Human Rights and the Unborn Child

by Rita Joseph

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Does international law protect the unborn from abortion? In *Human Rights and the Unborn Child*, Rita Joseph says it does. The question is important because activists allied with UN human rights experts now claim that abortion is an international legal obligation. Catholic and developing world courts and legislatures are under pressure to submit and remove legal protections for the unborn. Sadly, this stratagem has already worked in one country, Colombia.

In the midst of the fray, Joseph turns the argument of the activists on its head: the international treaties that activists misrepresent to claim an abortion right actually bind nations to criminalize abortion. The crux of her argument is that if we eschew our "twenty-first century bias" and restore an original understanding of these documents, we cannot help but agree. In the two chapters regarding abortion based on sex selection and disability, Joseph extends the obligation to international criminal tribunals as well, concluding that such abortions represent a crime against humanity.

From her first introductory chapter, Joseph builds the case for "inclusive meaning" of the term "children" in the foundational human rights documents, the 1948 Universal Declaration of Human Rights (UDHR) and subsequent UN human rights texts. Following chapters analyze legislative histories of regional treaties from Europe, Latin America, and Africa, then argue that the "child at risk of abortion" and "children before birth" are a group or "class" deserving special protection.

While abortion advocates work to dehumanize this group with terms such as "unborn fetus" and "embryo" in the lawsuits they bring against pro-life governments, Joseph shows that these terms are purposefully absent in the texts. In one example, she notes that even the UN Committee on the Rights of the Child, not known for its pro-life stance, refers to the "the child before birth" and not the "fetus" in a 2006 general comment. Joseph refutes the claim of some activists that the phrase "all human beings are born free and equal" was ever meant to demarcate birth as the point at which human rights begin. The Human Rights Commission preparing the UDHR rejected such distinction.

Like-minded legal scholars have averred in these pages that such facts prove that the original meaning—common understanding at the time—would have excluded abortion.[1] Joseph cites contemporaneous medical ethics to show that the average person, especially medical practitioners, would have assumed the documents excluded abortion. While the notion of original intent—discerning the mind of the drafters—may have fallen out of favor in some academic circles, it is in establishing the drafters' intention to protect the unborn child from the moment of conception that Joseph makes the deepest inroads.

Joseph's book is as provocative as it is timely. When she contacted our institute several years ago and suggested we quietly drop the phrase "international law is silent on abortion," she touched off a debate within the international pro-life coalition about what kind of protection UN human rights documents really afford the unborn child. Not one of us disagrees that nations *should* protect the unborn from abortion. Not all of us share Joseph's optimistic view of international obligation, however, because since 1948 not every nation interpreted its international law obligations that way. State interpretive practice matters in the determination of what the law requires.

For example, some countries already had legal abortion at the same time they negotiated the UDHR in the 1940s; even more states had liberalized their laws by the adoption of the two treaties that enacted

the UDHR—the 1966 International Covenant on Civil and Political Rights, and the 1966 International Covenant on Economic, Social, and Cultural Rights—and the 1989 Convention on the Rights of the Child. Joseph argues that when the UDHR was in the course of adoption, the UN General Assembly Third Committee rejected attempts to use existing national laws as a way of watering down the UDHR's articles. And when a staff member from the Commission on the Status of Women proffered this reason to mitigate the UDHR's right to life, she was likewise rebuffed. For these reasons, Joseph says we should be less concerned about state practice and more concerned about the original context, a time when Nuremberg judges were condemning abortion as an atrocity and a crime against humanity.

The main reason why the law is said to be silent on abortion is that no UN treaty even mentions abortion; only one regional treaty in Africa does. The Human Rights Commission rejected a proposal to recognize the right to life from "conception." Joseph argues that the reason this proposal did not prevail has nothing to do with abortion. Rather, the drafters were striving for a concise text and it was both generally understood at the time, and in the mind of the framers, that the unborn were included. The insane and disabled were also part of the deleted phrase and the word "women" was likewise rejected. No one today assumes that these groups are excluded.[2] Bolstering her case, Joseph manifests several failed attempts to explicitly include abortion rights.

Joseph argues for broad interpretation of passages regarding the unborn child, such as "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," from the preamble of the 1989 Convention on the Rights of the Child (CRC). While the references in the main body of the convention refer to prenatal care for the unborn, not protection from abortion, Joseph says one must look at the context of the 1950s when the CRC's parent document, the 1959 Declaration on the Rights of the Child, was negotiated. She refutes the belief that preambles are not binding on states parties, citing the 1969 Vienna Convention on the Law of Treaties provision that the "context for the purpose of the interpretation of a treaty" includes "its preamble and annexes."

One value of Joseph's return again and again to the context of 1948 is that it makes her analysis prophetic. She casts side-by-side the 2007 European Court of Human Rights decision in *Tysiac v. Poland,* calling for "simple" and "prompt" abortion in that country, and documents—based on Henrich Himmler's 1943 abortion edict—calling for abortion to be made a "simple and pleasant affair" for Polish workers. Comparisons to the Nazis are nowadays dismissed as extreme, but Joseph's selections are pertinent to her argument. The *Tysiac* pronouncement, like so many overstatements by UN human rights treaty bodies—such as telling Mexico that it must make abortion "easy and swift"—eerily mimic Himmler's dross. Joseph shows us that where we have been is where we are going.

There is difficulty when she says that the UDHR and all subsequent UN human rights documents *must* be interpreted in light of the Nuremberg trials. According to Mary Ann Glendon's history of the UDHR drafting, the Human Rights Commission spoke little of the Nazi atrocities and saw a "division of labor" between the criminal law taking shape in Nuremberg and their own work addressing the underlying causes of wars and atrocities, namely, unjust discrimination, poverty, and lack of economic opportunity.[3] The nonbinding UDHR, Glendon says, left it up to peoples and nations to figure out how to animate its principles through myriad means such as education, social programs, and legal measures at various levels.[4] While some nations may consider the Nuremberg Principles and trials relevant in that process, others might not. Joseph conflates international criminal law with human rights law.

Through painstaking documentation and with unwavering confidence, then,

Joseph demonstrates that the law is not silent on the unborn. Yet readers will still be divided on whether she proves that the law is not silent on abortion. She capably demonstrates that the unborn child is part of the group "children," who are afforded special protections in the documents, and that a child is considered a "human being" and "member of the human family," who therefore possesses human rights. She gives skeptics new reasons to weigh more heavily the CRC's language on the child before birth, provides many more sources attesting to the pro-life assumptions in these documents, and handily exposes the excesses in claims that the documents somehow include abortion rights, such as the Inter-American Commission on Human Rights' interpreting abortion rights into a treaty that specifically protects the right to life of each "person" not just before birth but "in general from the moment of conception."

The question remains whether her exegesis on original meaning provides evidence that national laws permitting abortion are contrary to a state's international legal obligation. This is a much higher bar, and one that perhaps cannot be cleared—for reasons related more to international politics than to human rights law.

To accept Joseph's assertion, one must dismiss state interpretive practice in determining what the law requires. For example, Joseph says that the prohibition against abortion is implicit in the prohibition of the death penalty for pregnant women found in several documents.[5] It is true that drafters had in mind the vulnerable unborn child and not just the mother. But it is also true that the United States ratified the International Covenant on Civil and Political Rights in 1992, nearly two decades after liberalizing abortion and without a reservation regarding its liberal abortion laws.[6] The United States did reinforce its commitment not to execute pregnant women, but it did so in a reservation rejecting prohibition of killing children under the age of eighteen. And it is likely that a woman on death row could obtain an abortion in the United States if she desired.

In other words, even if the drafters had in mind certain protections for the unborn child in these documents, not all states understood the words to preclude abortion of that child as they negotiated and ratified the documents. Some nations certainly did, and they have retained their pro-life laws. This diversity of state interpretive practice is one reason why it is easy to discredit claims of a new customary international law of abortion rights.

Likewise, Joseph shows that the Canadian government rejected accession to the American Convention on Human Rights in part because its life article "in general, from conception" contravenes Canada's liberal abortion policies. Yet she seems unaware of the internal contradiction to her own argument which posits that state practice matters little in ascertaining the meaning of the documents.

The fact is that nations interpret and apply international law according to their own political, legal, and cultural traditions and circumstances.[7] Thus realists conclude that international law is politics. Some, certainly not all, realists adhere to a positivist view—the law means only what it says—but many also believe in the moral significance of law while accepting the authority of states to interpret what it legally requires. Liberal internationalists and transnationalists, on the other hand, emphasize not what nations do but what they ought to do, seeing a political as well as moral authority of the law to change the world for the better.

In order to follow Joseph to the ultimate end of her analysis—that international law requires states to criminalize abortion—one must accept her perspective as a moral claim, as I do, rather than as evidence that international law prohibiting abortion already exists to bind sovereign states.

Conservatives may find her pro-life conclusions satisfying but be unsettled by her means, and liberals may appreciate her worldview but balk at the book's conclusions. While this may seem to limit the book's influence, the work nonetheless makes a major contribution. Students and activists who now must choose between

the moral relativism of contemporary legal positivists and the pro-abortion sentiments of many human rights idealists will find in Joseph's work a powerful example that a normative, internationalist approach is not necessarily inconsistent with pro-life conclusions. While contemporary normative theory is mostly infused by consequentialism and chases constantly evolving and sometimes contradictory ideas, Joseph's hermeneutics rest solidly on the natural law view of the document's drafters and the unchanging facts of legislative histories.

One problem with Joseph's approach is that by dismissing state practice, she undermines the main bulwark against the current normative onslaught for universal abortion rights. In fact, some of Joseph's strongest arguments against a pro-abortion misinterpretation of international law are found in her research on state practice. Strategically, accepting Joseph's approach is risky. Pro-life advocates might shift from working to protect good laws with like-minded advocates in developing countries, to confronting hostile delegates in powerful Western countries to overturn bad laws. Few if any conservatives in the U.S. Congress would accept the argument that international law should compel Americans, no matter how much they agree with the purpose.

As I read the book, I found myself desperately wanting to believe in Joseph's elegant argument. I suspect other pro-life advocates will be tempted, too. But there is no easy way out. Legal protection of the unborn will be secured when we persuade all nations, who alone have the right and ability to enforce international norms, to enact a proper understanding of human rights. A long struggle awaits us.

Susan Yoshihara

Susan Yoshihara, PhD, is vice president for research at Catholic Family and Human Rights Institute (C-FAM) and director of the International Organizations Research Group in New York City.

[1] See the letters to the editor from Richard Stith (referring to an article by Patrick Flood) and from Austin Ruse with Susan Yoshihara and Douglas Sylva, *National Catholic Bioethics Quarterly* 8.2 (Summer 2008): 221–224.

[2] Nicholas Wolterstorff has highlighted the fact that other important aspects were left vague in the UDHR, such as the fact that human rights are based on human dignity. This was only "suggested" in the UDHR, he points out, and not made explicit until the 1966 covenants on civil and political, and economic, cultural, and social rights made it so. Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2008), 313.

[3] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001): 189, 238.

[4] The Human Rights Commission deliberately drafted the UDHR as a nonbinding document because many of their governments would not have signed it had it been binding on states. See Glendon, *A World Made New*.

[5] The International Covenant on Civil and Political Rights (UN General Assembly, 1966), the Geneva Protocol (League of Nations, 1925), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol, African Union, 2003).

[6] The Maputo Protocol precludes killing pregnant women while at the same time allowing for abortion in certain circumstances.

[7] The differences among domestic applications of international law have been described as a continuum between extreme monism (in which international law essentially trumps domestic law) and extreme dualism (in which international law requires legislation to translate it into domestic law). Thus nations like the United Kingdom, and to a slightly lesser degree the United States, which have variations between the extremes, may be insulated from international law's domestic application.