement that they worked so hard to arrive at during their negotiations. It would mean that all of the delegates, all of their professional staff, all of the UN support personnel, and all of the civil society participants in the process would have blundered, or else would have been acting in bad faith. Oversights do occur on minor matters, such as what are called scrivener’s errors, but it is hard to find real life examples of delegates writing a treaty text that is contrary to what they meant on an important policy issue.

On the other hand, it is not unusual to find individual statements in the records that indicate a delegate took a position at odds with the obligations contained in the treaty, as interpreted through the ordinary meaning rule. The negotiations are an interactive process involving debate, compromise, refinement in thinking, and even changes in position over time. The final text adopted by all of the delegations as a group reflects the outcome of a process. What is important for the purposes of legal interpretation is the final policy decision, as reflected in the written agreement between the parties, and not the positions taken at any particular moment during the negotiations, or the views of any particular state, or the subjective opinions of delegates. Moreover, the official records of the

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185 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), article 31(1): “A treaty shall be interpreted [a] in good faith in accordance [b] with the ordinary meaning to be given to the terms of the treaty [c] in their context and [d] in light of its object and purpose” (brackets added).
proceedings are often incomplete, and, even more seriously, they only reflect a portion of what the delegates actually said to each other since a considerable amount of the interchanges take place off the record, outside of the formal meetings.\textsuperscript{188} For these and other reasons, it is easy, after a treaty has been adopted, for an advocate of a particular political position to construct an argument for their cause by selectively choosing individual statements from the documentary materials. Just as the ordinary meaning rule is based on commonsense principles that people apply in their everyday lives, so too is the corollary rule. The law is what is set forth in the text of the treaty, and, for most situations, the ordinary meaning rule is sufficient for producing an interpretation. However, there can still be practical reasons for turning to the legislative records to help promote acceptance of treaty obligations, and thus, better compliance. For instance, years after the treaty has been written and ratified, changes in office holders may result in some current government officials disagreeing with the decisions made by their predecessors in office. When a dispute breaks out over the state’s treaty obligations, it may help to encourage the new office holders to comply with the treaty by pointing out what their government’s representatives said during the drafting process. By permitting the legislative records to be used to confirm the interpretation produced by the ordinary meaning rule, the Vienna Convention has taken account of the psychological and political dimensions of treaty compliance.

The corollary rule is not to be confused with the second main rule of treaty interpretation, the legislative history rule. If the ordinary meaning rule results in an interpretation that is “manifestly absurd or reasonable,” or if the treaty’s meaning is still “ambiguous or obscure,” even after the provision is read in the context of the entire treaty, including its object or purposes, then the legislative history rule comes into play.\textsuperscript{189} The conditions for using the legislative history rule are quite demanding. But this too is a commonsense safeguard, considering the inherent limitations of the documentary records, and the very real potential for abuse from selective quoting. But when the first rule of interpretation -- the ordinary meaning rule -- fails, then there is no other option but to use the legislative materials.

And finally, there is a tendency to treat the Working Group members as the law-makers when it comes to interpreting the CRC. This is not correct. The Working Group is not itself a law-making organ of the United Nations. It is the Membership of the General Assembly that adopts the text of a treaty, and opens it for ratification. The General Assembly authorizes the Commission on Human Rights to prepare a text for its consideration. In the case of the CRC, as in the typical situation, the Commission created a working group to carry out the preliminary negotiations and drafting.

The following discussion will use the legislative records to confirm the interpretation arrived at in the main paper, pursuant to the corollary rule in VCLT article 32.

I. The Starting Point: The 1978 Polish Proposal

The creation of the CRC began in 1978 when Poland submitted a “Draft Convention on the Rights of the Child,” which was then circulated for comments from States, NGOs, and intergovernmental organizations.

A. The text of the 1978 proposal

The original Polish draft was modeled on the 1959 UN Declaration on the Rights of the Child. The draft did not have a jurisdictional clause; although the title used the word “right,” the operative provisions were not framed in terms of rights; it did not have a provision on protecting the life of a child; but it did have provision on health care, and it referred to prenatal care; and the preamble spoke of legal protection before birth.

To be specific: the preamble said that the child needs “legal protection, before as well as after birth” (third paragraph); Article I only said that “Every child, without any exception whatsoever, shall be entitled to the rights set forth [] without distinction [] on account of race, [etc.] …”); and Article IV said that “special care shall be provided both to him and to his mother, including adequate pre-natal and post-natal care.”

B. Comments from States and others

The 1978 proposal was distributed for feedback from States and other involved in the process. The comments emphasized that a treaty needs a highly degree of precision that found in the UN Declaration and in the proposal. States said that “child” has to be defined, and the pointed out that

\textsuperscript{188} The summary records of the Working Group that produced the basic text of the CRC are nowhere as complete as they are in other UN forums. For complaints about their inadequacies, see Sharon Detrick, The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires” (1992), at 94-5 [hereafter, A Guide to the “Travaux Préparatoires”], at 624, 630.

\textsuperscript{189} VCLT article 32: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order … to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”
the definition will link to all the other rights, in particular pre-natal care, and that the question of the definition would require addressing “the right to life of the unborn child, and the question of abortion.”

One of the clearest statements of the interconnections was from Austria:

The scope of Article IV [health] is not clear. There is a possible inconsistency between “the child’s” right to adequate pre-natal care and the possibility for legal abortion provided in some countries.

It will be recalled that the legal analysis (Chapter 4) put emphasis on reading all of the provisions together, and Points 3 and 4 used the right to pre-natal care (in article 24) to help interpret “human being” (in article 1). So even before the Working Group was established, States knew that all the provision must be read in light of each other when it comes to the definition of the child, the right to life, and abortion.

The comments were compiled and re-distributed to States, and they served as the basis for Poland’s revised text.

II. The 1979 Revised Polish Draft

Poland’s revised text was submitted in 1979, and titled, “Draft Convention on the Rights of the Child.”

1980 Session of the Working Group

In 1980, the Commission on Human Rights established a Working Group to draw up a draft of a convention on the rights of the child. The Working Group was made up of States, drawn from the membership of the Commission, but the proceedings were open to all States, and to accredited ngos and intergovernmental organizations as observers. During its first session that year, the Working Group adopted Poland’s “Revised Draft Convention on the Rights of the Child” as its basic working document. (Hereafter, “Polish Draft” or “draft.”)  

The Polish Draft contained three provisions relevant to the question of the CRC’s applicability during the pre-natal period of the human lifecycle:

- Draft article 1 read:

According to the present Convention a child is every human being from the moment of his birth … (emphasis added).

- The preamble of the Polish Draft did not contain any reference to the legal protection of children “before birth.” The fifth preambular paragraph said:

Recognizing that the child due to the needs of his physical and mental development requires particular care and assistance with regard to health, physical, mental, moral and social development as well as legal protection ….

- Draft article 13 read, in relevant part:

It is recognized that the child shall be entitled to benefit from the highest attainable standard of health care ….

The State Parties … shall pursue full implementation of this right, and, in particular, shall:

… (d) extend particular care to expectant mothers for a reasonable time before and after confinement … (emphasis added).

In other words, draft article 1 expressly excluded pre-natal children from being right-holders, which means that the Draft reflected the second vision of the human family: within the human lifecycle, membership in the human family begins at birth. It is also important to note the contradiction between the provisions: Children have a right to have their mothers receive pre-natal care under draft article 13, which conflicts with the “from the moment of birth” limitation in draft article 1.

As well be discussed in detail below, the delegates made three important decisions in subsequent meetings that changed the draft text. The
first occurred later in the 1980 session when the exclusionary “from the moment of his birth” clause was deleted, thereby reflecting the first vision of the human family, and making draft articles 1 and 13 coincide. The second took place in the last session, in 1989, when the delegates added the “before birth” language to the preamble. The third decision was to more expressly extend the child’s right to care to the entire pre-natal period, using the more legalistic language as contained in the rest of the convention, and this change also took place in the last session.

In other words, there was a progressive expansion of the children’s rights in the course of the negotiations, with the second vision of humanity being replaced by the first vision.

III. CRC Article 1 (jurisdictional clause)

A. 1980 Session, Third Meeting: “moment of birth” removed

The first crucial decision occurred at the third meeting in the 1980 session. A proposed was made to amend draft article 1 by deleting the exclusionary “from the moment of his birth” clause, and, after a vigorous debate, a consensus was reached to remove the restriction.

The records

Here is the entire text of the summary of the debate and the decision:

29. Some delegates opposed the idea that childhood begins at the moment of birth, as stated in the draft article, and indicated that this is contrary to the legislation of many countries. They argued that the concept should be extended to include the entire period from the moment of conception. Other delegates asserted that the attempt to establish a beginning point should be abandoned and that the wording should be adopted which was compatible with the wide variety of domestic legislation of the subject.

30. The representative of Morocco proposed that the words ‘from the moment of birth’ should be deleted from the article in order to solve the difficulty. Several delegations supported the proposed amendment.

31. The first part of the article was therefore adopted with the amendment proposed by Morocco.”

The amended text

The new text (after further amending on other matters) read:

According to the present Convention a child is every human being to the age of eighteen years unless, under the law of his state, he has attained the age of maturity earlier.

Commentary

The amended text reflects the first vision of the human family. The records quoted above show the delegates making three points:

(i) Children need CRC protection from conception onwards, so the draft must be amended. This is unmistakably the first vision of the human family.

(ii) It is inappropriate to try to establish a beginning point. Unfortunately, the summary records are ambiguous here, and it is not even clear to which side of the debate the remarks pertain. The statement could mean: “not try to establish ‘from the moment of birth’ as the beginning point of coverage.” Or, it could mean: “not try to define what ‘the moment of birth’ means, that is to say, not attempt to give a technically precise statement of when a human being comes into existence.” (The problem of establishing “the moment of birth” is discussed in detail in Chapter 5.C.) Or it could be a generalized summary that covers what was said by a number of delegations that were on various sides of the debate.

But regardless of the various possibilities, the argument is based on the first vision of the human family. This is because the second vision has a starting point — the moment of birth — and this vision was rejected by the amendment. Moreover, there are no grounds to think that any delegation adopted the third vision (represented by the philosopher Peter Singer). This leaves the first vision as the only possibility. Of course, there can be different sub-visions within the first vision, in which people will draw a line at some point after conception but before delivery is completed. But the statement in the record says that the Group should not “attempt to establish a beginning point.” So all we can say here is that the statement reflects the first vision: membership in the human family begins during the pre-natal period of the human lifecycle.


An amendment is necessary to make the CRC more consistent with State practice. This, too, is the first vision since, as the records indicate, all states at that time protected human life prior to birth in one manner or another (including Poland, the author of the restrictive clause).

**What we know for sure**

While the records give us only a limited amount of information about what the delegations thought, we do know some things for certain: First, the delegates consciously considered, and then deliberately rejected, limiting the right-holders to only those children who have been born. This confirms the inference in Point 2.

Second, the logical consequence of the policy decision to remove the exclusionary clause was to make children right-holders during the pre-natal period, and this makes the jurisdictional clause consistent with recognizing a child’s right to pre-natal care in draft article 13(2)(d), (present article 24(2)(5)). This logical connection was discussed in Point 4.

The records do not show any delegate making reference to this logical connection, but one would not expect them to do so at this stage of the proceedings. The Working Group was discussing each provision separately, and in the order of appearance in the Draft. It would be many years before the delegates would address the right to health. But the same policy decision – that human beings are to be protected and cared for during the pre-natal part of the human lifecycle – underlies both the amendment to draft article 1 and the child’s right to health prior to delivery, in the Draft as well as in the final text. Moreover, the linkage between the definition of the child and the right to pre-natal care was pointed out by Austria in the written comments discussed above.

Third, some states wanted the deletion for the precise purpose of making children right-holders from the moment of conception, and the records do not show that any state denied that this would be the legal consequence of the deletion.

And fourth, no delegation adopted the second or third vision of the human family: no delegate claimed that the word human being does not include the pre-natal period of life, or asserted a legal, philosophical, moral, or political barrier to recognizing pre-natal human beings as right-holders under international law.

**B. 1989 Session**

To understand what happened in the last negotiating session of the Working Group, it is necessary to take into account the interaction between article 1 and the preamble. In particular, the amendment to the ninth preambular paragraph that had just occurred in the 1989 session (which is discussed in detail later) needs to be considered.

Two delegations, one from Malta and one from Senegal, had submitted written proposals for the 1989 session to amend article 1, and both added language that would expressly recognize that CRC coverage begins at “conception.” However, after the proposed were submitted, but before taking up article 1, the Working Group amended the ninth preambular paragraph. And once they adding the “before birth” clause to the preamble, the two delegations saw no need to bring up their amendments to article 1. So they withdrew them.

According to the summary records, the Malta delegation explained, at the time of withdrawal, that, “protection of the child should begin from conception.” The summary record is not a verbatim transcript, however, so we cannot know what the delegation actually said. But a commonsense interpretation of the summary record is that, in lawyer’s jargon, the delegation “was making a record” about the meaning of the treaty, as the draft text stood at that time: In the view of the Malta delegation, when draft article 1 – with “from the moment of birth” having been eliminated in 1980 – is read in conjunction with the recent addition of “before birth” in the preamble, the result is that CRC will apply from conception onwards. Given that legal interpretation, there is now no need to proceed with the written proposal that would add the explicit language pertaining to conception.

What is crucial for our present purposes is that no delegation took a contrary position. One delegation stated that it would have supported the proposal had it not been withdrawn, but no delegate made a record for a contrary legal interpretation of the CRC. If any delegation had disagreed with the interpretation put forward by Malta, it would be foolish for that State to remain silent. Keeping silent, in a situation where commonsense calls for speaking up in the case of disagreement, will be understood as agreement. That is why making a record is such an important part of the creation of treaties, just as making a record is crucial in any type of legal forum.

**C. Conclusion**

The text of article 1, standing on its own, does not tell us the meaning of the operative term human being. Under the ordinary meaning rule, we interpret it in the context of the Convention as a whole, and the conclusion reached is that CRC coverage applies throughout the pre-natal
period of the human lifecycle, staring at conception (Points 1 to 9 taken together).

The corollary to the ordinary meaning rule allows us to use the summary records to confirm the interpretation. While we cannot know what every delegation thought in the third meeting of the 1980 session, we know two things for certain: (i) The delegates proposing the deletion of the restrictive phrase considered “human being” to include children from conception onwards, and (ii) the records do not show any delegate disagreeing with that. The records of the 1989 session tell us the same things: Malta made a record for its interpretation that the CRC provides protection from conception onwards, and no delegation denied or contested that reading.

In short, the legislative records confirm the interpretation arrived at for article 1, pursuant to the ordinary meaning rule: the CRC applies from conception onwards, up to the age of 18 years.

IV. Ninth Preambular Paragraph

A. Overview

As already mentioned, the preamble of the Polish Draft did not contain any reference to the legal protection of children “before birth” (although its original proposal did):

Recognizing that the child due to the needs of his physical and mental development requires particular care and assistance with regard to health, physical, mental, moral and social development as well as legal protection …. (Draft fifth paragraph.)

That draft provision was based on the preamble of the 1959 UN Declaration of the Rights of the Child:

Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, …(emphasis added). (Third paragraph.)

The most significant difference is that the authors of the Polish Draft had omitted the reference to protection “before birth.” However, delegates strongly objected to the omission, and, after nearly nine years of reflection and argument, the Working Group finally decided to add the “before birth” clause, quoting the 1959 Declaration word for word in the CRC’s preamble, along with a citation to the Declaration itself. The history of this shift is discussed below.

B. 1980 Session of the Working Group

1. Second Meeting

It is important to understand where things stood at the start of the second meeting of the 1980 drafting session. The subject of the meeting was the preamble, and the Draft under consideration did not contain the “before birth” clause from the 1959 Declaration. And since draft article 1 had not yet been discussed, it contained the from the moment of his birth exclusion.

The records

The second meeting opened with a proposal to add “before as well as after birth” to the draft fifth (now the ninth) preambular paragraph, in conformity with the 1959 Declaration.

The records show one main argument in favor of adding “before birth,” and one against.

The pro-before birth amendment argument reads as follows:

A number of delegations agreed in support of the amendment on the grounds that their national legislation contained provisions protecting the rights of the unborn child from the time of conception. They stated that the purpose of the amendment was not to preclude the possibility of abortion, since many countries had adopted legislation providing for abortion in certain cases, such as a threat to the health of the mother.\footnote{A Guide to the “Travaux Préparatoires”, at 102, excerpting UN Doc. E/CN.4/L.1542, pp. 2-5, para. 6.}

Commentary

There are three important things to note about that argument. In the first place, since a preamble does not recognize rights or otherwise place binding obligations on parties, it is true that adding “before birth” could not preclude abortion, or any other state behavior in implementing any right in the treaty. The delegations making this argument were clearly anticipating the battles that lay ahead on article 1, since, strictly speaking, the point did

\footnote{The 1959 Declaration is reproduced in, A Guide to the “Travaux Préparatoires”, at 642-44.}
not really pertain to a discussion about the preamble. In the second place, by speaking of “abortion in certain cases,” the delegations are clearly referring to balancing decisions, which are the essence of all context-dependent rights, including the right to life. In other words, while the argument reflects some confusion about the legal difference between the preamble and the rights, the underlying point is technically correct: since the right to life is context-dependent, the preamble cannot per se preclude any particular balancing judgement. Third, by citing the extreme case of a mother’s life being put in danger by a pregnancy, the delegations were referring to a situation that all states would agree call for a careful balancing of competing interests. Regardless of any person’s or any State’s position on the proper outcome in this example, all would agree that a balancing decision is necessary.

The records (continued)

The anti-before birth amendment argument reads:

In the[] view [of other delegations], this preambular paragraph should be indisputably neutral on issues such as abortion. They stated that the definition of “child” should be contained in article 1 and nothing in the Preamble should prejudice or slant the definition formulated in article 1. 197

Commentary

First of all, while it true that the preamble can be used to interpret an operative provision, article 1 at that time expressly precluded pre-natal children from being right-holders, so it would be impossible for the preamble to alter the legal effect of that exclusion. Here, too, delegations are anticipating the upcoming battles on the operative provisions.

Secondly, the statement about being “neutral” – an argument that was to come up repeatedly in later meetings – is extremely misleading. In order to understand the confusion about “neutrality”-talk, it is helpful to keep in mind that the right to life is a context-dependent right, and that it exists at two levels, the abstract and the concrete.

At this stage of the negotiations, draft article 1 contained the from the moment of birth restriction. In an extremely strained sense, the exclusionary clause is “neutral” on abortion: The termination of the life of any right-holder is a matter for the right to life (article 6), not the jurisdictional clause (article 1). To put it another way, the exclusionary clause reduces the class of human beings who are right-holders because it eliminates all pre-natal children. But the exclusion in article 1 does not affect the scope of the right to life in article 6 at the abstract level, nor does it affect the balancing decisions when the abstract right is translated in concrete entitlements. This is because pre-natal children don’t have a right to life, thanks to the exclusion in article 1.

But if we do not strain the language, then draft article 1 is not “neutral” on abortion (in the political sense of terminating the life of the baby). Since pre-natal children are excluded from being right-holders at the abstract level of the right to life, then the termination of the lives of pre-natal children is irrelevant to the CRC. And if their lives are irrelevant to the Convention, then governments are totally free to terminate their lives, as far as the Convention is concerned. So draft article 1, with the exclusionary clause, was not neutral.

A “neutral” stance on “abortion” is actually pro-abortion. A treaty creates international laws, and no law is ever neutral, since – as the maxim goes -- that which is not prohibited is permitted. Removing a prohibition of a practice will not make the law neutral; it will slant the law in the direction of that practice, if not outright permit the practice.

To give an example, CRC article 37 forbids the imposition of the death penalty on minors, just as the ICCPR article 6 prohibits it. But removing those provisions would not make international law neutral on executing minors: it would make those treaties pro-death penalty since it would leave States free, or at least less restricted, in enacting capital punishment laws and children and adolescents. Any international law restriction on the execution of minors would have to come from decisions about the correct trade-offs in applying context-dependent rights (like the right to life) to the concrete situation of executing minors.

In short, speaking of the draft treaty as being “neutral” on abortion is best understood as political rhetoric.

The Group’s decision

By the end of second meeting, the Working Group had agreed to add “before birth” in square brackets to the Draft of the preamble “on the understanding that the final language would be agreed upon after the adoption of article 1.” 198

198 A Guide to the “Travaux Préalatoires”, at 102, excerpting UN Doc. E/CN.4/L.1542, pp. 2-5, para. 8. The “on the understanding that …” statement
2. Fourth meeting

To follow the legislative history, it is important to have a clear picture of the sequence of events. In the third meeting, the Working Group removed the exclusionary from the moment of birth clause from article 1 (as discussed above). The deletion of that restriction raised the question of the interpretive interplay between the preamble and articles 1 and 6: How would the presence or the absence of the “before birth” language in the preamble affect the interpretation of the jurisdictional clause in article 1? or the right to life in article 6, at both the abstract and the concrete levels?

The records

The fourth meeting began with a suggestion to remove the bracketed “before as well as after birth” clause from the preamble.199

The anti-before birth argument reads as follows, with bracketed letters added to facilitate the discussion:

[A] Several delegations argued that the text inserted in square brackets should be deleted in order to ensure the neutrality of the preamble. [B] One representative expressed the view that, since article 1 had adopted a neutral wording, [C] the Convention should not appear to give a different interpretation in the preamble. [D] It was also stated that since national legislation differed greatly on the question of abortion, the Convention could be widely ratified if it did not take sides on the issue. (Brackets added.)200

Commentary

Statement [A] is a repetition of the political rhetoric that was discussed above, while statement [B] is not correct. Once the exclusionary clause in article 1 was deleted at the prior meeting, pre-natal children can be CRC right-holders, absent a valid reservation to the contrary. So amended article 1 is not neutral when it comes to the intentional termination of the lives of children prior to delivery because it makes pre-natal children holders of the right to life at the abstract level. Because of the amendment, the state must respect their human dignity, including their right to life, when it makes balancing decisions about the concrete enjoyment of article 6 in the context of “abortion.” It is only “neutral” in the narrow sense that article 1 does not specify what the proper balancing decision is in regards to any situation where article 6 is applicable, including “abortion” decisions. Finally, statement [D] is also political rhetoric since the CRC handles diversity on the issue of “abortion” in the same two ways that it accommodates any type of differences in state practices. First, the right to life is context-dependent, which gives each state party great latitude in writing national laws, subject to international accountability, and second, reservations are permitted, subject to loose procedural and substantive standards.

Just as important as what the anti-before birth delegations said is what they did not argue. No delegate claimed that pre-natal children are not “human beings,” or asserted that pre-natal human beings cannot be, or should not be, recognized as holders of human rights.

But what is most important about these anti-before birth arguments is that the states that made them eventually agreed, in the last session eight years later, to drop their objection to the amendment. We will return to this point at the conclusion of the discussion of the preamble.

The records (continued)

The pro-before birth arguments read:

[A] Other delegations … stated that, in their view, the wording was sufficiently neutral since it did not specify the length of period before birth which was covered. [B] They again argued that all national legislation included provisions for the protection of the child before birth. [C] One delegation considered that the proposal could be extended to cover legal protection in view of the fact that most legislations [sic] protected, for example, [D] the inheritance rights of children who had not yet been born.201

Commentary

It is important not to lose sight of the forest for the trees. The forest is the point that underlies all of the statements: Extending CRC coverage to pre-natal human beings will not deprive State parties from exercising

200 Id.
discretion (subject to international accountability) in enacting legislation on matters pertaining to those right-holders. Which is to say, the delegates were recognizing that the CRC rights relevant to pre-natal right-holders require balancing decisions.

Now for the trees: Statement [A] seems confused on several points. First, the jurisdictional clause in article 1 defines the right-holders, not the preamble. And second, the other delegations’ concerns about “neutrality” pertained to the discretion that parties would have in respect to making balancing decisions affecting CRC right-holders, rather than concerns about drawing lines between the pre-natal children who are right-holders and those who are not, based on their ages. However, since we do not have a verbatim transcript, we cannot be sure whether it was delegates who were confused, or the UN precis writers who prepared the summary records. Statements [B] and [C] are extremely important because they recognize that all State parties will be in the same boat. In essence, the statements recognize that every State will have to respect the CRC rights of pre-natal children, and while they will not lose their authority to make balancing decisions in implementing those rights, their judgments will be subject to international accountability. Statement [D] is not a red herring; State implementation reports to the CRC Committee on article 1 routinely give information on national inheritance legislation concerning pre-natal children.

The records (continued)

And finally, some delegations spoke of the need to compromise. Of particular importance is this statement:

One delegate pointed out that a compromise might be possible on the basis of the fact [A] all delegations agreed that some kind of protection and assistance before birth was necessary: in his view, [B] the disagreement lay in the precise definition of what kind of protection and assistance before birth should be specified in the Convention.202

Commentary

Statement [A] is important because it is a factual description of where matters stood: All states did in fact protect pre-natal children in their domestic laws to one degree or another, and the assertion that “all delegations agreed” seems correct when one looks at the summary records, and when one considers that the Working Group finally agreed, nine years later, to add the “before birth” language to the preamble. Statement [B] also makes good sense when one draws the distinction between the abstract and the concrete levels of context-dependent rights. Only three CRC rights are of life-and-death important to pre-natal children, the right to life, freedom from violence, and the right to health care, and they are all context-dependent. The CRC does “specify” -- in an abstract way -- the “kind” of protection and assistance that is required, but the Convention does not give a “precise definition.” So “precise definition” must be understood as referring to the concrete entitlements of right-holders, and since this calls for situation-specific balancing judgements, the entitlements are not “specified” by the Convention.

The Group’s decision

The fourth meeting ended by deciding to “postpone … the issue until an acceptable compromise could be found.”203

3. Fifth meeting

The chairman opened the fifth meeting by announcing that he had worked out a compromise text.204 His optimism was ill founded, however, and “[f]urther discussion ensued.”205

The record

The arguments in the fifth meeting do not raise any new points, but since commentators in the CRC literature have selectively quoted from this meeting, it is necessary to set out the record for the anti-before birth arguments:

[A] Others were not satisfied by the delegation’s explanation that the amendment was necessary to ensure the complete neutrality of the text, and expressed and expressed concern that the draft Convention would be slanted in favor of legalizing abortion. [B] They re-emphasized their contention that the draft Convention should ensure protection for children both before and after birth. In reply, the

delegate of the United States argued that [C] any attempt to institutionalize a particular point of view on abortion in the draft Convention [D] would make the Convention unacceptable from the outset to countries espousing a different point of view. [E] Accordingly, he insisted that the draft Convention must be worded in such a manner that neither proponents nor opponents of abortion can find legal support for their respective positions in the draft Convention.206

**Commentary**

Statements [A] and [B] are contradictory; statement [D] is a red herring. And statement [E] is disingenuous. First, no law is neutral, in the sense that that which is not prohibited is permitted. And second, it is the jurisdictional clause in article 1, when read in the context of the CRC as a whole, that makes pre-natal children right-holders, and, once they have CRC rights, a state’s discretionary judgments about its “abortion” laws are subject to international human rights law.

The only way to make sense of these arguments is to relate them to the two levels of context-dependent rights. Removing the from the moment of birth exclusion in article 1 made pre-natal children CRC right-holders. On the one hand, nothing in the text of the draft CRC pre-determines the details of a State party’s “abortion” legislation, any more than it automatically determines its laws on infanticide, euthanasia, or the rationing of medical care for children and teenagers. So in one sense, the draft (and the final) CRC are “neutral” on “abortion”: the Convention does not specify the concrete entitlements of context-dependent rights. On the other hand, a party’s implementation of context-dependent rights – including the right to life --, is subject to international accountability. In particular, a balancing decision that does not properly take into account the interests of pre-natal children, or does not truly respect their human dignity, cannot be considered a legitimate balancing judgment within the framework of the CRC. In this sense, the draft (and final) CRC is not “neutral” on “abortion.”

And finally, statement [C] is the one point that is entirely correct: recognizing CRC rights from conception onwards does not “institutionalize a particular point of view on abortion”: the CRC does not specify the concrete entitlements of any context-dependent right, including the pre-natal child’s right to life. On the other hand, denying CRC coverage to pre-natal children would institutionalize a particular point of view on abortion. Exclusion from CRC coverage would specify that pre-natal children are not members of the human family; a state could terminate the lives of pre-natal children for any reason whatsoever, and by whatever means that it wished, without any international accountability. But the draft (and the final) CRC rejected the institutionalization of the second vision of the human family: removing the from the moment of birth restriction in article 1, and recognizing the right to pre-natal care in article 24, makes pre-natal children CRC right-holders from conception onwards.

**The Group’s decision**

The fifth meeting ended with the Working Group adopting a “compromise text.”207 The draft fifth (final ninth) preambular paragraph became a more wordy version of preamble of the 1959 Declaration, but without the “before birth” language. However, the compromise in 1980 session was eventually overturned in the last, 1989 session.

**C. 1988 Session of the Working Group: The First Reading**

While some changes were made to other provisions in the preamble during the 1988 session, there was no discussion about adding the “before birth” language from the 1959 Declaration to the now sixth (former fifth) preambular paragraph. Since there were no changes in the paragraph, the Working Group adopted it, just as it had been agreed to in the 1980 session, at the “first reading” of the entire draft CRC.208

**D. 1989 session of the Working Group: Second Reading**

**Overview**

There was in fact no true consensus in the 1980 session over omitting the “before birth” clause in the preamble.209 and the issue was pressed with exceptional force in the final session of the Working Group. In the intervening years, many more states had become involved in the drafting process, and the notion of internationally recognized children’s rights acquired greater legitimacy. Throughout most of the negotiating process, the Group’s work was dominated by Western governments, or, as Nigel Cantwell has euphemistically put it, by “Northern” or “industrialized countries,” that worked in a “family atmosphere” – a clique or club, in

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plain English. But all that changed in “a sudden last minute surge” of
delегations from around the globe in the closing sessions, and, as is clear
from the records, that these delegations had consulted with each other in
advance of the 1989 session. The reversal of the 1980 decision can be
viewed as an example of the evolving nature of international human rights
law.

The records

The 1989 session was intended to be the last one for the Working
Group, and once the second reading of the draft treaty was completed, the
document was to go to the parent body, the Commission on Human Rights.
The Commission could adopt the text or revise it, and forward the draft
treaty to the General Assembly, which in turn could adopt or revise it, and
then open the treaty for ratification.

Two proposals to add the “before birth” clause to the preamble
were put forward by a combination of five delegations, and they were
officially supported by another eight states, the majority of which
apparently were not part of the 1980 Working Group.

The main pro- \textit{before birth} arguments read as follows:

\begin{verbatim}
\textbf{[A]} The importance of the protection of the child even before it is born was repeatedly stressed [in connection to retaining the “before birth” concept in the 1959 Declaration]… . \textbf{[B]} [In all national legal systems protection was provided to the unborn child and the draft convention should not ignore this fact. …] \textbf{[C]} [One delegation observed that no State was manifestly opposed to the principles contained in the Declaration on the Rights of the Child and, therefore, \textbf{[D]} according to the Vienna Convention on the Law of Treaties, the rule regarding the protection of life before birth could be considered \textit{jus cogens} since it formed part of the common conscience of members of the international community.]
\end{verbatim}

Commentary

Arguments [A] through [C] make the point that the CRC must not
reflect a position that is at odds with prevailing state practice, and are a
condensed version of the points made in the earlier sessions. Statement [D]
frames that point in terms of customary international law, echoing an
argument made in 1980.

The records (continued)

The main anti- \textit{before birth} arguments were:

\begin{verbatim}
\textbf{[A]} Other delegations [including ten named delegations] opposed what in their view amounted to re-opening the debate on this controversial matter which, as they indicated, had been extensively discussed at earlier sessions of the Working Group [B] with no consensus achieved. [C] It was also pointed out by some delegations that an unborn child was not literally a person whose rights could already [sic] be protected, and [D] that the main thrust of the convention was deemed to promulgate the rights and freedoms of every human being after his birth and to the age of 18 years. [E] The view was also expressed that the Declaration of 1959, being a document of almost 30 years, is to be superceded by the present new draft, and therefore, there was no need to stick to all of its provisions. … \textbf{[Another delegation said that the present draft paragraph]} \textbf{[F]} did not exclude protection of the child before birth, nor did it contradict a wider interpretation of the text or the application of other more comprehensive provisions, as
\end{verbatim}


\bibitem{Proposals} For the two proposals, see \textit{A Guide to the “Travaux Prépartoires”}, at 108-9, excerpting UN Doc. E/CN.4/1989/48, pp. 8-15, paras. 32-34. Although the records do not show the participants at the 1980 session, the subsequent records lead to the inference that most of the supporters of the proposals were not present at the 1980 session. See, \textit{A Guide to the “Travaux Prépartoires”}, at 644-57.


\bibitem{Cantwell} \textit{A Guide to the “Travaux Prépartoires”}, at 103, excerpting UN Doc. E/CN.4/L.1542, pp. 2-5, para. 13 (An ngo observer, “supported by some delegations,” suggested deleting the bracketed \textit{before birth} clause “on the understanding that the [1959] Declaration (including its third preambular paragraph containing a wording similar to the proposed amendment) remained in force under the proposed Convention.”).

laid down in article 21 of the draft convention [i.e., final article 41].

Commentary

Statement [A] is a procedural rather than a merit-based argument. And it is an argument that borders on bad faith, given the serious global imbalance in the composition of the earlier sessions. And the candid admission in [B] that there was no real consensus in 1980 just aggravates the injustice of making procedure more important than substance arguments.

Argument [C] is misleading since the operative term in article 1 is human being, not person. The difference is crucial since it is true that the national jurisprudence of a number of countries deem that a pre-natal child is not a “person” under the state’s constitutional or legislative provisions. It is not difficult to understand why the CRC is not framed in terms of person when one considers the bewildering ways that national court judges have interpreted that term. For instance, corporations are considered to be “persons,” while the supreme court of one prominent rule-of-law country (the United States) once ruled that members of the Negroid race are not “persons” for the purpose of constitution protection.

Statement [D] is also misleading. While it is true that only three CRC rights are of life-and-death significance to pre-natal children — the right to life, freedom from violence, and the right to health —, the main thrust of the Convention is respect for human dignity, and those three rights are vital to that concept. Moreover, the Working Group had made the policy to delete the restrictive from the moment of birth clause in article 1 in 1980, and after that no delegation made a proposal to change that decision.

Finally, argument [F] confuses the issues because the right-holders are defined by article 1, as read in conjunction with the CRC as a whole. The original from the moment of birth clause in article 1 did exclude pre-natal children, but its removed allowed them to be right-holders.

The “nuclear-option”

At this point in the proceedings one delegation exercised what can be called the nuclear-option: it said that it would “formally request a vote” if the before birth proposal was not accepted. Since the Working Group was governed by the so-called consensus rule, the delegation was threatening to kill the draft Convention if the amendment was not adopted. It is unthinkable that a State would make such an open threat if the delegation had not been sure of substantial backing within the Working Group, and the Commission on Human Rights as whole. Furthermore, the Working Group was just the first step in what could be an even longer process of negotiation and revision as a draft treaty must work its way up through the Commission on Human Rights, then the Economic and Social Council (ECSOC), and then the General Assembly. The demand for adding the “before birth” clause in the preamble was a non-negotiable ultimatum that was apparently backed by a coalition made up of nations from around the globe.

The resolution of the crisis

The result of the ultimatum was the rapid creation of a small negotiating group to work out a compromise. And, unsurprisingly, the group “in a spirit of collaboration [] adopted unanimously” the amendment exactly as it had been proposed: the preambular statement in the 1959 Declaration is quoted word for word, including the “before birth” clause. That amendment now constitutes the ninth preambular paragraph of the CRC.

The face-saving agreement

As part of the compromise, the negotiating group worked out a face-saving statement. According to the summary record:

The same drafting group, in agreeing to this text [the amendment], urges the following statement be placed in the travaux préparatoires by the Chairman on behalf of the entire Working Group.

“In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States Parties.”

The text of the preambular paragraph 6 [final 9] as proposed by the drafting group was adopted the

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Chairman read into the record the requested statement as set out above.220

Commentary

Here, too, it is important to not lose sight of the forest for the trees. The most important point — the forest — is that the negotiating group’s agreement only states the obvious: a preambular provision can always be used to interpret the operative provisions of a treaty, but it is nonsense to speak of using the preamble to prejudice them. The right-holders under the CRC are defined by article 1, and their rights are defined by articles 2 to 40. The content of those provisions are determined by application of the ordinary meaning rule of the Vienna Convention, which permits the preambular paragraphs to be used as the need arises as an aid to the interpretation. Once the meaning of these operative provisions are determined, then it goes without saying that the preamble must not be used to prejudice those provisions.

Now for the trees: (i) Whatever the statement means, it only applies to the governments that agreed to it, that is to say, the vast majority of parties to the CRC are not party to the negotiating group’s agreement. (ii) The summary records do not actually say that the Working Group agreed to the negotiating group’s statement: the Chairman read it into the record, which is not the same as saying that the members of the Working Group agreed to its contents. (iii) The negotiating group’s statement is not part of the text of the CRC, and therefore is not legally binding on any of the parties to the CRC. Consequently, a subsequent government in a State that originally agreed to it can repudiate the statement without any legal recourse available to the other states. In common parlance, it is a “gentleman’s agreement,” not a legal agreement. (iv) Even if one considers the Working Group to have adopted the negotiating group’s statement, it cannot be used to interpret the CRC under the ordinary meaning rule of the VCLT. The corollary to the VCLT article 31 allows the legislative history only for the limited purpose of confirming an interpretation; the records cannot be used to modify or over-turn the interpretation produced by the ordinary meaning rule. (v) The statement says that the Working Group “does not intend” to prejudice the interpretation of the operative provisions, but the subjective thoughts of the delegates are not what is important in the legal interpretation under the Vienna Convention.

It is difficult to understand the agreement in any way other than as a face-saving device for the delegations that had tried to resist the “before birth” amendment.

The Legal Counsel’s advice

After the Working Group adopted the “before birth” amendment, one delegation requested “confirmation from the Legal Counsel that the [negotiating group’s] statement would be taken into account if, in the future, doubts were raised as to the method interpreting article 1.”221

The Legal Counsel was not given a copy of the draft CRC, and its response is accordingly “somewhat abstract in nature.”222 The Legal Counsel’s reply does not contradict the foregoing commentary, and, in light of the legal insignificance of the face-saving statement, there is no need to dwell on the reply.

E. Conclusions regarding the ninth preambular paragraph

Nine points were taken into consideration in applying the ordinary meaning rule in the legal analysis in Chapter 4. Of all of those points, the ninth preambular paragraph is the least significant. Once the from the moment of birth limitation was deleted from article 1, then the expansive operative term, human being, when read in conjunction with the child’s right to pre-natal care, ensures that CRC rights are held from conception onwards.

But for the purposes of public advocacy, it is easy to understand why those with the first vision of the human family place so much emphasis on the preamble: it expressly says that legal protection is required before birth. And it is also easy to understand the advocacy strategies of those who hold the second vision or third vision of the human family. For instance, by focusing the audience’s attention on just one clause in the preamble, attention is diverted from all of the other eight arguments.

V. CRC article 24 (right to pre-natal care)


As mentioned earlier, article 13 of the revised Polish Draft reads, in relevant part:


1. It is recognized that the *child shall be entitled to* benefit from the highest attainable standard of health care …

2. The State Parties … shall pursue full implementation of *this right*, and, in particular, shall:
   …
   (d) extend particular care to expectant mothers for a reasonable time before and after confinement … (emphasis added).

B. 1989 Session of the Working Group

1. Right to pre-natal care in article 24

   While the Working Group considered the right to health in several prior sessions, it did not address paragraph (2)(d) of the Polish Draft until 1989. So at the start of the discussion, this paragraph read as it did originally: The child’s right to health includes the right to have the State take reasonable steps to “extend particular care to expectant mothers for a reasonable time before and after confinement” (emphasis added).

   The amendment to the right to health

   The records show that this paragraph went through three amendments, but no information is given about the reasons for the changes. The last amendment produced the text that now appears in article 24(2)(d):

   1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health …

   2. States Parties shall pursue full implementation of *this right* and, in particular, shall take appropriate measures: …
   (d) To ensure appropriate pre-natal … care for mothers. (Emphasis added.)

2. The 1959 Declaration and the child’s right to pre-natal care

   Although the summary records do not tell us what the delegates said about this amendment, other portions of the legislative history, with the aid of commonsense inferences, can shed light the differences between the original and the final texts.

   The CRC’s preamble refers twice to the 1959 Declaration on the Rights of the Child, and the Declaration itself makes two statements about the child’s right to pre-natal care.

   First, the Declaration’s preamble states that “the child” needs “legal protection before … birth.” The subject of the protection is the pre-natal child, and, since the protection to be provided includes legal protection, the pre-natal child would be the right-holder, if one puts the statement into legalistic language. This preambular statement was incorporated into the CRC’s preamble word for word, and was discussed above.

   The second reference to pre-natal rights is in the Declaration’s Principle 4: “The child … shall be entitled” to have “special care and protection … provided both to him and to his mother, including adequate pre-natal … care.” There are four important things about this Principle, as it relates to interpreting the CRC.

   (i) Pre-natal care is a clearer notion than “care to expectant mothers for a reasonable time before” birth. Technically speaking, the mother is the patient when she goes to the pre-natal clinic, but the range of services that one expects from the clinic are intended to benefit both her and the child. They are two separate beings, but their lives and welfare are intimately interconnected: so the services that the patient receives will benefit both of them. Moreover, society expects that both mothers and health care providers are genuinely concerned about the lives and well-being of the child and the mother alike, and this is in fact what normally happens. Principle 4 of the 1959 Declaration reflects this dualistic perspective about pre-natal care much better than the Polish Draft.

   (ii) Principle 4 does not contain the word “right.” But the title of the agreement is the “United Nations Declaration on the Rights of the Child”; Principle 1 says: “The child shall enjoy all the rights set forth in this Declaration”; and the word “right” never appears in any of the operative provisions. So one must conclude that Principle 4 is referring to a right, and the right-holder is the child, even though this is not explicitly stated in that provision.

   (iii) CRC article 24(2)(d) bears structural and linguistic similarities to Principle 4 with respect to the child’s right to pre-natal care, which suggests that the delegates took it into account in amending the Polish Draft.

   As for the conceptual similarity, both the CRC and the 1959 Declaration are concerned with articulating the obligations of states in the
language and concepts of the human rights of children, and the Convention, overall, goes much further in doing this than the Declaration. So one would not expect any formulation of the duties of states with respect to the pre-natal lives of children to be less orientated towards their human rights than the Declaration’s.

(iv) The orientation of both the Declaration and the CRC go far beyond the classic understanding that only adults, or at least mature young people, can be right-bearers, a conceptualization that based on the premise that only rational, autonomous decision-makers can exercise rights. The classic understanding not only excluded pre-delivery human beings as right-holders, it precluded pre-teens, adolescents, and, in the minds of many educated people, even mature women. But once a broader understanding of “human rights” is accepted, then there is no conceptual barrier to recognizing that non-adult human beings, including human beings at the start of their lives, are holders of human rights.

C. Conclusions regarding article 24

In summary, the amendment to the Polish Draft with respect to the right to health brings the CRC did two things: (i) It brought the draft CRC into harmony with the 1959 Declaration. And (ii), it transformed a declaration adopted a generation before into a child-centered human rights treaty. The legislative records as a whole, which include the Working Group’s use of the 1959 Declaration as a foundation to build on, confirm the interpretation in the main paper. The law-makers used “human being” in article 1 broadly, broadly enough to make the jurisdictional clause logically consistent with the right to pre-natal care in article 24.

VI. Final Conclusion

The legislative records conclusively confirm the interpretation arrived at in the legal analysis in Chapter 4: The CRC applies throughout the entire pre-natal period of life, from conception up to 18 years.

The records show that delegates wanted the from the moment of birth exclusion removed for the precise purpose of ensuring CRC rights from conception onwards. The domestic laws of all States protected human life during the pre-natal period, and, while there were significant differences in the degrees of protection, the prevailing view among the delegations is that the CRC needs to apply from conception onwards. The delegations recognized that the right to life is not absolute, which would allow States to exercise considerable discretion over “abortion,” subject to international accountability.

And no delegation said that “human being” in article 1 excludes the new individual at conception, or any other time prior to birth, and no delegation said that the CRC would not apply, or that its Government would refuse to recognize it as applying, throughout the entire pre-natal period.

In short, all of the evidence supports the legal interpretation: there is not a single piece of evidence that points in the opposite direction.
Appendix B

Commentary on Alston’s Unborn Child
Commentary

On

Prof. Philip Alston’s Unborn Child Article

Introduction

Chapter 4 identifies nine important points that must be considered in reaching a legal conclusion about the rights of pre-natal children under the Convention on the Rights of the Child. The legal analysis applies the ordinary meaning rule in the Vienna Convention on the Law of Treaties, and concludes that the CRC protects children throughout the entire pre-natal period of their lives. The analysis has short footnote discussions of Professor Philip Alston’s article on the Unborn Child. This appendix provides a more detailed discussion of some of the issues, organized according to the “points” that are discussed in Chapter 4.

Point 3: Article 24 (right to health) applies to the pre-natal period

Alston does not mention the right to pre-natal care in CRC article 24(2)(d), so he does not address the legal arguments in point 3. But there are a number of things about his article that raise serious concerns.

Alston’s argument is essentially made up of two parts:

(i) Prior to the CRC, the international community did not consider the unborn child to be a proper subject of concern of international law, in contrast to the pregnant mother being the subject of concern; therefore,
(ii) the CRC does not pertain to the unborn child.

There is an obvious logical problem with the connection between the two parts. If the first premise is true, (which it is not), that existing law did not protect children prior to birth, there is no logical reason why the framers could not have intended the CRC to go beyond the status quo. Indeed, one would expect that moving beyond the status quo is a principal reason for creating a new treaty. But the focus of our concern here is not with the gap in the logic. Rather than concentrate on the connection, or lack thereof, our present concern is with each part on its own.

1. Alston fails to mention the child’s right to pre-natal care

The second part of the argument - the conclusion - is about CRC rights, and the only way to determine what those rights are is to conduct a legal analysis. In the legal argument in Chapter 4, one of the nine important points is the right to pre-natal care in CRC article 24(2)(d). Alston did not tell his readers about this right, and it is hard to think of a legitimate reason why he would not have addressed it, especially since he mentioned a similar provision in earlier human rights agreements.

The 1959 Declaration, the ICESCR, and the Polish Draft all contain statements about pre-natal care and protection, and those provisions were the textual and conceptual basis upon which the framers constructed CRC article 24(2)(d).

Alston discusses or mentions those prior provisions, thereby acknowledging that pre-natal care is an important topic when addressing the question of CRC coverage during the pre-natal period of life. In light of this acknowledgement, Alston’s complete silence about a CRC right that is specifically about pre-natal care is disturbing.

2. Alston misrepresents existing law

The first part of Alston’s two step argument concerns the then-existing state of international law: His premise is that, at the time of the creation of the CRC, international law did not concern itself with human life case law] are significant in the present context because they confirm the consistent refusal of international law … to impinge significantly on the decision of each state to adopt its own policy regulating access to abortion.” Id., at 177. And, “In sum, therefore, on the issue of the status of the unborn child, the Convention [i.e., Alston’s interpretation of the CRC] conforms with existing international human rights law.” Id., at 178. These statements illustrate Alston’s maintain-the-status-quo argument. But not only is it illogical, his factual assertions are manifestly incorrect, as shown in Point 6 in Chapter 4.
prior to birth. However, not only is this premise untrue, Alston misrepresents existing law.

**The 1959 Declaration on the Rights of the Child**

Alston writes, “Neither the [1959] Declaration [on the Rights of the Child] nor the Polish [initial] Draft contained any explicit reference to the unborn child in the operative part of the text” (emphasis added). He then expands that by asserting, “None of these texts, however, contains any specific reference whatsoever to the unborn child” (emphasis added). There are two problems with those assertions: (i) Irrespective of the preambular/operative distinction, the assertions are not true. (ii) Alston withholds important information about existing law by selectively quoting from the documents that he is discussing.

The preamble of the 1959 Declaration states:

> [T]he child … needs special safeguards and care, including appropriate legal protection, before as well as after birth. (Emphasis added.) (Third paragraph.)

And Principal 4 of the Declaration proclaims that:

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

Alston’s assertion that the 1959 Declaration does not contain any “explicit” or “specific” reference to the “unborn child” is not a fair statement: The Declaration’s references to legal protection before birth and to pre-natal care are direct references to children prior to birth.

Even more seriously, Alston’s assertion that the operative part of the Declaration does not refer to unborn children is especially improper in light of the fact that he failed to quote or otherwise mention the operative part of the text -- Principle 4.

3. **Alston ignores the history of the creation of the pre-natal child’s right to health**

Principle 4 of the 1959 Declaration is especially important because it, along with the right to health in ICESCR article 10 and in the Polish drafts, were the basis for creating the pre-natal child’s right to health in CRC article 24(2)(d).

In the ICESCR and the revised Polish draft, the focus of the right to health is on the pregnant mother, but in the 1959 Declaration and in the initial Polish draft, the focus is simultaneously on the pre-natal child and the child’s mother.

The main difference between the CRC, on the one hand, and the Declaration and the initial Polish draft on the other, is that the CRC articulates the State’s obligations in terms of the child’s right to have his or her mother receive pre-natal care. In other words, the Convention retains the dual focus of care – the pre-natal child and the mother are simultaneously involved in and benefit from the pre-natal care provided to the mother --, but the CRC frames the duty to provide care in the language of children’s rights.

To put it another way, the texts of the 1959 Declaration, the ICESCR, and the two Polish drafts are like footprints that a person searching for the meaning of CRC article 24(2)(d) must follow, like a hunter tracking a bear. Alston mentions the three earlier documents with respect to pre-natal care (although he does not quote the relevant texts), but he does not follow them to the right to pre-natal care in the CRC. For some unexplained reason, Alston draws his readers attention to the footsteps, but then ignores the bear: he never mentions the existence of CRC article 24(2)(d).

**Point 4: Defining the right-holder as a “human being” gives rights from conception onwards, when read in conjunction with the right to health**

Similar problems occur with Alston’s handling of the Polish drafts (the initial and the revised), but for purposes of simplicity this paper will not discuss them.

The right to health is article 4 in the initial Polish draft, and in article 13(2)(d) in the revised Polish draft.
Alston effectively concedes that “human being” in article 1 includes the new individual from conception onwards.

1. **Alston ducks the issue**

   First, Alston never discusses the ordinary meaning of the operative term in article 1. A legal interpretation is an affirmative proposition, and that requires, in the issue at hand, offering a definition of the operative term, and then supporting it by an argument. Since Alston makes no attempt to demonstrate the ordinary meaning (or meanings) of “human being,” he cannot claim to have interpreted article 1, and therefore he cannot claim to have addressed the legal issue under discussion.

2 **Alston implicitly recognizes that pre-natal children are human beings**

   Second, Alston’s language all but concedes that the operative term human being covers the new individual from conception onwards.

   (i) When Alston says that “the interests of the unborn child can be promoted and protected” by the state, and that “the fetus is deserving of appropriate protection,” his language expresses and invokes the same type of valuation that human being expresses and invokes.

   The same thing happens when he calls a fetus a “child,” since “child” is only appropriate for a human being. Moreover, one does not say “child” unless one is expressing respect.

   (ii) Alston speaks of “the interests of the unborn child” (emphasis added), and he says the legal protection of pre-natal life requires “balancing the conflicting rights and interests” (emphasis). But saying that an unborn child has either an “interest” or has a “right” is to acknowledge the child as a human being.

   First of all, rights protect interests, and saying that some being “has an interest” is not a factual description, but a perception about that being’s moral status in society. For instance, we protect trees, but trees don’t have interests.

   Secondly, to say that unborn children have “rights” is to treat them as human beings. We value trees, but we don’t recognize trees as rights-holders.

   Just a few years before Alston wrote another article where he said that unborn children can be right-holders. And in his Unborn Child article he concedes that States may grant legal protection, including legal rights, to (human) fetuses. These concessions treat the unborn child as a human being because only human beings are holders of human rights.

3 **The specific ways that Alston avoids the issues indicate that it is intentional**

   In the section on the “juridical value” of the preamble, Alston writes:

   While the [ninth] preambular paragraph can be considered to form one part of the basis of for interpretation of the treaty, there is no obvious reason why the preamble would be resorted to in order to interpret what would otherwise appear to be [A] a natural and ordinary meaning of the term “child.” [B] In international law, at least, there is no precedent for interpreting either [C] that term, or others such as [D] “human being” or [E] “human person,” as including the fetus. [F] Where the intention is to extend the reach in that way, the practice has been to specify that fact – [G]

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231 Alston tries to avoid the implications of his language by asserting that “unborn child” and “fetus” are synonyms, Unborn Child, at 156n*, but this is not true. In the first place, activists on one side of the political divide of the “abortion” debate rigorously use one of the terms, while those on the other rigorously use the other: pro-abortion advocates say “fetus” and anti-abortion advocates say “unborn child.” The social norms governing the activists’ choices pertain to the different feelings of valuation associated with the two linguistic symbols, “unborn child” and “fetus.” In the second place, the controversy is never about the life of a fetus. Fetus is a generic scientific term for the “the young of an animal in the womb or egg.” The Random House Dictionary of the English Language (2nd ed., unabridged), at 711. The controversy is about human fetuses. The word “human” is implied in the political debates; it is left unspoken by pro-abortion advocates because “human” signals valuation.


233 Unborn Child, at 178.
an approach which was rejected in the drafting of the Convention. (Brackets added.)\(^{237}\)

Statement [D] shows that Alston is aware of that the real legal issue is the meaning of “human being.”

And the overall construction of the paragraph shows how he has buried the real issue under a pile of red herrings. Statements [A], [C], and [E] pretend that the operative term is “child” and “human person,” which is obviously not true. And statement [F] is a serious case of begging the question. Since Alston has gone out of his way to avoid discussing the ordinary meaning of *human being*, it is illegitimate for him to speak about “extend[ing] the reach” of the term. It is his duty, as a legal scholar purporting to give a legal interpretation of article 1, to discuss the meaning of the operative term.

Statement [B] contains a number of evasions and inaccurate assertions. (i) The statement is a fudge because the ordinary meaning rule does not require judges to limit themselves to definitions set down in prior court cases, or to examples drawn from legal sources: the Vienna Convention only requires looking for the “ordinary” meaning of terms. (ii) The statement is also false: For instance, Alston himself uses “child” to refer to the fetus: he expressly says that “‘fetus’ and ‘unborn child’ are used interchangeably in this article in accordance with common usage.”\(^{238}\)

In addition, the legislative records for the CRC show delegates using “child” to refer to the new individual being from the moment of conception, and Alston was aware of this since he carefully studied the records in the preparation for his article.\(^{239}\)

And [G] is especially misleading since the Working Group deliberately removed the *from the moment of birth* limitation so that article 1 -- where the operative term is *human being* -- would “include the entire period from the moment of conception.”\(^{240}\)

In conclusion, Alston appears to have deliberately avoiding facing the operative term “human being,” using innuendoes to imply that the term cannot cover pre-natal children, and then contradicting himself by using language that shows that he himself considers the “unborn child” as a human being. Alston would have had no reason to engage in any of these tactics if he honestly believed that he had a legitimate argument to make.

**Point 7: Rights must be interpreted in the context of a framework treaty**

Alston does not situate the human rights issue -- the protection of children during the pre-natal period of their lives -- within the context of a framework human rights treaty. Moreover, he has taken contradictory views on international human rights law: his *Unborn Child* article is based on the premise that the CRC must maintain the status quo, while throughout his career he has championed the dynamic, evolutionary approach to international human rights law.\(^{241}\)

*Alston has always championed the “progressive development” and “expansive interpretation” approaches to international human rights law -- except on this issue*

Alston has written a number of suburb articles that describe the “dynamism of the human rights tradition.”\(^{242}\) On the one hand, there is the “progressive development of international human rights law”\(^{243}\) which is made up of the “expansive interpretations” of the “content” of the rights,\(^{244}\) as well as the creation of new treaties and declarations of rights. Alston is a vigorous supporter of the expansive interpretation of rights, as will be discussed below.

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\(^{237}\) *Id.*, at 169-70.

\(^{238}\) *Id.*, at 156n*, and *id.*, at 157 (purpose of his article is to analyze the CRC “from the perspective” of “international law”).


\(^{242}\) *Third Generation*, at 314.

\(^{243}\) *Third Generation*, at 322.

\(^{244}\) *Third Generation*, at 315, see also *id.*, at 317.
On the other hand, there are actors that “devalue existing rights,” and this can result in the contraction of the content of human rights, or at least in efforts to restrict their meanings.

But despite the tensions between the two tendencies, the direction is one of evolutionary progression beyond the status quo.

1. The progressive development of international law through interpretation

As Alston explains, the stage is set for the expansion of the content of human rights agreements by the way that law-makers go about writing treaties (and declarations). Often times the states that draft a treaty will agree on the verbal formulation of a provision, but they will not have reached an agreement on what the provision means, that is to say, on what it will require the future parties to do (or not do). In the case of a human rights treaty, the lack of agreement can pertain to the meaning, or content, of a right. Although Alston doesn’t use the term, we can call this the “premature agreement” source of expansion. It is premature in the sense that the framers have not postponed the adoption of the provision until they have reached agreement on the meaning, or content, of the right.

When there is no agreement on the content of a provision, the delegates must use imprecise language. The law-makers sometimes construct the wording of a new text by borrowing terms and phrases from earlier agreements, and the familiar language may give a feeling of agreement on its meaning, even though the feeling will be misplaced. Imprecise language is a common feature of human rights agreements, hiding the fact that there is no real agreement on the content of the right. We can call this the “fuzzy formulation” source of expansion.

How premature agreements and fuzzy formulations are sources of expansion of human rights can be illustrated by a hypothetical example. In the drafting session, fifty delegates read a provision as meaning x, and fifty others read it as meaning y. In other words, half want the right to prohibit x, and half believe that it will prohibit y. But despite this fundamental disagreement about what the text means, they go ahead and adopt it. There is consensus on the formulation, but no consensus on its meaning.

Now let us say that, as between the two alternatives, x is more compatible with the ordinary meaning of the text than y is. So after the treaty is ratified and a dispute arises over readings x and y, the right will be interpreted to mean x, in accordance with the ordinary meaning rule. And let us also say that y reflects the practices of many states, and that x is a more demanding standard of state behavior with regards to respecting human dignity, that is to say, it places greater restrictions on a government’s discretion in how it treats people. So the states that thought they would only be bound not to y (they only need maintain the status quo) now find that they are forbidden to do x (change to the higher standard). As a result of the premature agreement and fuzzy formulation, half of the states now find themselves bound to a more burdensome standard than they expected or wanted at the time they wrote and ratified the treaty.

In other words, once the right has been interpreted to mean x, international law can be said to have evolved in two ways:

(i) Since forbidding states to do x places a limitation on them that did not exist before the treaty was written, the ordinary meaning interpretation advances international law beyond the status quo-ante. Before the interpretation was rendered, no one could say for sure what it meant – there were conflicting opinions --, but now it is settled: the parties are prohibited from doing x, which is a step forward in the protection of human dignity.

(ii) Since half of the states only wanted the treaty to prohibit y, the post-ratification interpretation that the right means x constitutes an expansion beyond what those states had expected or wanted.

Alston endorses these pathways to evolutionary change, especially the ones involving interpretation. These processes of “progressive legal interpretation” are of “great and enduring significance in developing the jurisprudence of international human rights law,” he says.

Alston does not criticize the expansive evolutionary processes, but he does have several critical remarks aimed at States. First, he chastises the wishful thinking of the delegations that write the treaties. They know that the “critical points of contention remain unresolved,” and they know that a “different group of actors” will “determin[e] the interpretation of be adopted,” and that this will happen after the governments have bound themselves to the treaty. Each delegation also knows the rules of treaty interpretation, and that its government will not be in control of the

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245 Third Generation, at 321.
246 Origins, at 776. See also, Making Space, at 29-40.
247 Origins, at 776; see also, id., at 767, 773-76.
248 Origins, at 776.
249 Origins, at 776.
250 Origins, at 776.
251 Origins, at 776.
interpretation process. It is wishful thinking to agree to the text under these circumstances.  

For instance, the states that wanted the right to only forbid y will say publicly that the provision “reflects, or at least [is] fully compatible with” that position. But they also know of the likely possibility that the right will be determined to mean x. These diplomats and their colleagues back home in the capital are turning a blind eye to the realities of treaty interpretation that are “so familiar to international lawyers.” Their government will be obligated under international law to respect all the rights in the treaty upon ratification, and if the content of one of the rights turns out to be different than what they had originally thought, that doesn’t reduce their duty to fulfill it. They are bound by the right means, as subsequently interpreted; their legal obligations are not determined by their subjective expectations – their wishful thinking – when they were drafting the treaty.

Secondly, Alston criticizes “the trend among states to resort increasing to techniques designed to minimize the domestic impact of treaty obligations.” For example, after ratification a state will “assum[e]” that the formulation it agreed to “can safely be interpreted as having an identical meaning to preferred domestic norms.” But the assumption is wrong; the right forbids x, according to the post-ratification interpretative processes. Sticking to its erroneous assumption, the state stubbornly refuses to “amend domestic legislation so as to take genuine account of treaty obligations.”

A state that takes genuine account of its international obligations will change its domestic laws as the contents of the rights are made known through the interpretation processes, and its failure to do so is a retreat from its human rights obligations. The wishful thinking at the time of the drafting has now hardened into a refusal to comply with international law.

These and other techniques aimed at minimizing the implementation of human rights treaties at home are the regressive part of the dynamism of human rights.

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2. Applying Alston’s analysis to the CRC

Alston’s description of the evolution of international human rights law can be applied to the issue of pre-natal rights of children under the CRC.

In light of the variety of state practices at the time the CRC was written, we can imagine the following scenario in the Working Group, and then later in the Commission on Human Rights, and then later still at the General Assembly. Some State delegations read “human being” in article 1 as referring to the new individual, from conception forwards – reading x. And other delegations read it as referring to the new individual starting somewhere between conception and delivery, in accordance with their domestic practice – reading y.

This scenario presents exactly the same situation that Alston has described as the stage setting for the progressive development of the law. Some delegations wanted x and some wanted y, and, without reaching an agreement on the content of the term “human being,” they adopted the entire text of the CRC as we now have it.

And since meaning x – from conception onwards -- is more compatible than y – some undefined point between conception and birth -- when read in the context of the CRC as a whole, the rules of treaty interpretation require all parties to respect the human rights of children from conception onwards. International human rights law has evolved beyond the status quo-ante, just as Alston has described the processes of international law development.

2. Alston’s self-contradiction

Alston takes an anti-evolutionary position in the Unborn Child article. He says that international law did not protect pre-natal children at the time the CRC was being written, and then argues that the CRC does not go beyond existing international law. Alston is emphasizing the maintenance of the status quo: “In sum, therefore, on the issue of the status of the unborn child, the Convention conforms with existing international human rights law.”

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252 See, Making Sense, at 12 (criticizing the “wishful thinkers” approach to legal interpretation), and id., at 11 (criticizing those who sacrifice “intellectual analysis” to advocate for “predetermined political positions”).
253 Origins, at 776.
254 Origins, at 776.
255 Origins, at 766.
256 Origins, at 766.
257 Origins, at 766.
258 Origins, at 766.
259 All states involved in the negotiations protected children prior to delivery, and none of the delegations said that the CRC won’t cover pre-natal children, so we don’t need to posit a third reading for the framers. But since Alston and other commentators adopt the second vision of the human family, we can define a reading n -- “human being” in article 1 only refers to children who have completely exited the birth canal.”
260 Unborn Child, at 198.
demonstrable unwillingness on the part of the international community to address" the “issue” of children “before[] birth.” 261 “In international law, at least, there is no precedent for interpreting [‘‘human being’’] as including a fetus.” 262 The choice [of definitions] would clearly be inconsistent with existing legislation of various states. 263

His argument is based on keeping the status quo: (i) International law did not protect pre-natal human life prior to the drafting of the CRC; (ii) therefore, the framers did not intend for the CRC to protect pre-natal human life.

As Alston has always been a champion of expansive interpretations and evolutionary development, he is making an about-face in the *Unborn Child* article: (1) In creating the CRC, the law-makers should not go beyond existing international law. (2) In interpreting the undefined operative term “human being,” a restrictive meaning should be attributed to it. But this is completely at odds with what he has said throughout his career about new treaties going beyond the status quo, and on expansive interpretations.

Not only is this anti-evolutionary, Alston wants to turn the clock back. Then-existing law in fact protected pre-natal children. The American Convention recognizes that human rights begin at conception, in articles Article 1(2) and 4. And ICCPR article 6(5) and ICESCR article 12 protect pre-natal human life, and implicitly recognizes that the right-holder is the pre-natal child.

So Alston’s claim that the CRC provides protection only from the moment of birth is a retreat from existing standards. He is now doing the very thing that he has so bitterly criticized others for doing: he is “devalu[ing] existing rights.” 264 While *Unborn Child* purports to defend the status quo, Alston is really a reactionary. 265

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**Point 9: The interpretation must be in “good faith”**

In discussing the “good faith” requirement in the Vienna Convention in the main paper, the distinction was made between acting in a judge-like capacity, and acting as an advocate for a client or a cause, or the difference between conducing an interpretation without an agenda, and with an agenda. In light of the foregoing commentary, there should be no dispute over describing *Unborn Child* as an agenda-driven piece of advocacy. Alston holds the second vision of the human family, which conflicts with the text of the CRC, and the intention of the framers.

This section will discuss two points. The first is how Alston presented himself to his readers, and the second is whether he acted fairly towards his readers in the way that he carried out his advocacy.

1. **Alston’s presentation of himself to his readers**

In the introduction to the *Unborn Child*, Alston criticizes the “partisans” who portray the CRC as meaning as what they wish it would mean. 266 Alston leads his readers to believe that he will rise above such partisanship:

[A] The purpose of the present review is not to discuss the relative merits of the competing viewpoints, [B] but to analyze the actual provisions of the current draft [the CRC had not yet been adopted by the General Assembly] from the point of view of the relevant provisions of international law. 267

That sentence gives the impression that Alston will conduct a legal analysis in the judge-like manner of a neutral legal expert. But a close look

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261 *Unborn Child*, at 161.

262 *Unborn Child*, at 170.

263 *Unborn Child*, at 173.

264 *Third Generation*, at 321.

265 Alston avoids the ICCPR art. 6(5) issue by not mentioning it. He also dodges the American Convention issue. The ACHR reads:

Article 1(2). For the purpose of this Convention, ‘person’ means every human being. …

Article 4. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception.

Although Alston quotes article 4, be makes no reference to article 1. On top of this, he says that the ACHR only “addresses itself *implicitly* to the status of the unborn child” (emphasis added). *Unborn Child*, at 175.That is not true, since *implicitly* means “not directly expressed.” *Webster’s II* (Berkley Books, NY, 1984), at 350. The two provisions taken together *explicitly* grant legal protection to unborn children. By not mentioning article 1, and describing the legal situation in terms of *implicit* recognition of “status,” Alston paints an inaccurate picture.

266 *Unborn Child*, at 157.

267 *Id.*
of [B] shows how carefully Alston has been. He never actually promises to conduct a legal analysis, despite the impression that he has given.

And even the impression in [A] of being neutral needs to be re-examined. What does “competing viewpoints” mean? His preceding paragraphs only mentioned the differing views on whether the CRC protects pre-natal children; there is no reference to the moral, political, pragmatic, or national law debates over “abortion.” So [A] seems to refer to the competing views over the interpretation of the CRC, not the rightness or wrongness of “abortion.” But interpreting the CRC is what his article purports to be about, so [A] does not seem to make any sense.

While [A] may appear to be a mysterious statement, there is in fact a way to read it as a true assertion. Alston does not “discuss the relative merits of the competing viewpoints” over the interpretation of the CRC because he is not conducting a legal discussion. He is in the role of an advocate for a client or a cause, presenting just one side of the matter, ignoring and (unfortunately) misrepresenting the competing arguments.

In short, when [A] is read with the utmost care, it is a completely true statement: Alston will not “discuss the relative merits of the competing viewpoints” because he is going to be one-sided. This, of course, conflicts with the impression that the paragraph gives his readers.

2. Respecting the readers

Alston uses the legislative records in this section on article 1. There are three problems with his discussion: (i) It is not a fair representation of the records. (ii) His factual and legal statements are incorrect. And (iii), by not following the Vienna Convention or the rules of customary international law, he misuses the notion of “intentions” in legal interpretation.

(i) Misrepresentation. While Alston does say that the Working Group considered a text that “provided that childhood [sic] began at the moment of birth,” he does not give his readers either a clear or a fair picture of the drafting history. For instance: He does not say that Poland’s restrictive text had been formally adopted, or that the restriction was formally deleted. And he neither quotes the records, nor mentions the fact, delegates deleted the exclusionary clause for the purpose of ensuring CRC coverage during “the entire period from the moment of conception.”

(ii) Incorrect factual and legal statements. Alston’s conclusions about article 1 are as follows:

Nevertheless, the final decision, which was to use the terms ‘child’ and ‘human being’ [A] without addressing in any way the issue of the lower age limits, [B] was clearly intended to maintain flexibility for potential states parties to the Convention to adopt whatever position they wished on that issue. (Brackets added).

Statement [A] is not true because the delegates did address the issue of the lower age limit – they removed the “from the moment of birth” cut-off. Statements [B] is not correct, for several reasons. First, there is no statement in the records that provides any support for Alston’s claim that the Working Group intended to allow parties to the CRC to do whatever they wished. Second, “clearly intended” is not only factual incorrect, it seriously misleads readers since he did not quote or summarize the records.

Third, [B] is not legally correct. A party is not free to deny all CRC rights to children under “whatever” age it “wishes.” Whatever the operative term is “human being” means, it means the same thing for all State Parties. A state is no more free to deny CRC coverage to children under 5 years of age as it is to deny coverage under the 20 week after conception, absent a valid reservation. The jurisdictional clause means the same thing for all State Parties. To put it another way, if a Party is free to do anything it wishes, then the treaty provision is empty of content. A human rights treaty sets standards; it restricts State discretion by establishing boundaries in which the State must act.

(iii) Misusing the notion of “intentions.” Alston asserts that the delegations making up the Working Group “intended” to allow parties “to adopt whatever position they wished on that issue.” Alston has made a fundamental error about the type of “intentions” that are the focus of legal interpretation, whether it is the primary rule, the ordinary meaning rule, or the fall-back rule, the legislative history rule, that is being applied. But then, Alston’s argument is not based on the rules of treaty interpretation.

There is a critical distinction between what law-makers “intended to say” in enacting the language they used, and what they intended – or expected or hoped – would be the consequence of their saying it. Legal interpretation is concerned with the first kind of intention – sometimes called semantic intention. Alston is talking about the second kind of

268 Id., at 162.
270 Unborn Child, at 163.
intention: trying to read the law-makers’ individual or collective minds about how the law would be applied in actual practice, in order to interpret the law to conform to those expectations.

Not only has Alston taken an incorrect approach to treaty interpretation, he offers a good lesson in why legal interpretation is based on semantic intentions. Alston’s reading of the delegates’ minds is a flight of fantasy. There is nothing in the summary records that support what he says. Alston’s approach to reading a legal text is result-oriented: the Working Group “clearly intended” exactly what Alston wants them to have intended.

If Alston were conducting a judge-like legal interpretation of the CRC, he would have demonstrated the truth of his claim about the law-makers’ intentions, or at least would have made a good argument for that claim. But he has taken the one-sided approach of an advocate, and, since his result-oriented goal is at odds with the text and the intentions of the law-makers, he was not able to make a case for his position. In sum, Alston has not met the “good faith” requirement of the ordinary meaning rule.