Toward an International Standard of Abortion Rights: Two Obstacles

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I. INTRODUCTION

On July 11, 2003, the African Union1 ("AU") adopted a "Protocol on the Rights of Women in Africa" ("Protocol"), which established a woman’s right to have an abortion in cases of rape or incest or to preserve the health of the mother.2 Perhaps surprisingly, this Protocol is the first explicit mention of abortion rights in international law.3 For a variety of reasons, many international organizations have carefully avoided taking positions on positive abortion rights.4 Complicating the issue are the laws of some nations that affect, at least

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1 The African Union was conceived in 1999, adopted its Constitutive Act at the Lome Summit in 2000, and convened its first assembly of heads of member states at the Durban Summit in 2002. It now has fifty-three member countries. For general information about the AU see <http://www.africa-union.org/home/Welcome.htm> (visited October 8, 2004).

2 Equality Now, Press Release, African Union Adopts Protocol on the Rights of African Women: Right to Abortion Articulated for the First Time in International Law, available online at <http://www.hrea.org/lists/women-rights/markup/msg00205.html> (visited Sept 8, 2004). This press release asserts that “States parties shall take appropriate measures to . . . protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.” The protocol itself is available online at <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20on%20the%20Rights%20of%20Women.pdf> (visited Oct 8, 2004). See id, art 14 § 2(c) for the relevant portion of the protocol.


4 See, for example, European Commission Regulation 1567/2003, preamble §§ 1, 15, 16, art 3(g), 2003 OJ (L 224). Note that while these sections discourage forced abortions, and urge treatment for complications related to unsafe or illegally performed abortions, they specifically disallow encouraging abortion and do not mandate that countries receiving aid make abortions freely available.
indirectly, the ability of other nations to create their own policies and develop them independently. The purpose of this Development is to briefly identify current issues in abortion rights in the international context and to suggest a framework for the future.

II. THE LACK OF INTERNATIONAL STANDARDS

The United Nations “does not promote abortion as a method of family planning” and takes the position that “[t]he legal status of abortion is the sovereign right of each nation.” The European Union (“EU”) similarly leaves to each member nation the right to formulate its own abortion policies. The EU’s silence is somewhat surprising, considering that the EU is composed entirely of developed nations; among the forty-eight nations identified by the UN as developed, thirty-one allow abortions on request and forty-two allow them when the health of the mother is at stake. The refusal of some member nations to allow abortions, mostly on moral (usually religious) grounds, is widely regarded as the foremost obstacle in developing international standards of abortion rights. Because the issue is hotly contested within and between nations, and involves not only questions of women’s self-determination but of sexuality and family dynamics, it is difficult even for nations with similar histories and cultures to agree on an abortion rights framework.

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6 “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950[,] and as they result from the constitutional traditions common to the member states . . . .” See Treaty on the European Union and Final Act (1992), art F, 31 ILM 247, 256 (hereinafter Maastricht Treaty). The European Convention for the Protection of Human Rights and Fundamental Freedoms, see 213 UNTS 221 (1950), does not mention abortion. But Ireland’s Constitution states that the right to life of a mother and her fetus are equal. Ireland Const of 1937, art 40.3.3. Taking these sources together, it seems that the EU will not take an official position on the abortion policies in its member nations.


8 See, for example, Peta-Gaye Miller, Member State Sovereignty and Women’s Reproductive Rights: The European Union’s Response, 22 BC Intl & Comp L Rev 195, 200-02 (1999) (addressing the reluctance of the European Court of Human Rights to impose any standard of abortion rights on the Republic of Ireland).
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A. THE UNCERTAIN LANGUAGE OF RIGHTS

A key legal question affecting international standards for abortion rights is whether abortion can be accommodated under current notions of human rights. The Universal Declaration of Human Rights ("UDHR") states that "[e]veryone has the right to life." Article 2 of the European Convention on Human Rights closely resembles the UDHR in stating that "[e]veryone's right to life shall be protected by law." It is far from clear what is meant by "everyone" and "life" and whether either might include unborn children; thus, member nations have tended to supply definitions that implicate their own policies. Neither the EU nor the UN has attempted to clarify the meaning of these terms, which has sometimes led to conflict between organizations and their member states.

B. RELATION TO OTHER IDENTIFIED RIGHTS

The UN's refusal to regard abortion as a fundamental human right has created a difficult conflict with its other policies. For example, article 25 of the UDHR states that "[m]otherhood and childhood are entitled to special care and assistance" and that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." Additionally, the UN recognizes that worldwide, seventy thousand women die each year from unsafe abortions (representing 13 percent of all maternal deaths) and that women who are already vulnerable due to poverty, poor family planning

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11 See, for example, Miller, 22 BC Ind & Comp L Rev at 196–98 (cited in note 8). Fetuses are not persons under United States law. See Roe v. Wade, 410 US 113, 156–62 and nn 53–54 (1973). Ireland's Constitution does not identify the fetus as a person, but confers upon the fetus a right to life equal to that of the mother (thereby making abortion equal to murder) and "guarantees .. . by its laws to defend and vindicate that right." Ireland Const of 1937, art 40.3.3 (amended 1983).


13 Universal Declaration of Human Rights, art 25(2) (cited in note 9). This article, however, impliedly does not include the unborn, because the UDHR also states that "[a]ll human beings are born free and equal in dignity and rights." Id, art 1 (emphasis added).

14 Id, art 25(1).
services, or refugee status are the most likely to receive unsafe abortions. They are also least likely to be able to care for their children adequately during the most fragile time of their development. It seems logical that UN aid workers should be prepared and willing to provide abortions to these women to prevent circumstances where children, once born, live in conditions that do not meet these articles of the UDHR. Despite these facts, the UN Population Fund ("UNFPA"); the UN High Commissioner for Refugees; and the International Committee of the Red Cross, operating together during the 1996 crises in Rwanda, Burundi, and Zaire (now the Democratic Republic of the Congo), declined to provide abortion services to women in these countries, even though they provided contraception and other reproductive services. This omission is especially telling in light of the fact that all three countries allow abortions in at least some cases.

The UN has chosen to play it safe in this politically sensitive area, possibly at the expense of its other goals. Its Fact Sheet Number 6 implies that liberal abortion policies improve the health and status of women in society. The Fact Sheet goes on to suggest that the outlawing of abortions does not prevent women from seeking abortions but only increases the danger of doing so. It stops short, however, of encouraging member nations to adopt any particular policy. Instead, it states that "prevention of unwanted pregnancies must always be given the highest priority" and that "whether or not abortion is legal in a country should not determine whether a woman receives health assistance for abortion-related complications." These mandates ring hollow in light of the fact that countries hostile to abortion are also those most likely to be hostile to family planning services (or to be unable to provide them), and be indifferent to the plight of those women who suffer abortion-related complications (or, again,

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15 See UN Department of Public Information, United Nations Fact Sheet Number 6, October 2000 (cited in note 5).
16 See id.
17 Burundi allows abortions to save the mother’s life or to preserve her health (but does not specify whether mental health is included). See Abortion Policies: A Global Review, available online at <http://www.un.org/esa/population/publications/abortion/profiles.htm> (visited Sept 13, 2004). The Democratic Republic of the Congo allows abortions to save the life of the mother. See id. Rwanda allows abortions to save the mother’s life or to preserve her physical or mental health. See id.
18 See UN Department of Public Information, United Nations Fact Sheet Number 6, October 2000 (cited in note 5).
19 See id.
20 See id.
unable to care for women who develop complications). To alleviate these problems, the UN should make the provision of assistance in these areas a matter of policy, rather than creating a blanket prohibition on providing or facilitating the procurement of abortions.

III. HOW THE POLICIES OF SOME NATIONS AFFECT THOSE OF OTHER NATIONS

Multinational standards of human rights require multinational cooperation for enforcement and legitimacy. In moving toward standards of abortion rights, multinational organizations will find it difficult to integrate their policies with member nations that are resistant. Two examples are timely. The first is the relationship between Ireland and the EU. The second is the complex relationship between the United States, the UN, and service-providing nongovernmental organizations ("NGOs").

A. FRICTION BETWEEN THE REPUBLIC OF IRELAND AND THE EUROPEAN UNION

Most nations of the EU regard abortion as a fundamental human right and a medical service that cannot be withheld. The exception, as already noted, is Ireland. Ireland's specific adoption of natural (Catholic) law in its Constitution, subsequent amendment of its Constitution, and adoption of the Offences against the Person Act all reinforce its deeply held moral rejection of abortion.

21 "More women resort to abortion where family planning services and sex education are poor." Id. An examination of the contraception use and maternal mortality rate information from the Population Division of the UN Secretariat, United Nations World Abortion Policies 1999, available online at <http://www.un.org/esa/population/publications/abt/fabtoc.htm> (visited Sept 13, 2004), and specifically the table for Africa, available online at <http://www.un.org/esa/population/publications/abt/tabtraf.htm> (visited Oct 14, 2004), shows a strong inverse correlation between contraceptive use and maternal mortality. This suggests that social conditions or the laws in those countries might be the root cause of both problems. The same table contains notes for each country discussing its abortion laws. Again, the African nations with the lowest rates of contraceptive use and highest maternal mortality are those with the strictest abortion laws.

22 The EU has twenty-five member countries, four candidate countries, and one country whose application is pending, for a total of thirty. Of these, only six do not allow abortion on demand. Among these six, Malta does not allow abortion under any circumstances; Ireland allows it to save the life of the mother; and Poland, Finland, Portugal, and Spain allow abortions to preserve physical or mental health, in cases of rape or incest, and in cases of serious fetal impairment. Population Division of the UN Secretariat, United Nations World Abortion Policies 1999 (cited in note 21).

23 See Ireland Const of 1937, Preamble (adoption of natural law); id, art 40.3.3 (pronouncing that the right to life of a woman and her fetus are equal); Offences against the Person Act, 1861, 24 Vict, §§ 58–59 (adopted under UK rule but remaining in force after independence) (making it a
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Ireland’s law once even went so far as to make it illegal for an Irishwoman to travel to another country where abortion is legal and obtain one there.\textsuperscript{24} This created an uneasy conflict between Irish law and the laws of most other EU members, which allow abortion on demand and do not allow service providers to turn away women of majority age.\textsuperscript{25} Ireland’s law may also have violated Article 11(2) of the UDHR, which prohibits criminal convictions for actions that are not crimes at the time they are committed, and Article 13(2) of same, which guarantees freedom of departure from and return to one’s own country.\textsuperscript{26} This conflict never played out in European courts because of the “X Case,”\textsuperscript{27} in which Ireland’s Supreme Court interpreted its Constitution to allow an abortion in the case of an underage woman who had been raped and subsequently became pregnant and suicidal. To avoid public outrage over the possibility that X would be denied an abortion and to reconcile that outrage with the desire to allow abortions only to save the life of the mother, Ireland amended its Constitution in 1992 to guarantee women the right of travel to other countries to obtain abortions.\textsuperscript{28} Still, Ireland imposes a de facto prohibition of abortion on women who cannot afford to travel to the UK (the most common destination for Irishwomen seeking abortions).

Additionally, as the EU expands, new members may limit or outlaw abortion. Some new members, and likely joiners from Eastern Europe, have strong religious traditions (mostly Catholic, some Muslim). Others lack experience with the notion of positive rights against the power of the state because of centuries spent as part of various empires and an additional half century behind the Iron Curtain. One nation falling into both categories is Poland.\textsuperscript{29} Not surprisingly, Poland’s first non-Communist government after the crime to abort a fetus). See also MacLean, 28 Hofstra L. Rev at 546–47, 552–53 (cited in note 12); Miller, 22 BC Ind & Comp L Rev at 199–202 (cited in note 8).

\textsuperscript{24} Ireland Const of 1937, art 40.3.3 (prior to 1993 amendment).


\textsuperscript{26} See Universal Declaration of Human Rights, arts 11(2), 13(2) (cited in note 9). EC law Articles 49 and 50 are similar in effect to UDHR Article 13(2). Ireland may not have been in violation of these conventions, however, because the European Court of Justice (ECJ) has determined that “the fundamental freedoms are strong, but rebuttable, presumptions.” MacLean, 28 Hofstra L Rev at 566 (cited in note 12). See also Steven A. Bibas, \textit{The European Court of Justice and the U.S. Supreme Court: Parallels in Fundamental Rights Jurisprudence}, 15 Hastings Intl & Comp L Rev 253, 268 (1992).

\textsuperscript{27} \textit{Attorney General v X}, [1992] IR 1 (Ir SC) (Ireland).

\textsuperscript{28} Ireland Const of 1937, art 40.3.3 (as amended 1992).

\textsuperscript{29} Poland is 95 percent Roman Catholic. CIA, \textit{The World Factbook 2004}, Poland entry, available online at \texttt{<http://www.cia.gov/cia/publications/factbook/geos/pl.html>} (visited Oct 14, 2004). It was partitioned among Russia, Prussia, and Austria in the late 18th Century and
collapse of the Warsaw Pact actually made it more difficult for women to obtain abortions.  

EU member countries opposed to abortion have strained EU efforts to assist developing nations in family planning. The European Parliament, in a vote taken on April 1, 2004, did not approve its own Annual Report 2003 on Fundamental Rights in the European Union because some member nations objected to a paragraph encouraging them to liberalize their abortion laws. The controversy has also made it difficult to monitor the status of fundamental rights within the EU, because an entire report, most of which regarded unrelated topics, was defeated due to two paragraphs found objectionable by some members. Though the information is likely still available from various sources, the EU failed in its mission to create a comprehensive report on the subject.

regained its independence in 1918 only to be overrun by the Nazis thirty-one years later, and dominated by the Soviet Union after World War II. See id. The sweep of elections by the Solidarity Party in 1990 marked Poland's break with Soviet influence. See id. At that time, the judiciary had to be made independent because “in 1992 Poland's body of laws still contained a motley assortment of Soviet-style statutes full of vague language aimed at protecting the communist monopoly of power rather than the rule of law itself.” See the entry for Poland at Country Studies, a clearinghouse for Library of Congress research on foreign nations, available online at <http://countrystudies.us/poland/79.htm> (visited Oct 14, 2004).

In particular, Ireland objects to the Sandbaek Report, which attempted to outline the EU’s plan for aid to developing countries over the next five years, because Irish tax money would be used to help provide abortions in countries receiving aid. The text of the report is available online at <http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=10674&LEVEL=4&MODE=SPIP&NAV=X&LSTDOC=N> (visited Oct 17, 2004). The objections of Mary Scallon, MEP from Ireland, are contained in the debate records, available online at <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+CRE+20030212+ITEM-009+DOC+XML+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y> (visited Oct 17, 2004).

B. THE COMPLEX RELATIONSHIP BETWEEN THE US, THE UN, AND SERVICE-PROVIDING NGOs

The United States was instrumental in devising and implementing the UN Population Commission in 1946 and the UNFPA in 1969, and the US began to classify foreign family planning assistance as a matter of foreign policy with the adoption of the 1961 Foreign Assistance Act. For many years the United States was the largest contributor to the UNFPA. But a change in political winds resulted in the Kemp-Kasten Amendment to the Foreign Operations Appropriations Act of 1985, which stipulated that no funds "be made available to any organization or program which . . . supports or participates in . . . coercive abortion or involuntary sterilization." Though the UNFPA does not support or participate in coercive abortions or involuntary sterilizations, it does operate in China, a country that is known to have engaged in both practices.

This fact was used to prevent the United States from funding the UNFPA from 1985–93, during the Reagan and George H. W. Bush administrations, and again since 2002, during the George W. Bush Administration. Conservatives in power during the 1980s also implemented the “Mexico City Policy” (sometimes called the “gag rule”), which denied any US funding to foreign NGOs that promoted or provided abortions, even if American monies were not used for this purpose. These two laws had the strange effect of denying to impoverished foreign women a basic medical service that the US cannot constitutionally deny its own female citizens. The laws are also in some sense a de facto abortion policy for those countries that rely on foreign aid for most of their medical and family planning services.

In a broader sense, these laws will render nearly impossible an effective UN policy regarding an international standard of abortion rights. First, any resolution or treaty declaring abortion to be a fundamental human right is likely to be rejected by the United States, which has a permanent veto on the Security Council. Second, the UN aid programs that would provide counseling or abortions would rely mostly on monies donated by the US and the EU, which

34 See id.
37 See id at 350–53.
38 See id.
39 At a minimum, no jurisdiction of the United States may deny or restrict abortions sought by adult women in the first trimester of pregnancy. See Roe, 410 US at 162–64.
means that the US can frustrate the full and effective implementation of such a policy simply by withholding funds.

IV. SUGGESTION AND CONCLUSION

To improve the lives of families, especially the women and children thereof, the United Nations should formulate a consistent policy on abortion rights that would increase the availability of abortions but seek to prevent them by proper family planning. It is possible that in the long term the traditional and religious resistance of some countries to abortion could be overcome by the economic and social benefits of this crucial women’s right.

Among multinational organizations such as the EU that are already experiencing conflict over members’ differing abortion policies, bodies vested with judicial authority should effectively address these conflicts instead of avoiding them. Avoiding resolution will create greater problems in the future. The European Parliament’s conflict over the Sandbaek Report, discussed above, is instructive. In the future, to preserve its tracking of fundamental rights in member states, the European Parliament may have to separate abortion and other contentious issues from the rest of its reports. This would have the undesirable effect of balkanizing member states into groups which have not harmonized their laws with official EU policy (regarding abortion or other issues), creating tensions that undermine the goal of European unity and “borderlessness.”

The ability to plan families autonomously and limit their size is incomplete without access to abortion. The inability to limit family size exacerbates poverty in developing nations because these families usually cannot afford to properly care for their children. This vicious cycle will strain the earth’s agricultural and environmental resources. Economically and socially, the world community can no longer afford to ignore the option of abortion and access to abortion services as fundamental human rights. Further literature on the contours and implementation of such a policy would be welcome and timely.