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Title	Ireland's abortion regime on the world stage: Performative acts and the claim to state sovereignty in foreign policy discourse
Author(s)	Reilly, Niamh
Publication Date	2017
Publication Information	Reilly, Niamh. (2017). Ireland's abortion regime on the world stage: Performative acts and the claim to state sovereignty in foreign policy discourse. In Lorraine Kelly, Tina-Karen Pusse, & Jennifer Wood (Eds.), <i>Gender. Nation. Text: Exploring Constructs of Identity</i> (pp. 155-185). Münster: LIT Verlag.
Publisher	LIT Verlag
Link to publisher's version	<a href="https://www.lit-verlag.de/publikationen/kulturwissenschaft/72414/gender.-nation.-text">https://www.lit-verlag.de/publikationen/kulturwissenschaft/72414/gender.-nation.-text</a> .
Item record	<a href="http://hdl.handle.net/10379/16111">http://hdl.handle.net/10379/16111</a>

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## **Ireland's Abortion Regime on the World Stage: Performative Acts and the Claim to State Sovereignty in Foreign Policy Discourse**

**Niamh Reilly**

### **Introduction**

Ireland continues to have one of the most restrictive and punitive abortion regimes in the world. This revolves around a 1983 constitutional amendment that recognizes the 'the right to life of the unborn' with 'due regard to the equal right to life of the mother' (Article 40.3.3).<sup>1</sup> In 1992, the case of a 14-year-old girl 'X' who was pregnant as a result of rape was the first in a series of legal cases that exposed the harmful consequences of a constitutional requirement to prioritize the life of the foetus over the health and wellbeing of the woman or girl carrying the foetus. Ostensibly to defend the constitutional right to life of the 'unborn', the state had prevented X from obtaining an abortion in the UK. X was subsequently deemed to be at risk of suicide. The X Case Supreme Court judgment ruled that abortion is lawful in Ireland where there is 'a real and substantial risk to the life', as distinct from the health, of a pregnant woman, including the risk of suicide. For more than two decades, successive Irish governments avoided legislating to implement the X judgment. The X case was followed by other high-profile Irish court cases including: the C case (1997), involving a 13-year-old girl and member of the Irish Traveller community, who had been raped and taken into state care whereupon the health executive's decision to facilitate her travel to the UK to terminate the pregnancy was contested; the case of Miss D (2007) involving a 17-year-old in state care whose request to travel to the UK to terminate her pregnancy, after she discovered the foetus had a fatal abnormality, was refused by the health executive; and the Y case (2014), involving a young woman asylum seeker who, pregnant as a result of rape in her home country, was refused an

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<sup>1</sup> Ireland is used throughout this article to mean the Republic of Ireland.

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abortion and eventually pressured by state actors to accede to giving birth by caesarean section at 26 weeks' gestation.

Prior to the Y case, however, two pivotal developments had already put the issue of abortion back at the center of public discussion in Ireland. First, the European Court of Human Rights ruled in the case of *A, B and C v. Ireland* (2010) (ABC) that the state had failed to protect the human rights of complainant 'C' by not ensuring clear laws and procedures whereby any woman whose life is at risk by a continuing pregnancy has access to a life-saving termination.<sup>2</sup> Because European Court rulings are legally binding on state parties to the European Convention on Human Rights, this put considerable external pressure on the Irish Government, at a minimum, to legislate for X. Second, the death of 31-year-old Savita Halappanavar in October 2012 in an Irish public hospital became the focus of intense public debate and renewed questioning of Ireland's stance on abortion writ large. Having experienced a miscarriage and been admitted to hospital, subsequently, over a three-day period, Savita Halappanavar had repeatedly requested and was refused a termination of her 17-week, unviable, pregnancy – ostensibly because of the presence of a foetal heartbeat.<sup>3</sup> She developed septicemia and died.<sup>4</sup> Multiple narratives competed in the public domain at the time in a scramble to explain what had 'gone wrong' in the case of Savita Halappanavar. However, few dispute that Article 40.3.3 is implicated, at a minimum because of the confusion it continues to generate about what is and is not legally permissible in clinical practice in Ireland when a pregnant woman's right to life comes into conflict with the 'right to life of the unborn'. In ensuing public discussions, women's experiences of pregnancy involving a diagnosis of fatal foetal abnormality also figured significantly. Under Irish law, a pregnant woman who receives such a diagnosis is compelled to continue the pregnancy to term and deliver a baby that cannot survive after birth or travel to another jurisdiction to terminate, or initiate termination, of the

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<sup>2</sup> European Court of Human Rights: *A, B and C v. Ireland* – 25579/05 [2010] ECHR 2032. 16 December 2010. <http://www.bailii.org/eu/cases/ECHR/2010/2032.html>.

<sup>3</sup> Kitty Holland: Woman "Denied a Termination" Dies in Hospital. *Irish Times*, 14 November 2012. <http://www.irishtimes.com/news/woman-denied-a-termination-dies-in-hospital-1.551412>.

<sup>4</sup> HSE: Final Report: Investigation of Incident 50278 from Time of Patient's Self Referral to Hospital on the 21st of October 2012 to the Patient's Death on the 28th of October, 2012, Health Service Executive, Dublin, Ireland, June 2013. <http://www.hse.ie/eng/services/news/nimtreport50278.pdf>.

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pregnancy with profound implications for the health and wellbeing of the woman, as well as for partners and family members.<sup>5</sup>

In tandem with the successive crises outlined above, a general decline in the popular authority (if not influence) of the Irish Catholic Church has occurred, spurred by revelations of decades of abuse and actions to cover it up on the part of the Church and affiliated organizations.<sup>6</sup> Against this backdrop, popular attitudes regarding abortion in Ireland have moved steadily in a more liberal direction. In 1997, an *Irish Times*/MRBI poll indicated that 77 percent of the population supported legal abortion in certain circumstances including 35 percent in situations where a woman’s life is at risk, and 14 percent where there is a threat to a woman’s health, while 28 percent agreed that ‘an abortion should be provided to those who need it’. Just under one-fifth (18 percent) opposed abortion in all circumstances. Hence, by the late 1990s, the state’s virtual prohibition on abortion appeared to be already out of step with ‘the nation’. This trend has continued. In 2004, a Royal College of Surgeons survey found that 51 percent of those under 45 years of age supported ‘abortion on-demand’, with a further 39 percent supporting access to abortion in ‘limited circumstances’, while only 8 percent believed abortion should not be permitted in any circumstances. By 2010, two years before the death of Savita Halappanavar, a Marie Stopes/YouGov opinion poll found 87 percent agreed that abortion should be permitted in Ireland where a pregnancy endangers a woman’s life, while 79 and 78 respectively indicated support for abortion in situations where a woman’s health is at risk or where the pregnancy resulted from sexual abuse, rape or incest. Only 3 percent opposed abortion in Ireland in all circumstances.

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<sup>5</sup> Paul Cullen: Stillbirths Here after Fatal Foetal Abnormality Abortions Cause Alarm. *Irish Times*, 10 October 2014. <http://www.irishtimes.com/news/health/stillbirths-here-after-fatal-foetal-abnormality-abortions-cause-alarm-1.195904>.

<sup>6</sup> Carole Holohan: In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports. Dublin: Amnesty International, 2011. [http://www.amnesty.ie/sites/default/files/INPLAININSIGHT%20\(WEB\\_VERSION\).pdf](http://www.amnesty.ie/sites/default/files/INPLAININSIGHT%20(WEB_VERSION).pdf).

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The *Protection of Life During Pregnancy Act (2013)*<sup>7</sup> is the state’s response to the ABC ruling and, indirectly, to the widespread disquiet generated by the death of Savita Halappanavar.

Notwithstanding, the high-profile cases that continue to erupt and make visible the harmful consequences of Ireland’s constitutional protection of ‘the unborn’, and the evidence that such consequences are repugnant to a growing majority of ‘the people’ in Ireland, the *Protection of Life During Pregnancy Act* stands as one of the most restrictive pieces of legislation on abortion in the world. It permits no account to be taken of the wishes of the woman at the center of any decision to authorize abortion in Ireland; it sanctions intrusive procedures for receiving and considering a request by a pregnant woman for an abortion on grounds of suicide risk; and it continues to criminalize abortion with severe penalties in all situations except where it is ascertained there is an imminent risk to the life, as distinct from the health, of a woman. Moreover, the notion that the Act would somehow settle the abortion question in Ireland, even temporarily, quickly evaporated following two new crises in 2014: the Y case as mentioned above, and, yet another harrowing case of a pregnant woman who had suffered fatal brain damage but was kept on ‘life support’ for three weeks after her death, against the wishes of her family members and partner, in the putative interests of the 16-week ‘unborn’.<sup>8</sup>

How can the persistence of highly restrictive state regulation of abortion in Ireland be explained in a wider context of social ‘liberalization’ and a much discredited Catholic Church? The influence of conservative Catholic doctrine undoubtedly continues to be exerted in key domains of the state’s social policy and service delivery in Ireland. However, only in relation to the prohibition of abortion is such doctrine punitively enforced by the state (although it not explicitly framed or defended as such). A late ‘modernizer’, the Irish state finally lifted all restrictions on contraception, decriminalized homosexuality and legalized divorce in the 1990s. Yet, 25 years on, the strength of the abortion prohibition is undiminished and, arguably, growing. As will be discussed in the next section, much of the scholarship that seeks to explain

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<sup>7</sup> Ireland: The Protection of Life During Pregnancy Act 2013. Act Number 35 of 2013. <http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0035.pdf>.

<sup>8</sup> Henry McDonald: Irish Doctors Seek Legal Advice over Brain-Dead Pregnant Woman. *The Guardian*, 18 December 2014. <http://www.theguardian.com/world/2014/dec/18/irish-doctors-legal-advice-brain-dead-pregnant-woman>.

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the dynamics and significance of this phenomenon focuses on Ireland *qua* nation. That is, different contributors explain Ireland's stance on abortion in terms of particular aspects of the nation's history (especially relating to the Catholic Church and the exercise of patriarchal power). Others examine discursive practices of nation and national identity formation as they unfold around key events taking place in Ireland. While references to state sovereignty are often present in these accounts, the terms 'sovereignty', 'national interest' or 'national identity' are often used in tandem or interchangeably.

In this article, I suggest there is a need to disentangle 'nation' and 'sovereign' and to explore sovereignty as a distinct analytical category and locus of discursive practice in understanding the reproduction of Ireland's stance on abortion. In international relations, the traditional or 'realist' account of the sovereign state or government entails two elements: it is 'independent of all foreign authorities' and 'supreme over all other authorities' within the territorial jurisdiction it governs (upheld through its monopoly of the 'legitimate' use of force).<sup>9</sup> This account of state sovereignty has been much criticized not least for its ontological premise that states are unitary, rational (and implicitly masculine) actors who formulate, and act on, state interests within an essentially anarchic international context.<sup>10</sup> In an age of intensified globalization where most recognize that international law and norms shape 'state behaviour', it is widely asserted that no state can be truly independent, making the realist account of state sovereignty all but redundant. In contrast, viewing sovereignty as discursive practice, others posit that globalization and the *de facto* interdependence or weakness of states have 'not led to a renunciation of the idea of sovereignty of states'.<sup>11</sup> Indeed, 'threats to the state's autonomy and ability to rule have reinforced the claims to sovereignty rather than weakened them' (emphasis added).<sup>12</sup> In the same vein, I posit that Ireland's highly restrictive and punitive regulation of abortion can be read in

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<sup>9</sup> Robert Jackson: *Sovereignty*. London: Polity Press, 2007, p. 23.

<sup>10</sup> Annick Wibben: *Feminist International Relations: Old Debates and New Directions*. *Brown Journal of World Affairs* 10/2 (2004), pp. 97-114.

<sup>11</sup> Wouter G. Werner and Jaap H. De Wilde: *The Endurance of Sovereignty*. *European Journal of International Relations* 7/3 (2001), p. 284.

<sup>12</sup> Werner and De Wilde, p. 284.

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part as the discursive effect of such performative claim-making in the international domain.<sup>13</sup> To explore this further, I consider how abortion features in the promulgation of Irish foreign policy, where claims to state sovereignty come sharply in to focus. Specifically, I examine the text of Ireland’s statements relating to abortion in the context of the UN Commission on Population and Development and related UN venues during the period 1999 to 2011.

More generally, this inquiry is guided by Judith Butler’s account of the ‘specific kind of injury that language itself performs’<sup>14</sup> and an interest in considering strategies that might counter its ‘injurious operations’.<sup>15</sup> From Butler’s perspective ‘language constitutes the subject in part through foreclosure, a kind of unofficial censorship that constitutes the possibility of agency in speech’ and, furthermore, in this process, “‘who’ the subject is depends as much on the names he or she is *never called*’ (emphasis added).<sup>16</sup> Hence, in statements by Ireland *qua* Sovereign that deal with abortion, it is instructive to consider the subject positions that are available or not to (pregnant) women and the discursive strategies possible to counter the ‘injurious operations’ of such language. More specifically, what linguistic strategies are available in such contexts to enable resistance to the erasure or absence of ‘abortion-seeking women’ that might render them ‘survivable subjects’?<sup>17</sup>

Before turning to examine how abortion features in performative acts of sovereignty-claiming in Irish foreign policy, the following section reviews some of the main contributions and key themes explored in the literature that seek to make sense of the abortion question in Ireland.

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<sup>13</sup> The term ‘performative’ is used here along lines developed by J. L. Austin who characterised performative speech as entailing ‘illocutionary’ aspects, that is, the ‘performance of an act in saying something’; and ‘perlocutionary’ aspects, where the speech act produces ‘certain consequential effects upon feelings, thoughts, or actions’ of others. See: J.L. Austin: *How to Do Things with Words*. The William James Lectures Delivered at Harvard University in 1955. Ed. J.O. Urmson. London: Clarendon Press, 1962, pp. 99-100.

<sup>14</sup> Judith Butler: *Excitable Speech: A Politics of the Performative*. New York : Routledge, 1997, p. 6.

<sup>15</sup> Butler, p. 41.

<sup>16</sup> Butler, p. 41.

<sup>17</sup> Butler, p. 5.

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## **Making Sense of the Irish State’s Position on Abortion: Church, Patriarchy, Nation, Sovereignty**

Explanations and interpretations of the Irish state’s restrictive approach to abortion generally focus on one or more of the following: the social and cultural influence of the Catholic Church and historical entwinement of Church and state; the persistence of patriarchal mores and practices across society; projects of defining and building ‘the nation’; and, less explicitly, the exercise of state sovereignty. The role or impact of social movements is also sometimes cited as a compelling factor.

The influence of the Catholic Church in newly independent Ireland, especially during the first half of the 20<sup>th</sup> century, is well documented. Brian Girvin notes regarding this period:

Criticisms of the intimate relationship between church and state were almost nonexistent within Ireland. ... [Rather] the most important debate focused on the extent to which the Irish constitution reflected Catholic norms and values, not whether it should or should not.<sup>18</sup>

During the 1930s, reflecting the fusion of patriarchal and Catholic mores, the Irish parliament adopted new legislation to criminalize contraceptives and ban women’s employment in industrial work.<sup>19</sup> For Conroy Jackson the exercise of patriarchal power and absence of organized women’s movement are as much part of the explanation as the influence of the Catholic Church. She notes: ‘The inability of women’s groups and associations during this period to rally women to redress some of the injustices they experienced left the legislature and the judiciary intact in their patriarchal mode of thought’.<sup>20</sup> Some decades later, seeking to stymie the perceived liberalizing influences of the 1970s – not least Ireland’s membership in the

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<sup>18</sup> Brian Girvin: Church, State, and Society in Ireland since 1960. *Éire-Ireland* 43/1 (2008), p. 75.

<sup>19</sup> Pauline Conroy Jackson: Outside the Jurisdiction: Irish Women Seeking Abortion. In A. Smyth (ed.): *The Abortion Papers*. Dublin: Attic Press, 1992, p.126.

<sup>20</sup> Conroy Jackson, p.129.

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European community and the effect of second-wave feminism – the 1983 campaign to insert a ‘pro-life’ amendment in the constitution was championed by a similar array of forces in a ‘political coalition ... [that] included the Catholic hierarchy, Fianna Fáil, and newly mobilized conservative Catholic activists’.<sup>21</sup>

Looking beyond the historical dominance of Roman Catholicism in Ireland and drawing on the work of Nira Yuval-Davis, Ruth Fletcher considers the regulation of abortion as part of the reproduction of the ‘Irish nation’ and ‘Irishness’, in ways that are both gendered and racialized. By way of illustration, she offers analyses of two key cases. The C Case (1997) wherein an Irish Traveller girl who was pregnant as a result of rape was ultimately assisted by the Irish state to obtain an abortion in the UK. In the O case (2002), a pregnant Nigerian woman, whose application for asylum in Ireland was refused, subsequently contested her deportation – also unsuccessfully – on grounds of the Irish state’s obligation to protect the ‘unborn’. Fletcher uses these examples to illustrate how the seemingly pro-natalist ‘Irishness’ encapsulated in Article 40.3.3 in practice is not extended to women and girls or the ‘unborn’ in marginalized minority or migrant communities, who, she posits, are deemed to be ‘non, or less productive’ within hegemonic neoliberal logic.

However, the more recent Ms Y case<sup>22</sup> raises further questions about the nature of the Irish state’s punitive regulation of abortion, which are not entirely accounted for in terms of the regulation of ‘Irishness’, citizenship and the boundaries of ‘the nation’. Occurring after the enactment of the *Protection of Life During Pregnancy Act*, the Ms Y case involves a young woman seeking asylum in Ireland. Upon her arrival in late March 2014, as part of the asylum seeking process, Ms Y discovered she was pregnant as a result of rape in her home country. Reportedly very distressed, she repeatedly requested an abortion in meetings with officials and representative of non-governmental bodies attempting to support her. Thwarted by restrictions

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<sup>21</sup> Girvin, p. 86. Fianna Fáil is a centrist to center-right and conservative political party in the Republic of Ireland.

<sup>22</sup> See: Kitty Holland: Timeline of Ms Y Case: HSE Draft Report Tracks Ms Y’s Care from Her Arrival in Ireland in March to Her Discharge after Caesarian Section in August. Irish Times, 4 October 2014. <http://www.irishtimes.com/news/social-affairs/timeline-of-ms-y-case-1.1951699>.

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that limit access to abortion information and the means to travel overseas, which are exacerbated for women within the asylum process in Ireland, there were lengthy delays and gaps in the care of Ms Y. Eventually, the *Protection of Life During Pregnancy Act* was invoked and through its mechanisms Ms Y was deemed to be at risk of suicide. However, Ms Y was refused an abortion, reportedly due to the relatively advanced stage of the pregnancy. She gave birth by caesarian section at 26 weeks' gestation, despite her protests and wishes not to proceed with the pregnancy or to become a mother.

What questions does the Ms Y case raise? Over the decade prior to the Ms Y case, it was not uncommon for women asylum seekers in Ireland, wishing to terminate a pregnancy, to be facilitated by state agencies in obtaining travel documents and financial support to do so.<sup>23</sup> This confirms Fletcher's thesis that perceptions of 'Irishness' shape how pregnant women encounter the Irish abortion regime, which varies according to whether the woman seeking an abortion or, as in the O case, the 'unborn', is 'Irish' or 'non-Irish'. The Ms Y case confounds this reading. Reports indicate that Ms Y was actively obstructed in her efforts to travel to the UK for an abortion. Moreover, the extreme interventions on the part of state to enforce the 'right to life of the unborn' in this case (now an infant with special needs in 'state care' but 'stateless') suggest a process that is less about regulating national identity and belonging and more about the exercise of state sovereignty *per se*.

Lisa Smyth also interprets Ireland's stance on abortion as a reflection of the construction of national identity, paying particular attention to the role of 'moral values'. She observes: 'A concerted effort was made from the late 1970s to define the [Irish] nation in terms of a principal moral norm, described as "pro-life", and taking the form of an almost absolute ban on abortion'.<sup>24</sup> Smyth argues that the X case precipitated a notable discursive shift 'from arguments based on rights to arguments centered on national identity ... [because of] the questions it

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<sup>23</sup> Ruth Fletcher: *Reproducing Irishness: Race, Gender, and Abortion Law*. *Canadian Journal of Women and the Law* 17/2 (2005), p. 396.

<sup>24</sup> Lisa Smyth: *Ireland's Abortion Ban: Honour, Shame and the Possibility of a Moral Revolution*. In Aideen Quilty, Catherine Conlon, and Sinéad Kennedy (eds): *The Abortion Papers 2013*. Cork: Cork University Press, 2015, p. 2.

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raised about women's citizenship status and women's position *in relation to the nation* and the state' (emphasis added).<sup>25</sup> This mobilization of national identity-centered discourse in relation to abortion, Smyth posits, signaled a move 'towards more liberal articulations'.<sup>26</sup> She posits:

Rather than using the [rights] language of 'pro-life' or 'pro-choice' where opposing camps were firmly entrenched, and no common language or interests remained for negotiation, the emphasis [in public discourse] on the need for 'the people' to face up to the failures of the past if the abortion crisis was to be resolved was an important rearticulation of 'the people's' will, which had significant practical consequences. Not only was the ban on X travelling for an abortion lifted ... but ... two further constitutional amendments were ratified ... on women's rights to freedom of movement, and freedom of information.<sup>27</sup>

Smyth's oppositional representation of the language of 'rights' versus 'nation', where the latter is associated with progressive possibility and the former with inevitable stalemate, is problematic, not least because the actual gains achieved in the wake of the X case were gains of recognition of basic rights that are vital to women in Ireland seeking access to abortion. At the same time, Smyth's analysis is very valuable in revealing the mutability of discursive practices in the nexus of 'abortion and nation' and the proposition that different modes of discursive practices shape the conditions of possibility for 'practical responses' of the state vis-à-vis abortion. Through a discussion of the D case, Smyth further develops her analysis. The Miss D case involved a 17-year-old girl who, while in state care, became pregnant and wished to terminate the pregnancy after the foetus was diagnosed with fatal abnormalities and could not survive after birth. Instigating a High Court action, the Irish Health Service Executive attempted to prevent Miss D from travelling for an abortion, which she contested. Smyth notes that public debate around the case, which was largely sympathetic to the girl, was framed in affirmative

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<sup>25</sup> Lisa Smyth: Narratives of Irishness and the Problem of Abortion: The X Case 1992. *Feminist Review* 60 (Autumn 1998), p. 61.

<sup>26</sup> Smyth, *Narratives*, p. 61.

<sup>27</sup> Smyth, *Narratives*, p. 73.

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narratives of ‘love in familial relationships, particularly those between mothers and their children’<sup>28</sup> and exhortations ‘to let the doctors decide’.<sup>29</sup> Ultimately, Smyth concludes: ‘the primacy accorded to compassion as the key moral value in the debate involved *downplaying questions of rights and responsibilities*’ (emphasis added)<sup>30</sup> and enabled ‘exceptions to be made to the principled opposition to abortion’.<sup>31</sup> Miss D was permitted to travel to Britain to terminate her pregnancy, which, very significantly, was subsequently represented in print media in terms of ‘induced’ delivery of a much-wanted baby and maternal loss, rather than ‘abortion’.<sup>32</sup>

Later, drawing on the ideas of Anthony Appiah,<sup>33</sup> Smyth explores the significance of the death of Savita Halappanavar, and the adoption of the *Protection of Life During Pregnancy Act*, through a discussion of the relative influences of ‘honor’ versus ‘shame’ vis-à-vis the ‘nation’s’ position on abortion. Acknowledging that the *Protection of Life During Pregnancy Act* cannot be regarded as ‘progressive’,<sup>34</sup> Smyth argues its promulgation indicates an end to the conflation of ‘pro-life’ morality and ‘Irishness’, as Ireland’s restrictive position on abortion has ‘finally become a source of shame, not least as the operation of the ban has *violated the Irish nation’s reputation* in the wider world’ (emphasis added).<sup>35</sup> From this perspective, she posits that the Act ‘can be understood as a significant step towards a moral revolution’.<sup>36</sup> For Smyth, an important signal of this is the Government’s ‘effort to re-frame abortion as a health matter’<sup>37</sup> wherein it asserts that the decision of whether or not an abortion is necessary to save a woman’s life rests with medical professionals, rather than lawyers concerned with ‘balancing rights’.

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<sup>28</sup> Smyth, *Narratives*, p. 57.

<sup>29</sup> Smyth, *Narratives*, p. 59.

<sup>30</sup> Lisa Smyth: *From Rights to Compassion: The D Case and Contemporary Abortion Politics*. In Jennifer Schweppe (ed.): *The Unborn Child, Article 40.3.3, and Abortion in Ireland: 25 Years of Protection?* Dublin: Liffey Press, 2008, p. 59.

<sup>31</sup> Smyth, *From Rights*, p. 61.

<sup>32</sup> Smyth, *From Rights*, p. 56.

<sup>33</sup> Anthony Appiah: *The Honor Code: How Moral Revolutions Happen*. New York: W.W. Norton, 2010.

<sup>34</sup> Smyth, *Ireland’s Abortion Ban*, p. 8.

<sup>35</sup> Smyth, *Ireland’s Abortion Ban*, p. 10.

<sup>36</sup> Smyth, *Ireland’s Abortion Ban*, p. 8.

<sup>37</sup> Smyth, *Ireland’s Abortion Ban*, p. 9.

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Against this optimistic reading, I argue that the state’s restrictive stance on abortion is strengthened by such a discursive shift. Smyth’s interpretation underplays the significance of the absence of ‘rights and responsibilities’ in abortion discourse and how this – mirroring the position of the Holy See in the international domain – works to close off the rights-claiming subject position of the pregnant, abortion-seeking woman and to constrict the horizon of actions possible to avert the recurring harms that inexorably attend punitive abortion regulation. Further, Smyth’s analysis views the presence of more ‘morally pluralist’ public discourse on abortion as a positive harbinger of a more liberal regulation of abortion. But is this warranted? As noted, successive opinion polls from 1997 onward have indicated that, beneath the state machinery that enforces Ireland’s restrictive abortion law, a large majority of the population support permitting abortion in Ireland on moderately ‘pro-choice’ grounds of risk to the life or health of a pregnant woman, or where a pregnancy is a result of rape, incest or sexual abuse. Yet, in 2013, the Irish state enacted one of the most restrictive pieces of abortion legislation in the world, which continues to criminalize abortion on most of these grounds. In response, I suggest that scrutiny of the role of abortion in the Irish state’s claim to sovereignty *on the global stage* offers important insights into discursive processes that underpin the naturalization of an extraordinarily restrictive approach to abortion *in Ireland*.

Related to this perspective, some have interpreted the regulation of abortion in Ireland as a form of state violence. Following the X case, in a statement intended to jolt, Ailbhe Smyth declares:

Women in Ireland are living in a police state. ... I mean quite plainly, that the reproductive activities of women in Ireland are being subject to a process of ‘regulation, discipline and control’, carried out by the police in accordance with state law and policies.<sup>38</sup>

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<sup>38</sup> Ailbhe Smyth: *The Politics of Abortion in a Police State*. In A. Smyth (ed.): *The Abortion Papers*. Dublin: Attic Press, 1992, p.138.

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This characterization resonates with a reading of punitive abortion regulation as a manifestation of the forceful exercise of state sovereignty within its territorial jurisdiction. Smyth further flags the significance of the Irish Government's insistence on the inclusion of Protocol 17 in the Maastricht Treaty around the time of the X case. As will be discussed below, this action signaled a pattern to follow, of Ireland acting *qua* Sovereign on the abortion issue vis-à-vis the international community (significantly at the moment of transition from European Community to European Union and the perceived threat to state sovereignty that accompanied this). Smyth posits: 'the clear political intention of its insertion was to ensure that women in Ireland would not be entitled to any increase in their rights with regard to abortion as a consequence of Ireland's participation in the European Union'.<sup>39</sup> Also implicating the exercise of state sovereignty, borrowing from Giorgio Agamben,<sup>40</sup> Ronit Lentin views the punitive regulation of migrant women's reproductive lives in Ireland as an expression of the inherent violence of the state *qua* Sovereign. She posits 'migrant m/others as the female version of *homo sacer* – *femina sacra*',<sup>41</sup> that is, a woman's whose life is 'at the mercy of sovereign power'.<sup>42</sup> Specifically, commenting on the death of Savita Halappanavar, Lentin argues: 'beyond being a woman who unnecessarily died in childbirth in Ireland's post-Catholic patriarchy, Halappanavar was a migrant woman, whose death requires theorizing the Republic of Ireland as a gendered racial state'.<sup>43</sup>

Staying with this focus on state sovereignty, the following section explores a selection of performative speech acts by Ireland *qua* Sovereign in the international domain *on the issue of abortion* and how these relate to statements on abortion by other key performers at the UN, including the EU and the 'Holy See'. In doing so, I consider the wider discursive logic that is mobilized, how this contributes to the persistence of the punitive regulation of abortion *in*

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<sup>39</sup> Smyth, *The Politics of Abortion*, p. 142.

<sup>40</sup> Giorgio Agamben: *Homo Sacer: Sovereign Power and Bare Life*. Trans. Daniel Heller-Roazen. Stanford, Calif.: Stanford University Press, 1998.

<sup>41</sup> Ronit Lentin: *A Woman Died: Abortion and the Politics of Birth in Ireland*. *Feminist Review* 105 (2013), p. 134.

<sup>42</sup> Lentin, p. 131.

<sup>43</sup> Lentin, p. 130.

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Ireland, and what linguistic strategies are available to counter the ‘injurious operation’ of the fusion of Irish state sovereignty with the prohibition of abortion.

## **Performative Acts, Abortion and State Sovereignty at the UN Commission on Population and Development**

*Setting the context: The ICPD Programme of Action*

The UN Decade for Women (UNDW) (1976–85) and a post-Cold War revival of interest in human rights discourse prompted transnational feminist networks to engage, in an unprecedented, coordinated fashion, across different entities of the United Nations in an effort to variously influence UN agendas. The International Conference on Population and Development (ICPD) (Cairo, 1994) was a particularly important site of engagement.<sup>44</sup> Women’s movement actors sought to frame global population policy in terms of women’s human rights, and to challenge the dominance of the conservative, pro-natalist agenda of the Holy See, as well as the paradigm of ‘population control’, wherein excessive population growth in ‘developing’ countries was constructed as ‘the problem’.

While the official outcome of the Conference – the *Cairo Programme of Action*<sup>45</sup> – falls short of the more radical aspirations of feminist reproductive health and rights movements, it nonetheless signaled a shift in discourse away from top-down ‘population control’ to one of promotion of ‘reproductive health’ and ‘reproductive rights’. For the first time it clearly defined reproductive health as a human right, grounded in established international human rights commitments of states:

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<sup>44</sup> Niamh Reilly: *Women’s Human Rights: Seeking Gender Justice In A Globalizing Age*. Cambridge: Polity Press, 2009, pp. 83-88.

<sup>45</sup> United Nations Population Fund: *Programme of Action: Adopted at the International Conference on Population and Development, Cairo 5-13 September, 1995. 20th Anniversary Edition*. <http://www.unfpa.org/sites/default/files/pub-pdf/ICPD%20PoA%20English.pdf>.

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*Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.*  
(Emphasis added)<sup>46</sup>

The *Programme of Action*, however, did not include access to safe and legal abortion as part of reproductive health and rights. (It also failed to affirm sexual rights, including freedom of sexual expression and orientation.) In contrast to the foregoing paragraph, the agreed language that deals with abortion contains no reference to human rights and bears the imprint of trade-offs and negotiations between ‘conservative’ and ‘liberal’ state actors, including the Holy See. It states:

*In no case should abortion be promoted as a method of family planning. All Governments ... are urged to strengthen their commitment to women’s health, to deal with the health impact of unsafe abortion ... and to reduce the recourse to abortion through ... family-planning services. ... Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. Any measures or changes related to abortion within the health system can only be determined at the national or local level. ... In circumstances where abortion is not against the law, such abortion should be safe.*  
(Emphasis added)<sup>47</sup>

Since 1994, a backlash against women’s human rights discourse in UN policy forums has been well-documented.<sup>48</sup> This manifests most notably in struggles to control and contain the

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<sup>46</sup> United Nations Population Fund, Paragraph 7.3, p. 60.

<sup>47</sup> United Nations Population Fund, Paragraph 8.25, p. 89.

<sup>48</sup> Rosalind Petchesky: *Global Prescriptions: Gendering Health and Human Rights*. London: Zed Books, 2003.

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definition of key terms relating to reproductive and sexual health and rights, in line with conservative religious and social mores, often by not exclusively spearheaded by the Holy See. The following subsections document, contextualize and interpret selected interventions and speech acts by ‘Ireland’ relating to abortion at key UN meetings to review progress on implementation of the ICPD *Programme of Action*.

### ICPD+5

In June 1999, a Special Session of the United Nations General Assembly took place in New York to review implementation of the ICPD *Programme of Action* (ICPD+5). Ireland was represented by its then Minister for Health and Children, Brian Cowen. The short statement he delivered can be read as the first in a series of performative speech acts by ‘Ireland’ over more than decade, in which, I argue, the question of abortion plays a pivotal role in a repetitive process of legitimation of Ireland’s claim to sovereignty *per se*.

The nature of Ireland’s statement to ICPD+5 as a claim to sovereign authority is discernible in a number of ways. First, the statement eschews any reference to ‘human rights’ or ‘reproductive rights’. This omission is striking because the central contribution of the ICPD *Programme of Action* is that it frames population and development issues, for the first in terms of states’ human rights obligations, especially rights to gender equality, the ‘highest attainable standard of sexual and reproductive health’. Why is this omission consequential? When states undertake to be bound by international human rights, they accept the possibility, in principle, of answering to an authority ‘above the state’ vis-à-vis their ‘domestic affairs’, albeit in highly qualified ways. By not endorsing the human rights basis of the *Programme of Action*, Ireland strongly signals resistance to such scrutiny on matters of reproductive law and policy. This is a performative act. That is, by ‘saying something’ (no to abortion), Ireland is ‘doing something’ (i.e., being Sovereign).

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Second, while most of the short statement is descriptive and perfunctory, one single paragraph dealing with abortion stands out as animated and engaged with one substantive issue in a particular way. It states:

The Cairo Programme of Action and the [ICPD+5] review process have emphasized the importance of reducing the extent of abortion throughout the world. Improved health education, access to family planning services and contraception are essential in order to bring that about. *Ireland strongly endorses the principles enshrined in the Cairo Programme of Action and in the review process that abortion must not be promoted as a method of family planning.* It is, therefore, of great importance to Ireland ... that the document **recognizes** [bold in original] that ... policy and legislation in relation to the *circumstances in which the termination of pregnancy may be permitted if at all is a matter for each country to determine for itself.* (Emphasis added)<sup>49</sup>

The sentence starting with ‘Ireland strongly endorses’ signals that Ireland speaks *qua* Sovereign. In the same sentence, a significant rhetorical trick is played. The imperative that ‘abortion must not be promoted as a method of family planning’ is asserted as a ‘principle’ that is ‘enshrined’ in the *Programme of Action*. However, this imperative does not feature in the Principles section of the programme.<sup>50</sup> Rather, it is stated in two action paragraphs in a document of about 170 pages (especially paragraph 8.25 and indirectly in paragraph 7.10). Similarly, while the ‘sovereign right of each country’ is recognized in the introduction to the text of the 15 principles, it is not one of the enumerated 15 underpinning principles. Nonetheless, having invoked Ireland’s sovereign status in this way, and tied it firmly to abortion (as something to be prevented), Ireland further uses the moment to underline the particular importance (in bolded text) of the recognition in the ICPD+5 document of the sovereign right of each country to ‘determine for itself’ under what circumstances ‘if at all’ abortion may be permitted nationally.

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<sup>49</sup> Ireland: Address by Mr Brian Cowen T.D., Minister for Health and Children, Ireland, to the Special Session of the General Assembly for the Review and Appraisal of the Implementation of the Programme of Action of the International Conference on Population and Development at United Nations Headquarters. 30 June 1999. <http://www.un.org/popin/unpopcom/32ndsess/gass/state/ireland.pdf>.

<sup>50</sup> United Nations Population Fund, pp. 10-15.

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Third, it is important to note, in the context of the ICPD+5 review, along with the Holy See, a very small number of almost 200 UN member states registered similar reservations, that is, against the possible use of abortion as a form of family planning and/or as a potentially obligatory part of sexual and reproductive health or services, beyond whatever is determined at national level. These were: Sudan, Nicaragua, Malta, Qatar and Australia (with respect to allocation of its development aid).<sup>51</sup> While Ireland, normally subsumed as a member state in EU statements, did not formally attach similar reservations to the final document of the ICPD+5, it is significant that, through Cowen’s address, it effectively aligned itself with the Holy See and a small group of states that oppose abortion in all or most cases. In doing so, Ireland stepped outside the EU consensus, which is associated with championing the most liberal readings of states’ obligations under the ICPD *Programme of Action* as expressed in Paragraph 7.3. Hence, in this opening performative act, Ireland’s sovereign status is invoked *through the articulation of an oppositional stance on abortion*.

### *ICPD+10*

The 37th session of the UN Commission on Population and Development (CPD), and a dedicated session of the UN General Assembly (October 14, 2004) marking the 10<sup>th</sup> anniversary of the ICPD (ICPD+10), offer the next major windows on engagement by UN member states with the ICPD agenda. As it happened, the CPD session coincided with Ireland’s sixth term holding the Presidency of the Council of the EU (January to June 2004). This had the effect of confining Ireland’s pronouncements in relation to ICPD+10 to the EU collective statement, which Ireland was obliged to deliver on behalf of the EU.

In key respects, the EU statement delivered by Ireland to the CPD in 2004<sup>52</sup> is the antithesis of Ireland’s individual country statement to the same body five years earlier. First, as a collective

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<sup>51</sup> United Nations Population Fund, pp. 267-280.

<sup>52</sup> Ireland: Statement by Mr. Tom Mooney, Head of Delegation of Ireland, on behalf of the EU, 37th Session of the Commission on Population and Development, New York, 22 March 2004.

Please cite as: Niamh Reilly, “Ireland’s Abortion Regime on the Global Stage: Performative Acts and the Claim to State Sovereignty in Foreign Policy Discourse,” in *Gender, Nation, Text: Exploring Constructs of Identity*, ed. Lorraine Kelly, Tina-Karen Pusse and Jennifer Wood (Vienna: LIT Verlag, 2017), 155-185.

EU statement, the sovereign state is repressed; there is no reference to the importance of states determining at national level how to implement the ICPD *Programme of Action*. Much of the statement is a blend of descriptive accounts of what has or has not been achieved to address persistent obstacles to sexual and reproductive health, especially for women in the ‘developing world’, and declarative statements of the normative orientation that is required in response. The active, collective subject, ‘The EU’, is used sparingly and pointedly to underline the bloc’s ‘strong and consistent’ support for, or ‘strong commitment’ to the implementation of the ICPD agenda. Second, in striking contrast to Ireland’s 1999 address, which did not use the word ‘rights’ at all, the EU statement explicitly frames the ‘promotion of human rights’, ‘the rights of women and girls’ and ‘reproductive rights’ as integral to the effective realization of the *Programme of Action*. The six-page statement contains seven references to ‘sexual and reproductive health and rights’ or ‘reproductive health rights’ and calls for ‘human rights based reproductive and sexual health services’.

Moreover, on the question of abortion, within the limitations of the *Programme for Action*, consistent with the EU consensus, the statement leans toward an interpretation that potentially includes abortion rights. This is achieved primarily by underlining the impact of ‘unsafe abortion’ in exacerbating women’s risk of mortality in a dedicated single paragraph as follows:

Unsafe abortion continues to take a *heavy toll* on women’s lives. Meeting the unmet need for contraception would help reduce abortion. *Many thousands of women die* following recourse to *illicit and unsafe abortion*, a result of lack of choice of other means to avoid unwanted pregnancy. In this context, the *EU reaffirms its strong commitment to the provisions of ICPD and ICPD+5 relating to this issue*. (Emphasis added)<sup>53</sup>

While a positive right to abortion is not asserted in this paragraph, foregrounding the dire consequences of ‘illicit and unsafe abortion’ invites the inference that ‘legal and safe abortion’ is

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<http://web.dfa.ie/uploads/documents/Embassy/New%20York%20PM/Ireland%27s%20Term%20as%20EU%20Presiden cy%20in%202004/22%20march%202004.pdf>.

<sup>53</sup> Ireland, Statement by Mr. Tom Mooney.

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at least part of what is necessary to stop the avoidable deaths of 'many thousands of women' each year. This linguistic strategy contains the possibility of 'survivable subjects', women who might claim a right to access abortion. This implication is softened but not erased by the inclusion of qualifying claims that addressing the 'unmet need for contraception' would reduce (but not eliminate) the numbers of women who must resort to 'illicit and unsafe abortion'. In this regard, the EU statement on the 10<sup>th</sup> anniversary of the ICPD can be read as a renewed challenge to the influential position promulgated by the Holy See regarding implementation of the ICPD *Programme of Action* since 1994; that access to abortion should never be interpreted as a dimension of 'reproductive rights' or of similar terms in the programme.<sup>54</sup>

#### *ICPD+15*

In 2009, in the context of the 42<sup>nd</sup> session of the UN Commission on Population and Development (ICPD+15), Ireland resurfaces *qua* Sovereign state. Specifically, along with Comoros, Chile, Peru, Poland and Saint Lucia, and non-voting members Malta and the Holy See, Ireland records an 'explanation of position' that: 'any reference to reproductive rights and to sexual and reproductive health services must be read in the context of the Programme of Action and [does] not constitute promotion or encouragement of abortion'.<sup>55</sup> As in 1999, such an action at a formal UN meeting by a member state of the EU, although low key, is nonetheless a clear claim to sovereign authority, especially as the position espoused is at odds with the more liberal readings of the ICPD that have characterized EU statements on the matter since 1994. To appreciate the significance of this act by Ireland, it is helpful to consider the wider milieu of ICPD+15 and the differences between the stated positions of the EU (of which Ireland is ostensibly a part) and the positions of the Holy See.

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<sup>54</sup> United Nations Population Fund, p. 198.

<sup>55</sup> United Nations: Commission on Population and Development Concludes Session by Adopting Guideline for International Action over Next Five Years, POP/975, 3 April 2009. <http://www.un.org/press/en/2009/pop975.doc.htm>.

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In the context of ICPD+15, the main message emanating from the United Nations, and from most member states that expressed views, was a reassertion of the centrality of the human rights of women and gender equality in the implementation of the ICPD *Programme of Action*. As in 2004, high numbers of preventable deaths of women related to pregnancy, including as a result of illegal and unsafe abortions, form a key element of the narrative mobilized to bolster calls for a women-centered, human rights-based action in the nexus of development and population policies. This is evident in the EU statement, delivered by the Czech Republic’s Deputy Minister for Foreign Affairs, Helena Bambasová, which contains a particularly celebratory endorsement of the rights-based approach to reproductive health adopted at the ICPD:

It was at the Cairo conference [in 1994] where delegates confirmed reproductive rights and first proclaimed the right to attain the highest standard of sexual and reproductive health, which cuts to the core human existence, progress and survival. ... The members of the EU hold the firm belief that ... international agreed development goals will not be achieved unless these rights are vigorously promoted and protected.<sup>56</sup>

Some months later, the headlines of UN press statements, detailing proceedings of a two-day dedicated session of the General Assembly to mark ICPD+15, similarly capture the dominant narrative surrounding the review:

‘Secretary-General Urges Renewed Commitment to Gender Equality, Reproductive Health Rights, Marking 15th Anniversary of Cairo Population and Development Conference’<sup>57</sup>

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<sup>56</sup> Czech Republic: Statement on behalf of the European Union by Ms. Helena Bambesová, Deputy-Minister of the Ministry of Foreign Affairs of the Czech Republic, Commission on Population and Development, 42nd session, 30 March-3 April, New York, March 30, 2009.

<sup>57</sup> United Nations Department of Public Information: Secretary-General Urges Renewed Commitment to Gender Equality, Reproductive Health Rights, Marking 15th Anniversary of Cairo Population and Development Conference. GA/10869, 12 October 2009. <http://www.un.org/press/en/2009/ga10869.doc.htm>.

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‘Fifteen Years after Cairo Conference, Delegations Say, Much Work Remains to Ensure Women Did Not Die of Preventable, Treatable Pregnancy-Related Causes’<sup>58</sup>

In contrast, the statements and interventions of the Holy See at the same UN events continue its practice, since 1994, of explicitly qualifying the Holy See’s acceptance of human rights terminology *when applied to reproductive health and services* in line with conservative Catholic teaching. Also during the ICPD+15, going against the grain of the dominant drive to refocus attention on gender equality and reproductive rights, the Holy See begins to champion its version of ‘human-centered development’ as distinct from ‘rights-based development’ (thereby eschewing any potential recognition of a right to abortion). The Holy See’s account of human-centered development is overtly pro-natalist; it rejects ‘funding programs which focus upon lowering population growth rather than fostering an environment for development’.<sup>59</sup> Moreover, human-centered development is defined as ‘what the Holy See does’ as follows:

Through its continued presence and emphasis on providing quality and affordable education, health care, access to food and respect for all human rights, the Holy See and its various organizations show that care for the poor, along with overall poverty reduction, serves as a model for human-centered development.<sup>60</sup>

Immediately following this explication, the statement makes clear that such ‘human-centered development’ categorically excludes abortion. It also flags the commitment of the Holy See to shaping the actions of states (i.e., ‘public efforts’). It reiterates the Holy See’s

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<sup>58</sup> United Nations Department of Public Information: Speakers in Assembly Urge Support for Maternal Health, Reproductive Services, Backing Goals of 1994 International Conference on Population and Development. GA/10870, 13 October 2009. <http://www.un.org/press/en/2009/ga10870.doc.htm>.

<sup>59</sup> Holy See. Statement by H.E. Archbishop Celestino Migliore Apostolic Nuncio, Permanent Observer of the Holy See, Economic and Social Council, 42nd session of the Commission on Population and Development, On Item 4: Contribution of the Programme of Action of the International Conference on Population and Development to the internationally agreed development goals, including the Millennium Development Goals. New York. 1 April 2009. <http://holyseemission.org/statements/statement.aspx?id=216>.

<sup>60</sup> Holy See.

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[consistent] affirmation that *abortion is not a legitimate form* of sexual and reproductive health or services ... and hopes that international organizations and policymakers maintain or where possible *redirect public efforts toward human centered approaches* to achieving the MDGs. (Emphasis added)<sup>61</sup>

The pivotal place of the Holy See’s objection to abortion in its engagement with the ICPD agenda is further elaborated in its contribution to the General Assembly discussion on ICPD+5 (October 13, 2009). It says:

In addressing the role of the ICPD on maternal health, attempts were made too frequently to promote a notion of sexual and reproductive health that was *detrimental to unborn human life and the integral needs of women and men in society*. Suggesting that reproductive health included a right to abortion explicitly *violated the language* of the ICPD, *defied moral and legal standards within local communities* and divided efforts to address *the real needs of mothers and children*. (Emphasis added)<sup>62</sup>

In this quote, Catholic doctrine (i.e., that abortion is never permissible) is not declared as such. Rather, in making its argument against abortion, the Holy See relies on discrediting the rights-based ‘notion of sexual and reproductive health’. This is done by associating the imagined rights-bearing individual (in this case, a woman in possession of a right to abortion) with outcomes that are ‘detrimental to unborn human life’ and to ‘the integral needs of women and men in society’. The effect of the latter phrase is to endorse a ‘needs’-based approach (e.g., fulfilled through charity of religious organizations) and to close off a ‘rights’-based approach (i.e., guaranteed by the liberal state). In this worldview, neither women nor men figure as ‘individuals’; their needs are subsumed into the ‘integral needs of women and men’, seemingly, as dictated by their hetero-normative roles ‘in society’.

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<sup>61</sup> Holy See.

<sup>62</sup> United Nations Department of Public Information, Speakers in Assembly.

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To further implicitly bolster the Holy See’s position against possible recognition of an international right to abortion, legalist rhetoric is engaged in the assertion that any attempt to claim such a right ‘**violated** the language of the ICPD’ and ‘**defied** moral and legal standards within local communities’ (emphasis added). On the first point, as noted, while the language on abortion in the ICPD *Programme of Action* is circumspect, the notion that implementation of the ICPD agenda could entail a right to abortion is not incompatible *prima facie* with the ICPD *Programme of Action* (although obviously would go against the many objections registered against such an interpretation by the Holy See). The second point firmly locates legal and moral legitimacy in ‘local communities’. This reproduces a number of key tenets of conservative communitarianism. First, it rejects the legitimacy of international norms and law *per se*, which are cast as defying local norms, implying the latter are prior and superior. Second, while ‘local’ in the UN context often means ‘national, used by the Holy See in the term ‘moral and legal standards within local communities’, it alludes to recognition of faith communities and religious law in everyday life, potentially in competition with state or civil law. Finally, by invoking ‘the real needs of mothers and children’, the Holy See recognizes the female subject only as mother, whose ‘needs’ pertain to her role and status in the community as mother and not as a person in her own right.

Hence, when Ireland invokes its status as Sovereign state at the UN Commission on Population and Development, *solely* to object preemptively to interpretations of ‘reproductive rights’ and ‘sexual and reproductive health services’ that might include access to abortion, and when it refers to the Cairo *Programme of Action* primarily as a constraint on the possibility of an internationally recognized right to abortion, it clearly echoes key elements of the position of the Holy See and steps outside of the EU consensus. As a longtime member of the EU that otherwise represents itself in its foreign policy activity as a ‘modern’, ‘progressive’ and ‘secular’ state, and as a champion of gender equality and human rights, Ireland’s action, in tandem with Poland and Malta, has added significance. Further, the alignment of Ireland with the Holy See is corroborated by statements by Ireland in other low-key venues relating to ICPD+15.

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For example, in a short statement to the United Nations Family Planning Association, as a member of the executive, Ireland *qua* Sovereign eschews human rights terms, which diminish sovereign authority. Rather, it recognizes as *the positive contribution* of the ICPD placing the ‘education of girls, maternal health and the empowerment and status of women ... at the heart of the international agenda’.<sup>63</sup> In doing so, the empowered female subject permitted is the maternal subject, while the name of the abortion-seeking subject is ‘never called’. Underlining this, the statement stresses that the ‘ICPD Programme of Action remains the primary vehicle to ... reduce maternal mortality by three quarters by 2015’ and offers by way of positive example: ‘With Irish support, in ... Dar es Salaam, 40 to 60 babies are born safely every day’. This focus on education, maternal health and birth, and the positive association of these with ‘the empowerment and status of women’, rather than on the EU-favoured language of human rights of women, significantly resonates with the Holy See’s explication of ‘human-centered development’.

#### *CPD 2011: Fertility, reproductive health and development*

A former Policy and Advocacy Officer at the Irish Family Planning Association (IFPA), who attended various UN forums on behalf of the IFPA during the period under discussion, recalls that Ireland’s seemingly Vatican-friendly positions were a source of tension between Irish delegations to the UN and the EU delegation.<sup>64</sup> Apparently in an action intended, at least in part, to ameliorate such tensions, the 44<sup>th</sup> session of the Commission on Population and Development (April 2011) was the site of a particularly assertive performative speech act by Ireland *qua* Sovereign. The context is significant; once again Ireland visibly claims sovereign authority via pronouncements at a CPD session with a specific thematic focus: ‘Fertility,

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<sup>63</sup> Ireland: Statement by Ireland to UNFPA Board Meeting. 8 September 2009. <http://dfa.ie/uploads/documents/New%20York%20PM/UN%20Statements/8%20september%2009,%20statement%20to%20unfpa%20board%20meeting.pdf>.

<sup>64</sup> In interview with author, Dublin, July 2012. In author’s possession.

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reproductive health and development’.<sup>65</sup> Ireland’s intervention takes the form of an uncharacteristically detailed statement delivered by Anne Anderson, Ireland’s Permanent Representative to the UN at the time. It is noteworthy that this intervention has been interpreted, within IFPA and by others in Ireland sympathetic to the ICPD agenda, as a positive development.<sup>66</sup> (I will return to the basis of this view below.) In contrast, I argue that the implications of Ireland’s performative speech act at the 44<sup>th</sup> session of the CPD are retrogressive from a perspective of concern with advancing human rights-based approaches to reproductive and sexual health, not least *in* Ireland. The statement contains four principal moments or messages: opposition to abortion ‘as a method of family planning’; reassertion of the primacy of state sovereignty on matters of sexual and reproductive health and rights; the equation of state sovereignty with national law; and opposition to being bound by any international right to abortion that might be recognized in international law in future.

Echoing Ireland’s statement delivered to the CPD ten years earlier in 1999, it reasserts:

The ICPD Programme of Action underlines two important principles, first that *abortion should never be used as a method of family planning* and second, that the *availability or otherwise of abortion is a matter for decision by national governments in accordance with their national legislative frameworks*. (Emphasis added)<sup>67</sup>

As before, the command that ‘abortion should never be used as a method of family planning’, is misrepresented as an ICDP ‘principle’ – a usage that both infers legitimacy and obscures the conservative religious-doctrinal principle behind the command (i.e., the Catholic dictate that abortion is *always* wrong). In the second part of the sentence, the sovereign state is implicitly

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<sup>65</sup> In twenty annual sessions of the UN Commission on Population and Development since 1994, just three have had a thematic focus that includes reference to ‘reproductive health’ or ‘reproductive rights’, in 1996, 2002 and 2011.

<sup>66</sup> These views were expressed in informal exchanges at a public launch of the IFPA annual report in Dublin, November 14, 2012.

<sup>67</sup> Ireland: Statement of H.E. Ms. Anne Anderson, Permanent Representative, 44th Session of the Commission on Population and Development. Item 4: General Debate on National Experience in Population Matters: Fertility, Reproductive Health and Development. New York, 11 April 2011. <http://www.un.org/en/development/desa/population/pdf/commission/2011/country/agendaitem4/ireland.pdf>.

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invoked as the definitive source of authority in any decision about the ‘availability or otherwise of abortion’. Moreover, state sovereignty is implied to reside in ‘national legislative frameworks’. The punitive implications of the state’s prohibition of abortion are elided by the use of ‘availability’ rather than ‘legality’. Overall, the effect is to link state sovereignty firmly to state law, to divert attention from associations of anti-abortion positions with religious authority, and at the same time, to close off notions of ‘popular sovereignty’ or the ‘will of the people’, that are potentially disruptive to states authority. Having asserted the primacy of state sovereignty in this way – tied to the question of abortion and in the form of ‘state sovereignty as national legal sovereignty’ rather than popular sovereignty, the statement continues emphatically in Sovereign mode:

Ireland is fully committed to upholding these principles. Our starting point as an international community when we debate the issue of sexual and reproductive health and rights *must be* a clear acknowledgement that *it is for individual member states to determine* whether or not abortion should be part of ... sexual and reproductive health services ... provided *at national level*.<sup>68</sup>

This logic is further cemented by a remarkably peremptory statement, whereby Ireland *qua* Sovereign through its speech performs the conditions of its exemption from *any* international law that might include a right to access abortion. Specifically, the statement declares:

In this context, *Ireland wishes to put on record* that it *persistently objects* to any interpretation of sexual and reproductive health and rights or sexual and reproductive health services in international law as including abortion. (Emphasis added)<sup>69</sup>

While contested by some, the status of ‘persistent objector’ has a specific meaning and effect in international legal discourse:

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<sup>68</sup> Ireland: Statement of H.E. Ms. Anne Anderson.

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If, while a norm of international law is in its embryonic stages, a state consistently and openly objects to it, after time, while a norm may apply to other states that have consistently and regularly followed it ... *the norm will ... not apply to the state that objected to it in its formative stages.* (Emphasis added)<sup>70</sup>

In this moment, therefore, *on the issue of abortion*, Ireland performs the first of two elements of realist state sovereignty as it claims complete independence vis-à-vis the 'international community' and its international law. Ireland's 'persistent objector' statement is followed by a claim to supreme authority on the issue of abortion in the national domain, the second part of realist state sovereignty. It asserts:

In line with *our constitutional position*, Ireland does not believe that the right to sexual and reproductive health services includes *an intrinsic right to access to abortion services.*

In this claim, the implied supreme authority in Ireland is the constitution, further underlining a meaning of state sovereignty as vested in law and specifically expressed the basic law of the state. The 'constitutional position' alluded to is Article 40.3.3 of the Irish constitution, whereby 'the State guarantees the right to life of the unborn ... with due regard to the equal right to life of the mother'. The use of 'our' in the expression 'our constitutional position' is notable. It invokes a supposed universal and harmonious 'we' that masks the bitter discord that has attended this particular provision in Irish public life since its adoption in 1983, as well as the known punitive outcomes for pregnant girls and women in Ireland, when their rights come into conflict with the 'right to life of the unborn'. In this way, it conceals the dictatorial moment in maintaining the constitutional ban on abortion and the injurious operation of authorizing the pregnant woman to speak only as 'the mother'. The overall effect is to naturalize Ireland's extreme position on abortion. This is achieved by repeated performative acts wherein opposition to abortion is *constitutive* of Ireland *qua* Sovereign in the international arena; that is, by declaring perpetual independence from external interference in relation to abortion as a

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<sup>70</sup> American Society of International Law and the International Judicial Academy: General Principles of International Law: Customary International Law. International Judicial Monitor 1/5 (December 2006).

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'national' issue while also proclaiming the prohibition of abortion in Ireland as a singular expression of Ireland's internal supremacy via the constitution.

So, where is the 'progressive' moment in Ireland's statement to the Commission on Population and Development in 2011? Based on its reassertion of the primacy of state sovereignty in decisions relating to sexual and reproductive health and rights (SRHR), the Irish state declares it 'does not seek to influence decisions taken by other national governments on the issue [of abortion]'.<sup>71</sup> The statement continues:

We accept that countries in which abortion is legal may define [sexual and reproductive rights and health] nationally as including access to safe abortion services, in the same way that countries in which abortion is illegal or restricted may exclude abortion services from their definition of SRHR.<sup>72</sup>

One implication signaled here is that Ireland will not attach conditions to the allocation of Irish Aid funding. For example, it will not refuse aid 'on principle' to countries or projects that permit abortion under more liberal conditions than prevail in Ireland. In doing so, Ireland is enabled to retain its identity as progressive donor country in line with the more liberal EU consensus (of which it is also supposed to be party). This move also appears to distinguish Ireland's position on abortion from that of the Holy See, which strenuously seeks to influence governments and other actors in the international community to reject abortion and encourage instead 'human-centered development'. Given the clear overlap in language and discursive logic deployed in statements by Ireland and by the Holy See, the extent of the distance between Ireland and the Holy See on the issue of abortion is questionable. Ireland's statement to the CPD in 2011 nevertheless serves to obscure the conservative religious-doctrinal roots of the state's constitutional ban on abortion in the first instance. In doing so, the role of Ireland's opposition to abortion on the world stage purely as a constitutive act of sovereignty claiming is accentuated. Hence, the statement may have the effect of ameliorating diplomatic tensions with

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<sup>71</sup> Ireland: Statement of H.E. Ms. Anne Anderson.

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the EU on the issue of abortion and sustaining Ireland's reputation as a progressive donor country internationally. However, this performative act by Ireland also operates to underpin the persistence of restrictive regulation of abortion *in* Ireland, which continues to produce dire consequences for the women and girls whose reproductive experience render them 'at the mercy of sovereign power'.

## Conclusion

Much of the scholarship that seeks to explain Ireland's stance on abortion focuses on Ireland *qua* Nation. Such writing considers the historical and cultural significance of the Catholic Church and how the regulation of women's sexuality and reproductive lives has been inextricably tied to processes of nation-building and the construction of national identity in ways that are gendered and racialized. In this article, I have argued the importance of disentangling 'nation' and 'sovereign' and viewing sovereignty as a distinct analytical category and locus of discursive practice in understanding the nature and persistence of Ireland's stance on abortion. More specifically, I argue that Ireland's highly restrictive and punitive regulation of abortion can be read in part as a discursive effect of performative speech acts by Ireland *qua* Sovereign in the international domain. To support this interpretation, I have offered analyses of key statements made by Ireland relating to abortion in the context of the UN Commission on Population and Development and related UN venues, during the period 1999 to 2011. In doing so, I pay particular attention to how these discursive practices operate in enabling or closing off the linguistic conditions whereby 'abortion-seeking' women and girls in Ireland might be 'survivable subjects'.

A number of significant patterns and insights come into focus. First, in a wider context of globalization there are few opportunities, especially for small states like Ireland, to perform sovereignty in its classic sense, that is, to be *the final authority on a matter*. A close reading of Ireland's performative speech acts at the UN CPD suggests that the issue of abortion and

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specifically the promulgation of Ireland's prohibitionist stance on abortion are constitutive of Ireland *qua* Sovereign. This is achieved through discursive practices that equate state sovereignty (expressed as opposition to abortion) with state law (the constitutional position on abortion). In doing so, I argue that Ireland's position on abortion is unmoored from 'Irishness' or 'national identity' or 'popular sovereignty', and that, rather, it has come to signify pure sovereign power in the international arena.

Second, human rights discourse is much criticized across the philosophical and ideological spectrum. However, in the context of UN policy forums that deal with the nexus of population and development, opposition to human rights-based approaches to reproductive and sexual health is associated with two conservative sets of forces. These are: firstly, alliances of the most conservative religious actors who oppose sexual and reproductive freedom; and, secondly, critics of international law *because* it threatens state sovereignty. Ireland's performative speech acts on abortion must be read in light of these forces. Regarding conservative religious influences, the statements made by Ireland closely mirror discursive practices of the Holy See including categorically excluding abortion from the definition of reproductive health and rights, avoiding positive use of human rights language in relation to reproductive health, and affirming women's empowerment only in terms of motherhood. Within this discursive logic, abortion-seeking women are not permitted to speak. In particular, speaking to claim rights is foreclosed, which in this milieu, arguably is a vital linguistic strategy of 'survivable subjects'. For these reasons, the replacement within Ireland of a language of rights by a language of compassion or of deference to medical expertise as identified by Lisa Smyth is problematic.

At the same time, the repeated rehearsal of such conservative, Catholic positions by Ireland *qua* Sovereign is a potential source of diplomatic embarrassment to 'modern' Ireland.

Countering this, Ireland's promulgation of a strident defense of state sovereignty on the issue of abortion elides its alignment with the Holy See by signaling that Ireland's position on abortion is not a principled, religious one. It does this by proclaiming non-interference on the question of abortion in other countries, while simultaneously cementing the state's opposition to abortion

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*in* Ireland. The effect of these performative acts cannot be inconsequential. Abortion-seeking women in Ireland pay a steep price when Ireland is Sovereign through its opposition to abortion. They pay again when Ireland produces its distance from the Holy See through an ardent defense of state sovereignty that further entrenches the state's opposition to abortion in Ireland as a sign of that commitment. The weight of the mutually reinforcing associations that are invoked, of law, state sovereignty and the opposition to abortion, indicate the enormity of the task involved in reimagining abortion in Ireland. Resisting the erasure of rights-based language in this context is an important linguistic strategy that can enable abortion-seeking women to survive and transform the prevailing discursive horizon.