Abortion from an International Perspective after the *Dobbs* case

El aborto desde una perspectiva internacional tras el caso *Dobbs*

O aborto numa perspectiva internacional, após o caso *Dobbs*

Gabriela García Escobar*

* https://orcid.org/0000-0002-7030-9543. Facultad de Derecho, Universidad Panamericana, Alvaro del Portillo 49, Zapopan, Jalisco, 45010, Mexico. gabgarcia@up.edu.mx

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Abstract

The American Supreme Court of Justice recently overturned the precedents that legalized abortion in the *Dobbs v. Jackson Women's Health Organization* case. This article analyzes whether this decision is consistent with the current status of abortion as established in International Human Rights Law (IHRL), according to its classical sources (treaties and customary law). Since no treaty includes a right to abortion and there is no consistent practice among states to legalize abortion, various soft law instruments are discussed to clarify the consensus on this issue. These instruments include the agreements reached at the World Population Conferences, the Fourth World Conference on Women of 1995, and the pronouncements and case law of human rights mechanisms (treaty monitoring bodies and regional courts). This analysis shows that the arguments and conclusions in the *Dobbs* case are consistent with what states have agreed to internationally on the matter.

Keywords

Dobbs v. Jackson Women's Health Organization; International Human Rights Law; abortion legality; soft law instruments; human rights mechanisms.

Resumen

Hace poco, la Corte Suprema de Justicia estadounidense anuló los precedentes que legalizaban el aborto en el caso *Dobbs v. Jackson Women's Health Organization*. En este artículo se analiza si esta decisión es coherente con el estatus actual del aborto conforme al Derecho Internacional de los Derechos Humanos (DIDH), según sus fuentes clásicas (tratados y derecho consuetudinario). Dado que no existe ningún tratado que incluya el derecho al aborto ni ninguna práctica coherente entre los Estados para legalizar el aborto, se examinan varios instrumentos del *soft law* para aclarar el consenso sobre el tema. Entre ellos se encuentran los acuerdos alcanzados en las Conferencias Mundiales de Población, la Cuarta Conferencia Mundial sobre la Mujer de 1995 y los pronunciamientos y la jurisprudencia de los mecanismos de derechos humanos (órganos de supervisión de tratados y tribunales regionales). Este análisis demuestra que los argumentos y las conclusiones del caso *Dobbs* son coherentes con lo que los Estados han acordado internacionalmente sobre esta cuestión.

Palabras clave

Dobbs v. Jackson Women's Health Organization; Derecho Internacional de los Derechos Humanos; legalidad del aborto; instrumentos del *soft law*; mecanismos de derechos humanos.

Resumo

O Supremo Tribunal de Justiça americano anulou recentemente os precedentes que legalizavam o aborto no caso *Dobbs v. Jackson Women's Health Organization*. Este artigo analisa se esta decisão é consistente com o atual estatuto do aborto tal como estabelecido no Direito Internacional dos Direitos Humanos (DIDH), de acordo com as suas fontes (tratados e direito consuetudinário). Uma vez que não existe um tratado que inclua o direito ao aborto e não existe uma prática consistente entre os Estados para legalizar o aborto, são analisados outros instrumentos internacionais para clarificar o consenso sobre esta questão. Estes incluem os acordos alcançados nas Conferências Mundiais sobre População, a Quarta Conferência Mundial sobre as Mulheres de 1995 e os pronunciamentos e a jurisprudência dos mecanismos de direitos humanos (órgãos de controlo dos tratados e tribunais regionais). Esta análise mostra que os argumentos e as conclusões do processo *Dobbs* são coerentes com o que os Estados acordaram a nível internacional sobre esta questão.

Palavras-chave

Dobbs v. Jackson Women's Health Organization; Direito Internacional dos Direitos Humanos; legalidade do aborto; instrumentos de soft law; mecanismos de direitos humanos.

Introduction

Abortion has always sparked a heated debate and ultimately became a human rights battle. Both proponents and opponents of abortion use the language and values of human rights to frame their positions.[1] Pro-choice voices advocate for bodily autonomy, while pro-life groups defend the right to life; in doing so, both sides present different visions of women's dignity and how to foster a free and equal society.

Recent changes around the world illustrate the unsettled nature of the debate. Some countries have decided to legalize the practice democratically, as in Ireland's 2018 referendum.[2] Others have opened up to a more permissive legal regime on abortion through the judiciary, as in Colombia[3] and Mexico.[4]

On the other hand, states such as Poland,[5] El Salvador,[6] and Malta[7] have maintained their position on abortion laws, severely restricting the practice or allowing it only in limited circumstances. In other places, such as the United States, after nearly fifty years of legal abortion, the decision upheld in the *Dobbs v. Jackson Women's Health Organization* case overturned legal precedents that had established a constitutional right to access abortion. This ruling has had a cascading effect with the enactment of restrictive legislation in more than half of the states in the United States.[8]

Although abortion has always been a controversial issue, it has changed significantly in recent decades in that it now evokes strong emotional responses on both sides of the debate in terms of the international component of the discussion and the use of human rights language to frame the discussion.

1 See Martti Koskenniemi, "Whose Intolerance, Which Democracy?," in Gregory Fox and Brad Roth (eds.), *Democratic Governance and International Law*, Cambridge, Cambridge University Press, 2010.

2 Luke Field, "The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date," in *Irish Political Studies*, 4 (2018), pp. 608–628.

3 Constitutional Court of Colombia, *Sentencia C-055/22*, February 21, 2022.

4 Mexican Supreme Court of Justice, *Acción de Inconstitucionalidad 148/2021*, September 7, 2021.

5 Constitutional Court of Poland, *Case K 1/20* (22 October 2020).

6 Gabriela García Escobar and José Gilberto Solís Jiménez, "Claves para la resolución del caso 'Beatriz': El estatus jurídico del aborto y la protección del no nacido," in Débora Ranieri de Cechini, Sofía Calderone and Lucía María Traverso (eds.), *El aborto ante la Corte IDH: A propósito del caso "Beatriz vs. El Salvador,"* Buenos Aires, El Derecho, 2024, pp. 149–155 and 158–161.

7 Parliament of Malta, "Bill No. 28 Criminal Code (Amendment No. 3) Bill," Parliament of Malta, 2022, https://parlament.mt/14th-leg/bills/bill-028-criminal-code/, consulted on May 29, 2024.

8 Dan Mangan, "Here Are the States Set to Ban or Severely Limit Abortion Access Now That Roe v. Wade Is Overturned," *CNBC*, September 24, 2022, in https://www.cnbc.com/2022/06/24/states-set-to-ban-abortion-after-supreme-court-overturns-roe-v-wade.html, consulted on January 25, 2024.

The European Parliament's response to the *Dobbs* decision combines all of the above. This organ of the European Union issued a resolution explicitly addressing this ruling and condemning the Supreme Court of Justice of the United States (SCOTUS).[9] This resolution calls on states to defund pro-life groups and proposes that a right to abortion be included in both the Charter of Fundamental Rights of the European Union and in a revision of the 1948 Universal Declaration of Human Rights (UDHR).

Another example of this shift comes from a press release of the Inter-American Commission on Human Rights (IACoHR) condemning SCOTUS's decision and urging the United States to guarantee women's access to abortion as a human rights obligation.[10] Also, in a 2019 statement by Kate Gilmore, the deputy high commissioner for human rights at the United Nations (UN) Human Rights Council, referring to the situation in the United States, stated that laws restricting abortion are "extremist hate" and "torture."[11]

Along with these interventions, scholars[12] and international non-governmental organizations (such as Human Rights Watch and Amnesty International)[13] have condemned the *Dobbs* decision and firmly maintained that abortion is a human right, and thus, states are internationally obliged to legalize this practice. Supporting this idea, Western media has also consistently characterized this ruling as a human rights violation and a threat to women's rights,[14] while pro-life organizations have defended the *Dobbs* decision as a step forward in protecting the right to life and women's rights.[15]

9 European Parliament, "European Parliament resolution on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU," B9 0365/2022, July 7, 2022.

10 IACoHR, "IACHR: The United States must protect and guarantee women's right to reproductive health," Organization of American States, June 24, 2023, https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/134.asp, consulted on May 29, 2024.

11 Liz Ford, "US Abortion Policy Is 'Extremist Hate' and 'Torture', Says UN Commissioner," *The Guardian*, June 4, 2019, in https://www.theguardian.com/global-development/2019/jun/04/us-abortion-policy-extremist-hate-torture-un-commissioner-kate-gilmore, consulted on January 22, 2024.

12 Risa Kaufman, Rebecca Brown, Catalina Martínez Coral, Jihan Jacob, Martin Onyango, and Katrine Thomasen, "Global impacts of *Dobbs v. Jackson Women's Health Organization* and abortion regression in the United States," in *Sexual and Reproductive Health Matters*, 1 (2022), pp. 22–31. For scholars that argue that abortion is a human right, see Christina Zampas and Jaime M. Gher, "Abortion as a Human Right—International and Regional Standards," in *Human Rights Law Review*, 2 (2008).

13 Human Rights Watch, "Q&A Access to Abortion is a Human Right," Human Rights Watch, 2022, https://www.hrw.org/news/2022/06/24/qa-access-abortion-human-right, consulted on January 22, 2024; and Amnesty International, "Key Facts on Abortion," Amnesty International, 2020, https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/, consulted on November 16, 2023.

14 Ariana Eunjung, "U.S. Joins 19 Nations, Including Saudi Arabia and Russia: 'There Is No International Right to an Abortion,'" *The Washington Post*, September 24, 2019, https://www.washingtonpost.com/health/2019/09/24/us-joins-nations-including-saudi-arabia-russia-there-is-no-international-right-an-abortion/, consulted on January 22, 2024.

15 See Alliance Defending Freedom, "Dobbs v. Jackson Women's Health Organization," Alliance Defending Freedom, 2022, https://adflegal.org/case/dobbs-v-jackson-womens-health-organization, consulted on January 25, 2024; and The Heritage Foundation, "Dobbs v. Jackson Women's Health Organization: An Opportunity to Correct a Grave Error," The Heritage Foundation, 2022, https://www.heritage.org/the-constitution/report/dobbs-v-jackson-womens-health-organization-opportunity-correct-grave-error, consulted on January 25, 2024.

Looking at these different reactions, a deeper discussion of this landmark decision is needed for two main reasons. On the one hand, the strategic political and economic position of influence of the United States implies that the *Dobbs* case will have a worldwide political impact on the abortion debate, just as the *Roe v. Wade* precedent did.[16]

On the other hand, the fact that both sides of the debate defend their positions as being "in line with internationally protected women's human rights and international human rights standards"[17] suggests that an analysis of the status of abortion under the norms of International Human Rights Law (IHRL) is needed. This analysis is especially relevant considering that international organizations, several scholars, non-governmental organizations, and Western media maintain that the *Dobbs* decision contradicts international human rights standards on abortion.

Keeping in mind these accusations, the purpose of this article is not to analyze whether the *Dobbs* decision is compatible with the international obligations assumed by the United States. Rather, the purpose is a broader and general one: to analyze the accuracy of these accusations in terms of whether or not the SCOTUS decision in *Dobbs* is consistent with the status of abortion under the current state of IHRL and, thus, whether or not the *Dobbs* decision is inconsistent with international human rights standards on this topic.

Considering that the normative value of soft law is not clear under General International Law[18] or IHRL,[19] for this article, all hard and soft law instruments related to abortion will be analyzed in order to determine whether there is an international obligation to legalize abortion and whether there are international parameters for its regulation.

Thus, this article will first analyze the precise content of the *Dobbs* decision in Section 1 to clarify what the decision does and does not say about abortion as a right. Then, Section 2 will examine the status of abortion in IHRL, first, as established in the formally recognized sources of International Law: treaties and customary law.

16 See Sundari Ravindran, Pascale Allotey, and Sofia Gruskin, "The US abortion decision is already having global impacts," *Knowable Magazine*, 31 August 2022.

17 European Parliament, "European Parliament resolution on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU."

18 Hugh Thirlway, *The Sources of International Law*, Oxford, Oxford University Press, 2019, pp. 186–194. For the different theories on the sources of International Law, see Jean D'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, 2018. For an introduction to the scholarly debate on the normative status of soft law, see Jean D'Aspremont and Tanja Aalberts, "Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks," in *Leiden Journal of International Law*, 2 (2012).

19 See Dinah Shelton, *Advanced Introduction to International Human Rights Law*, Cheltenham, Edward Elgar, 2020, chap. 4; and Samantha Besson, "Sources of International Human Rights Law: How General is General International Law?," in Jean D'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, 2018.

As explained in this section, no treaty or customary trend recognizes abortion as an international human rights obligation. However, several soft law materials can provide guidance in determining the international human rights standards on this issue and what parameters could guide its regulation. To this end, Section 2 examines some of the state discussions that took place in adopting the UDHR, the agreements of the World Population Conferences held between 1966 and 1994, and the Fourth World Conference on Women in 1995. In addition, the development of abortion in terms of a human rights obligation is analyzed by looking at the relevant pronouncements of human rights treaty monitoring bodies and the case law of regional human rights courts in the European and Inter-American systems.

Finally, the parameters found in IHRL and relevant instruments on the status of abortion are compared to the parameters and conclusions reached in the *Dobbs* case (Section 3). This analysis shows that the *Dobbs* case is consistent with the current status of abortion according to the parameters found in IHRL and the agreements of states.

1. The *Dobbs v. Jackson Women's Health Organization* Case

For context, the *Dobbs v. Jackson Women's Health Organization* case challenged the constitutionality of Mississippi's Gestational Age Act, which provides that

> Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform (…) or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.[20]

An abortion clinic called the Jackson Women's Health Organization challenged the Mississippi law, arguing that there is a constitutional right to an abortion under the judicial precedents of *Roe v. Wade* and *Planned Parenthood v. Casey*.

In the first case, SCOTUS argued that access to abortion is a constitutional right that can only be restricted if there is a "compelling" state interest, according to the strict scrutiny test used by the Court.[21] This compelling interest would be satisfied until a fetus becomes viable (24 and 28 weeks after conception).[22] Using this parameter, the ruling developed a trimester framework to guide judges and lawmakers in regulating and permitting abortion. In the first trimester, the state should not intervene or impel access to abortion; in the second trimester, the state should not intervene unless there is a risk to the health of the woman;

20 *Dobbs v. Jackson Women's Health Organization* No. 19-1392, 597 U.S. (2022), § I.
21 *Roe v. Wade* 410 U.S. 113 (1973), § 173–174.
22 *Roe v. Wade*, § 160.

and in the last trimester (when the fetus becomes viable), abortion may be restricted, but the regulation should include an exception in case of the health of the mother is at risk.[23]

In the second case, SCOTUS decided to eliminate the trimester framework and instead ruled that the state's compelling interest in restricting abortions of viable unborn children can only be justified when the health of the mother is at risk.[24] Thus, the Court held that instead of the strict scrutiny test, abortion laws should be evaluated under an "undue burden" standard, which refers to placing a substantial obstacle in the path of a woman seeking to abort a non-viable fetus.[25] If a state regulation imposes an undue burden on a woman's access to abortion, then this right is violated.

In June 2022, SCOTUS decided to overturn these precedents. In the *Dobbs* decision, the majority opinion criticized *Roe v. Wade's* idea that the right to privacy protected abortion. In *Roe*, SCOTUS recognized that although the Constitution did not explicitly grant any right to privacy, it could be found somewhere in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[26] In both *Roe* and *Casey*, SCOTUS maintained that abortion was a part of the Due Process Clause of the Fourteenth Amendment, which purported to provide both substantive and procedural protections for what they perceived as a notion of "liberty."[27]

The majority opinion questioned this interpretation, acknowledging that SCOTUS has been "reluctant" to recognize rights not mentioned in the Constitution.[28] However, the Court did not deny that rights not explicitly included in the Constitution could be inferred from certain amendments, but it cautioned that specific parameters should be established to avoid an arbitrary proliferation of rights and interpretations.

To this end, SCOTUS decided to examine, first, the standards behind the notion that the Fourteenth Amendment's reference to "liberty" protects a particular right, and second, to consider whether a right to obtain an abortion is part of a broader right supported by judicial precedent.

On the first question, SCOTUS recognized that the Due Process Clause of the Fourteenth Amendment might guarantee rights not mentioned in the Constitution, but the right in question must be rooted in the traditions and history of the United States and be an essential component of "ordered liberty."[29]

23 *Roe v. Wade,* § 163–166.
24 *Planned Parenthood v. Casey* 505 U.S. 833 (1992), § 873–876.
25 *Planned Parenthood v. Casey,* § 876–878.
26 *Roe v. Wade*, § 152–153.
27 *Roe v. Wade,* § 168–179; and *Planned Parenthood v. Casey,* § 846–850.
28 *Dobbs v. Jackson Women's Health Organization*, § II A 2.
29 *Dobbs v. Jackson Women's Health Organization,* § II A 1–2.

On this point, the justices warned that "in interpreting what is meant by 'liberty,' the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about the liberty that Americans should enjoy."[30]

In this regard, SCOTUS argued that history and tradition provide an essential map for the American conception of "ordered liberty." Based on this premise, SCOTUS found that a right to abortion was not deeply rooted in the nation's history and traditions because,

> Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before Roe, no federal or state court had recognized such a right. Nor had any scholarly treatise. Indeed, abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day Roe was decided.[31]

In light of this, SCOTUS ruled that the "historical understanding of 'ordered liberty' does not prevent the people's elected representatives from deciding how abortion should be regulated."[32] So, states can debate and change their applicable laws.

On the second issue, SCOTUS reviewed judicial precedents and analyzed the doctrine of *stare decisis* to determine whether a right to abortion could be upheld from this angle. SCOTUS recalled that the purpose of this doctrine is to protect the rights of those who act on the basis of prior cases.[33] However, this doctrine does not mean precedents are automatically and uncritically mandatory. The Court stated that "a proper application of *stare decisis*, however, requires an assessment of the strength of the grounds on which *Roe* was based."[34]

SCOTUS argued that several factors determine whether a precedent should be overturned, including the nature of the Court's error, the quality of the reasoning, workability, effects on other areas of law, and the reliance interest.[35] After a detailed analysis, the majority opinion maintained that both *Roe* and *Casey* settled the abortion debate on the basis of a zero-sum game. Moreover, in both precedents, the Court acted as a legislative body establishing a detailed set of rules for each month of pregnancy (*Roe v. Wade*) and a confusing and contro-

30 *Dobbs v. Jackson Women's Health Organization*, § II A 2.
31 *Dobbs v. Jackson Women's Health Organization*, § II B 1–2.
32 *Dobbs v. Jackson Women's Health Organization*, § II C 1.
33 *Dobbs v. Jackson Women's Health Organization*, § III.
34 *Dobbs v. Jackson Women's Health Organization*, § a.
35 *Dobbs v. Jackson Women's Health Organization*, § III.

versial "undue burden" test for a woman's right to have an abortion (*Planned Parenthood v. Casey*).[36]

SCOTUS ruled that, in light of the absence of a constitutional right to abortion, the *Roe* and *Casey* precedents should not be followed in the future. Then, the appropriate test to apply to the Mississippi law to analyze its constitutionality was the "rational-basis review."[37] This means that the Court must apply a test of reasonableness to decide whether the state's asserted justifications for regulating abortion are legitimate, i.e., whether they serve a legitimate interest.[38]

SCOTUS evaluated the reasons for the restriction on obtaining an abortion after 15 weeks of pregnancy. The Court noted that this issue is different from contraception, intimate sexual relations, or marriage because it involves the destruction of fetal life.[39] The Court also noted that, when the Mississippi law was enacted, besides the United States, only six other states (Canada, China, the Netherlands, North Korea, Singapore, and Vietnam) permitted non-therapeutic abortions on demand after the twentieth week of gestation.[40]

Moreover, the legislature that passed the law did so on the basis of scientific studies. It found that a heartbeat can be detected at five or six weeks of gestation, that the unborn human being begins to move around in the womb at eight weeks, that all essential physiological functions are formed at nine weeks, that all vital organs are functioning at ten weeks; and that the unborn human being takes on complete human form at 12 weeks.[41] In addition, most abortions after 15 weeks involve "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," which is a "barbaric practice" and a dangerous procedure for women.[42]

Based on these parameters, SCOTUS decided that *Roe* and *Casey* should be overturned and confirmed that Mississippi's restriction on abortion after 15 weeks of pregnancy met the "rational-basis review" standard. Thus, by overruling *Roe* and *Casey*, SCOTUS concluded that the issue of abortion should be decided democratically by each state through the regular legislative process rather than through the judiciary. In this sense, the *Dobbs* decision rejected the Court's previous judicial activism,[43] understood as a judicial usurpation of the legislative function and, thus, as a deviation of the judicial function.[44]

36 *Dobbs v. Jackson Women's Health Organization*, § III B 1 b.
37 *Dobbs v. Jackson Women's Health Organization*, § VI A.
38 *Dobbs v. Jackson Women's Health Organization*, § VI A.
39 *Dobbs v. Jackson Women's Health Organization*, § II C 1.
40 *Dobbs v. Jackson Women's Health Organization*, § I.
41 *Dobbs v. Jackson Women's Health Organization*, § I.
42 *Dobbs v. Jackson Women's Health Organization*, § I.
43 For a discussion about the different meanings of judicial activism, see: Juan Bautista Etcheverry, "Formalismo, Activismo y Discrecionalidad Judicial," in *Díkaion* 2 (2020), pp. 336–351; and Pablo Rivas-Robledo, "¿Qué Es El Activismo Judicial? Parte II: Una Definición Más Allá de La Extralimitación de Funciones," in *Díkaion* 2 (2022), pp. 1–28.
44 María Marta Didier, "*Dobbs vs. Jackson*: un giro copernicano en la jurisprudencia de la Corte Suprema de Estados Unidos," in *Prudentia Iuris*, 94 (2022), p. 370.

2. The Status of Abortion in IHRL

To begin this analysis, following the classical theory of the sources of International Law,[45] the status of abortion under IHRL will first be assessed according to what has been established in treaties (Section 2.1) and customary law (Section 2.2). Sections 2.3 and 2.4 will then examine various soft law instruments to determine whether there can be an international obligation to legalize abortion or whether international parameters for its regulation have been established.

2.1 Treaties

In terms of treaties, no human rights treaty includes access to abortion as a human right or as an international obligation of states.[46] However, the absence of the issue in international treaties does not mean that states have not discussed it during the drafting process of various human rights instruments.

Discussions on abortion as an international concern began as early as 1946 during the UDHR drafting process. Some delegates from Latin American and Muslim countries wanted to protect life from conception in that document. At the same time, some Western states, China, and the USSR maintained that such a proposal would jeopardize their laws permitting the practice of abortion.[47]

To avoid dealing with deeply divisive issues, the drafters of the UDHR decided that such a controversial subject should not be included in an international instrument.[48] Therefore, the delegates agreed that the question of abortion must be left to national law.[49] This reflects their view that sensitive matters do not enjoy universal support and, therefore, cannot be uniformly regulated by a human rights instrument. For the same reason, abortion was also explicitly

45 As recognized in Article 38 of the Statute of the International Court of Justice. Also see Malgosia Fitzmaurice, "The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present," in Jean D'Aspremont and Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford, Oxford University Press, 2018; and Hugh Thirlway, *The Sources of International Law*, pp. 8–12.

46 Except for one regional African treaty, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003 (the Maputo Protocol). However, in addition to being a treaty with a limited regional scope (applicable only among African states that have ratified it), Article 14.2.c refers only to access to abortion in limited circumstances (sexual assault, incest, and to protect the mother's health). Moreover, this Article has been controversial, and not all members of the African Union have ratified it, see African Union, "High Level Consultation on the Ratification of the Maputo Protocol," African Union, January 29, 2018, https://au.int/en/newsevents/20180129/high-level-consultation-ratification-maputo-protocol#:~:text=To date%2C, consulted on January 30, 2024.

47 See the study conducted by Samnøy on the history of the drafting of this document, where he points out that one of the key features that contributed to the adoption of the UDHR was that the drafters decided to exclude problematic and sensitive issues from the UDHR. One of these was the issue of abortion. See Åshild Samnøy, *Human Rights as International Consensus: Making the Universal Declaration of Human Rights 1945-1948*, Bergen, Michelsen Institute,1993, pp. 89–90.

48 Samnøy, *Human Rights as International Consensus: Making the Universal Declaration of Human Rights 1945-1948*, p. 90.

49 Samnøy, *Human Rights as International Consensus: Making the Universal Declaration of Human Rights 1945-1948*, p. 90.

excluded during the drafting process of the Convention on the Rights of the Child[50] and the International Covenant on Civil and Political Rights (ICCPR).[51]

These exclusions (rather than omissions) say something clear about the drafters' intent regarding abortion. Moreover, these events should be considered in light of Article 4 of the American Convention on Human Rights of 1969 (ACHR), which explicitly protects life from conception.[52] In addition, the Convention on the Rights of the Child states in its preamble that the child requires "legal protection, before as well as after birth." Thus, states decided explicitly to exclude a right to abortion in human rights treaties, and in some cases, states have decided to protect human life from conception explicitly.

2.2 Customary Law

In customary International Law, to determine whether access to abortion is a human right, it is imperative to demonstrate that there is a consistent and largely uniform state practice and that this practice is followed because it is considered legally binding (*opinio iuris*).[53]

Following the two-element theory, state practice in regulating abortion has not been uniform. To date, 117 countries either prohibit abortion altogether (24) or allow it only in limited circumstances (93), mainly to save the life of the mother or in cases of rape or incest.[54] The former is legal in 98 % of the countries worldwide, while the latter is included in 43 % of laws.[55] It is also important to note that in the majority of states that allow abortion, it is not a right but rather an act that is exempt from criminal responsibility.[56]

Only about 30 % of countries in the world allow abortion on demand (or almost entirely on demand), but they have different gestational limits.[57] It is important

50 As described by Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague, Martinus Nijhoff, 1999, p. 102.

51 As seen in the compilatory work of Marc Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, The Hague, Martinus Nijhoff, 1987, p. 121.

52 American Convention on Human Rights, Art. 4.1: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

53 Malcolm Shaw, *International Law*, Cambridge, Cambridge University Press, 2014, pp. 53–66.

54 See the study conducted by the Pew Research Center in Angelina Theodorou and Aleksandra Sandstrom, "How Abortion Is Regulated around the World," *Pew Research Center*, October 6, 2015, https://www.pewresearch.org/fact-tank/2015/10/06/how-abortion-is-regulated-around-the-world/, consulted on January 30, 2024.

55 See the study conducted by the parliament of the United Kingdom at UK All-Party Parliamentary Group on Population, "Who Decides? We trust women Abortion in the developing world and the UK," March 2018, p. 15, in https://static1.squarespace.com/static/5dc18cebdf3c7b576d0caacf/t/6018198ac5636e4cc26f08b7/1612192166560/Abortion+hearings+report+-+March+2018.PDF, consulted on January 23, 2024.

56 See the research of Alejandro González-Varas Ibáñez, "Aspectos Ético-Jurídicos de La Regulación Del Aborto En España," in *Revista General de Derecho Canónico y Derecho Eclesiástico Del Estado*, 23 (2010) and Louise Finer and Johanna Fine, "Abortion Law Around the World: Progress and Pushback," *American Journal of Public Health*, 4 (2013), p. 585.

57 UK All-Party Parliamentary Group on Population, "Who Decides? We trust women Abortion in the developing world and the UK," p. 15.

to note that among these states, some of them (e.g., the former Soviet Union states, Turkey, India, Tunisia, China, and Vietnam) have liberalized abortion not because there is an emerging *opinio iuris* toward considering abortion as a human rights obligation, but because this practice was legalized as a population control strategy to regulate fertility.[58]

Thus, according to the classical theory of sources of International Law, there is no solid basis for a human right to abortion. However, this issue has been discussed through other soft law instruments (political commitments and pronouncements of human rights mechanisms). Although these instruments do not constitute hard law and thus are not legally binding,[59] it is relevant to analyze them because they reveal the position of states (to determine the existence or emergence of consensus) and the parameters that have been discussed for the regulation of abortion. On the other hand, it is also pertinent to study them because some scholars argue that these instruments should be considered sources of international rights and obligations.[60]

2.3 World Population Conferences

The first relevant political commitment that needs to be examined is the UN population conferences held from 1966 to 1994. These were intergovernmental meetings to discuss issues related to the wave of population growth that began in the 1960s, particularly in developing countries. As noted in their proceedings (and emphasized by historians),[61] these conferences were primarily concerned with fertility reduction.[62] Thus, the resulting documents are not

58 See the research conducted by several scholars on the legalization of abortion and other methods of family planning as a population control strategy in different states to reduce population growth: Mark Savage, "The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries," in *Stanford Law Review*, 4 (1988); Donna Harsch, "Communism and Women," in Stephen Smith (ed.), *The Oxford Handbook of the History of Communism*, Oxford, Oxford University Press, 2013; Irene Maffi and Malika Affes, "The Right to Abortion in Tunisia after the Revolution of 2011: Legal, Medical, and Social Arrangements as Seen through Seven Abortion Stories," in *Health and Human Rights Journal*, 2 (2019); Bussarawan Teerawichitchainan and Sajeda Amin, "The Role of Abortion in the Last Stage of Fertility Decline in Vietnam," in *International Perspectives on Sexual and Reproductive Health*, 2 (2010); Betsy Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control*, Chicago, Haymarker Books, 2016; and Matthew Connelly, *Fatal Misconception: The Struggle to Control World Population*, Cambridge, Harvard University Press, 2008.

59 For a general overview of the concept and status of soft law, see Daniel Thürer, "Soft Law," Max Planck Encyclopedias of International Law, March 2009, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1469?prd=EPIL, consulted on May 31, 2024; and D'Aspremont and Aalberts, "Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks."

60 See, for example, Ulrich Fastenrath, "A Political Theory of Law: Escaping the Aporia on the Validity of Legal Arguments in International Law," in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford, Oxford University Press, 2011; and Armin von Bogdandy and Ingo Venzke, "Beyond Dispute Settlement: Judicial Institutions as Lawmakers," *German Law Journal*, 5 (2011), pp. 979–1003.

61 See Hartmann, *Reproductive Rights and Wrongs: The Global Politics of Population Control*; and Connelly, *Fatal Misconception: The Struggle to Control World Population*.

62 See Alisa Sánchez, "Population Discourse, Family Planning Policies, and Development in Colombia 1960-1969," in Tanya Saroj (ed.), *Reproductive Justice and Sexual Rights: Transnational Perspectives*, Routledge, 2019;

human rights instruments but governmental policies regulating demographic dynamics. Moreover, these documents are not treaties, do not enshrine principles of International Law, and do not codify customary norms.

The outcome documents of these conferences are non-binding intergovernmental agreements whose normative value is questionable because they were adopted with numerous reservations that indicate deep disagreement.[63] Nevertheless, an analysis of their content is valuable because they are the only intergovernmental agreements reached in International Law on abortion. On the other hand, their analysis is also crucial because national courts and international mechanisms cite these instruments to justify the existence of a human right to access abortion.[64]

The issue of abortion was first raised at the International Conference on Population held in Mexico City in 1984. The American and Swedish representatives tried to include a right to abortion in the conference report, but their proposal was rejected.[65] In recommendation 18 of that report, the agreement reached called for "tak[ing] appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning, and whenever possible, provide for the humane treatment and counselling of women who have had recourse to abortion."[66]

The next conference was the International Conference on Population and Development (ICPD) held in Cairo in 1994. Its final document was the Programme of Action of the International Conference on Population Development. This conference has become the most important instrument in developing what are known as "reproductive rights." Although reproductive rights cannot properly be considered human rights since the Programme of Action itself states that the ICPD "does not create any new international human right,"[67] it is appropriate to look at its definition, which was agreed upon in paragraph 7.3 in the following terms:

and Jason Finkle and Barbara Crane, "The Politics of Bucharest: Population, Development, and the New International Economic Order," in *Population and Development Review*, 1 (1975).

63 See Mary Ann Glendon, "What Happened at Beijing," *First Things*, January 2016, https://www.firstthings.com/article/1996/01/005-what-happened-at-beijing, consulted on January 27, 2024; and Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics,* Cornell University Press, 1998, p. 188.

64 For instance: Mexican Supreme Court of Justice, *Acción de Inconstitucionalidad 148/2021*; CESCR, *General Comment 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22, May 2, 2016; and IACoHR, *Informe No. 9/20 Beatriz v. El Salvador,* March 3, 2020, para 97.

65 See the drafting history of this conference in Seamus Grimes "From Population Control to 'Reproductive Rights': Ideological Influences in Population Policy," in *Third World Quarterly*, 3 (1998), p. 215.

66 The International Conference on Population, "The International Conference on Population, 1984," in *Population and Development Review,* 4 (1984), p. 31.

67 International Conference on Population and Development, "Report of the International Conference on Population and Development," Cairo, 05/09/1994-13/09/1994., para 1.15.

> 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.[68]

Thus, the agreed concept of "reproductive rights" did not include any reference to abortion as a human rights obligation. Instead, the document reaffirmed the 1984 agreement in paragraph 8.25: "Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning."[69] It also stated that one of the main objectives in achieving the full enjoyment of women's health is to reduce "morbidity from unsafe abortion"[70] and that "prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion."[71]

The program further states that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe."[72] Thus, the agreement reached by states indicates no international obligation to decriminalize abortion or to consider it as a human right. Instead, states can decide democratically at the national level how each society wishes to regulate the matter.

In addition, states agreed that the outcome documents (especially the chapter on reproductive rights)[73] should be implemented "with full respect for the various religious and ethical values and cultural backgrounds of its people, and in conformity with universally recognized international human rights."[74] Therefore, this document provides guidance on how states should regulate abortion and all matters related to reproductive health. These issues should be decided locally, respecting the different religious and cultural backgrounds, and in accordance with universally recognized international human rights norms.

68 International Conference on Population and Development, "Report of the International Conference on Population and Development," p. 40.
69 International Conference on Population and Development, "Report of the International Conference on Population and Development," p. 46.
70 International Conference on Population and Development, "Report of the International Conference on Population and Development," p. 57.
71 International Conference on Population and Development, "Report of the International Conference on Population and Development," pp. 58–59.
72 International Conference on Population and Development, "Report of the International Conference on Population and Development," para 8.25.
73 International Conference on Population and Development, "Report of the International Conference on Population and Development," para 7.1.
74 International Conference on Population and Development", p. 11.

Such provisions were necessary in light of the numerous reservations made by most states.[75] They demanded respect for different cultural and religious views on sexuality. Some Latin American states, like El Salvador, Honduras, Peru, Nicaragua, Paraguay, Guatemala, Ecuador, the Dominican Republic, and Argentina, noted that according to the ACHR, their legislation, and their religious beliefs, life should be protected from conception. Libya, Malta, and the United Arab Emirates said they opposed abortion as a means of family planning. Guatemala also expressed a general reservation to Chapter VII, which refers to reproductive rights, stating that "the General Assembly's mandate to the Conference does not extend to the creation or formulation of rights."[76]

A similar scenario occurred during the Fourth World UN Conference on Women in Beijing in 1995. As with the population conferences, this conference's final report is non-binding, but its analysis is relevant in determining what states have agreed to in international discussions on abortion. At this conference, the Beijing Declaration and Platform for Action, which reaffirmed the 1994 agreement on the regulation of abortion, was adopted amid deep disagreement and numerous reservations.[77]

These state positions on abortion are not controversies of the past. In fact, the same discrepancies can be seen in the follow-up sessions to the population conferences. The most recent one took place in Nairobi in 2019 (the Nairobi Summit or ICPD+25). Tensions were so high that the event was not even hosted by the UN General Assembly due to a lack of agreement among states but by the governments of Kenya and Denmark and the UN reproductive rights agency known as the United Nations Population Fund (UNFPA).

In response to this conference, the United States sponsored a statement joined by Brazil, Belarus, Egypt, Haiti, Hungary, Libya, Poland, Senegal, St. Lucia, and Uganda. The document emphasizes that the concept of reproductive rights and its current interpretations:

> Do not enjoy international consensus, nor contemplates the reservations and caveats incorporated into the Cairo outcome. In addition, the use of the term SRHR [sexual and reproductive health and rights] may be used to actively promote practices like abortion. There is no international right to abortion; in fact, international law clearly states that '[e]veryone has the right to life' (e.g., Article 3 of the Universal Declaration of Human

75 All the reservations could be consulted at: International Conference on Population and Development, "Report of the International Conference on Population and Development," pp. 189–280.

76 International Conference on Population and Development, "Report of the International Conference on Population and Development," p. 142.

77 Fourth World Conference on Women, "Beijing Declaration and Platform for Action," Beijing, 04/09/1995-15/09/1995, p. 40.

> Rights). The ICPD notes that countries should 'take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning' (ICPD 7.24) and to 'reduce the recourse to abortion' strongly affirming that'… [a]ny measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process' (ICPD paragraph 8.25). This legislative process should reflect the democratic expression of the will of the people, through their freely elected representatives.[78]

Another important statement was adopted in September 2019, during the UN General Assembly's high-level meeting on universal health coverage. A coalition of the United States, Bahrain, Belarus, Brazil, the Democratic Republic of the Congo, Egypt, Guatemala, Haiti, Hungary, Iraq, Libya, Mali, Nigeria, Poland, Russia, Saudi Arabia, Sudan, United Arab Emirates, and Yemen presented a joint statement that declared

> We do not support references to ambiguous terms and expressions, such as sexual and reproductive health and rights in U.N. documents, because they can undermine the critical role of the family and promote practices, like abortion, in circumstances that do not enjoy international consensus and which can be misinterpreted by U.N. agencies.[79]

In sum, the prevailing view on abortion, as agreed at intergovernmental conferences, indicates that there is no international consensus recognizing access to abortion as a human right. Rather, states have preferred to leave the issue open for each society to decide locally through the normal legislative and democratic decision-making process.

2.4 Pronouncements of Human Rights Mechanisms

For this article, another set of instruments must be examined: the pronouncements of human rights treaty monitoring bodies (TMBs) and the case law of regional human rights courts.

2.4.1 TMBs

With regard to TMBs, there are ten such mechanisms. They monitor the core human rights treaties on civil and political rights, economic, social and cultural rights, women's rights, children's rights, the elimination of racial discrimination, the elimination of torture, the rights of persons with disabilities, enforced disappearances, and the rights of migrant workers.

78 U.S. Department of Health and Human Services, "Joint Statement on the Nairobi Summit," February 21, 2020, https://srhrindex.srhrforall.org/uploads/2020/04/2019_Joint-Statement-on-the-Nairobi-Summit-on-the-ICPD25.pdf, consulted on January 12, 2024.

79 Kylie Atwood, "US asks for abortion references to be removed from UN pandemic response plan," *CNN*, May 19, 2020, https://edition.cnn.com/2020/05/19/politics/us-abortion-un-pandemic-response/index.html, consulted on January 22, 2024.

Non-judicial bodies consist of "committees of independent experts that monitor implementation of the core international human rights treaties."[80] Their primary function is to assess state parties' reports on the implementation of their human rights obligations through a process of "constructive dialogue" and the adoption of "concluding observations," which are recommendations on how to best comply with their human rights obligations.[81] In addition, TMBs may receive individual complaints and issue views in a quasi-judicial procedure if the state concerned has ratified the relevant protocol. All of their pronouncements are non-binding.

Another relevant practice that has developed among TMBs is the adoption of "General Comments" or "General Recommendations," which have been described as "a treaty body's interpretation of human rights treaty provisions, thematic issues or its methods of work" and which "seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions."[82]

Five out of these ten mechanisms have adopted statements on abortion. The Committee on the Elimination of Discrimination against Women (CEDAW), which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, stated in its General Recommendation No. 30 that the protection of women's rights includes the obligation to legalize and provide abortion, as part of reproductive rights.[83] In the 2011 case of *L.C. v. Peru*, the CEDAW also affirmed that access to a therapeutic abortion is part of the state's obligation to eliminate discrimination in access to health care and to the applicant's reproductive rights.[84]

In its General Comment 22 on sexual and reproductive health, the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights, indicated that the denial of abortion may amount to a violation of the right to life and security and may constitute torture or cruel, inhuman, or degrading treatment.[85]

80 Office of the High Commissioner of Human Rights, "Human Rights Treaty Bodies," United Nations, in https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx, consulted on January 27, 2024.

81 Office of the High Commissioner of Human Rights, "Human Rights Treaty Bodies."

82 Office of the High Commissioner of Human Rights, "Human Rights Treaty Bodies."

83 CEDAW, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations,* CEDAW/C/GC/30, 1 November 2013, para 52; and CEDAW, *General Recommendation No. 35 on gender based violence against women, updating general recommendation No. 19,* CEDAW/C/GC/35, July 26, 2017, paras 18 and 29. Also see CEDAW's concluding observations on several reports where it requests states to legalize abortion: CEDAW, *Concluding observations on the sixth periodic report of Zimbabwe,* CEDAW/C/ZWE/CO/6, March 10, 2020, para 39; CEDAW, *Concluding observations on the fifth periodic report of Pakistan*, CEDAW/C/PAK/CO/5, March 10, 2020, para 43; CEDAW, *Concluding observations on the fourth periodic report of Côte d'Ivoire*, CEDAW/C/CIV/CO/4, July 30, 2019, para 43.

84 CEDAW, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, October 17, 2011, paras. 8.10–8.16.

85 CESCR, *General Comment 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, *ibid*., para 10.

Following this line of reasoning, the CESCR has interpreted restrictions on abortion as "not compatible with other fundamental rights, such as the woman's right to health and life."[86] In several concluding observations, the CESCR has ordered the decriminalization of abortion and the provision of access to it (as part of the notion of reproductive health and rights), for example, in the case of Ecuador in 2020,[87] Senegal in 2020,[88] Pakistan in 2018,[89] Honduras in 2017,[90] Kenya in 2017,[91] the Philippines in 2017,[92] Guatemala in 2015,[93] El Salvador in 2015,[94] and Sri Lanka in 2011.[95]

The Human Rights Committee (CCPR) also framed the legalization of abortion as a human rights obligation (derived from the notion of reproductive health and rights) in the concluding observations of the Central African Republic (2019),[96] Senegal (2018),[97] Nigeria (2018),[98] El Salvador (2017),[99] and Ghana (2015),[100] among others.

In the 2016 case of *Mellet v. Ireland*, the CCPR ruled that Ireland's balance between protecting the unborn and women's rights was not justified because Ms. Mellet experienced "intense physical and mental suffering" that amounted to cruel, inhuman, or degrading treatment.[101] The CCPR also ruled that the denial of access to abortion constituted a violation of the right to privacy because the balance struck by Ireland between the protection of life from conception and Ms. Mellet's right to privacy was "unreasonable and arbitrary." The CCPR held this because "the options open to her [Ms. Mellet] were inevitably a source of intense suffering."[102] In the 2017 case of *Whelan v. Ireland*, the CCPR also maintained that the denial of access to abortion constituted cruel, inhuman,

86 CESCR, *Concluding observations on the sixth periodic report of Poland*, E/C.12/POL/CO/6, October 26, 2016, para 47.
87 CESCR, *Concluding observations on the fourth periodic report of Ecuador*, E/C.12/ECU/CO/4, November 14, 2019, para 52.
88 CESCR, *Concluding observations on the third periodic report of Senegal*, E/C.12/SEN/CO/3, November 13, 2019, paras 36–37.
89 CESCR, *Concluding observations on the initial report of Pakistan*, E/C.12/PAK/CO/1, July 20, 2017, paras 77–78.
90 CESCR, *Concluding observations on the second periodic report of Honduras*, E/C.12/HND/CO/2, July 11, 2016, paras 53–54.
91 CESCR, *Concluding observations on the combined second to fifth periodic reports of Kenya*, E/C.12/KEN/CO/2-5, April 6, 2016, paras 53–54.
92 CESCR, *Concluding observations on the combined fifth and sixth periodic reports of the Philippines*, E/C.12/PHL/CO/5-6, October 26, 2016, paras 51–52.
93 CESCR, *Concluding observations on the third periodic report of Guatemala*, E/C.12/GTM/CO/3, December 9, 2014, para 23.
94 CESCR, *Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador*, E/C.12/SLV/CO/3-5, June 19, 2014, para 22.
95 CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights on Sri Lanka*, E/C.12/LKA/CO/2-4, December 9, 2010, para 34.
96 HRC, *Concluding observations on the third periodic report of the Central African Republic,* CCPR/C/CAF/CO/3, April 30, 2020, paras 15–16.
97 HRC, *Concluding observations on the fifth periodic report of Senegal*, CCPR/C/SEN/CO/5, December 11, 2019, paras 22–23.
98 HRC, *Concluding observations on Nigeria in the absence of its second periodic report*, CCPR/C/NGA/CO/2, August 29, 2019, paras 22–23.
99 HRC, *Concluding observations on the seventh periodic report of El Salvador*, CCPR/C/SLV/CO/7, May 9, 2018, paras 15–16.
100 HRC, *Concluding observations on the initial reports of Ghana*, CCPR/C/GHA/CO/1, August 9, 2016, paras 23–24.
101 HRC, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, November 17, 2016, paras 7.4–7.6.
102 HRC, *Mellet v. Ireland,* para 7.8.

or degrading treatment because of the suffering and mental anguish that Ms. Whelan endured.[103]

The Committee on the Rights of the Child (CRC) has also insisted on access to abortion for children[104] and adolescent girls "without the need for the consent of and to be accompanied by a parent or legal guardian."[105] Even the Committee against Torture (CAT), whose mandate seems to be completely removed from this debate, has joined this view and has recommended the legalization of abortion.[106]

However, these interpretations cannot be seen as directly and automatically creating an international obligation to legalize abortion or as recognizing a right to access abortion in IHRL. Three issues about the nature and scope of the TMB's pronouncements should be clarified. First, they are non-binding, meaning they are recommendations that states should consider in good faith but are not obliged to adopt them.[107]

Second, because of the non-binding nature of their pronouncements, there is a debate in International Law as to whether or not TMBs can be considered the ultimate interpreters of human rights treaties.[108] This question becomes even more controversial when one considers that there is no international consensus among states on the recognition of abortion as a human rights obligation and that states have explicitly chosen to leave the regulation of this matter to each society at the local level. As Samantha Besson has argued, human rights mechanisms

> should only offer new interpretations of international human rights law in the course of their monitoring activity when those are based on an existing transnational human rights practice and the common ground arising thereof. In the absence of such a common ground or 'consensus,' they should respect domestic authorities' 'margin of appreciation' in specifying and restricting their respective international human rights' duties.[109]

Third, TMBs have been widely criticized for their weakly constructed interpretations and lack of mastery of general rules of International Law.[110] As the

103 HRC, *Whelan v. Ireland,* CCPR/C/119/D/2425/2014, March 17, 2017, paras 7.5–7.7.

104 CRC, *Concluding observations on the fifth periodic report of Pakistan*, CRC/C/PAK/CO/5, July 11, 2016, paras 51–52.

105 CRC, *Concluding observations on the combined fifth and sixth periodic reports of Rwanda*, CRC/C/RWA/CO/5-6, February 28, 2020, para 36. Also see CRC, *Concluding observations on the combined third to fifth periodic reports of Kenya,* CRC/C/KEN/CO/3-5, March 21, 2016, paras 49–50.

106 CAT, *Concluding observations on the seventh periodic report of Peru*, CAT/C/PER/CO/7, December 18, 2018, paras 40–41; and CAT, *Concluding observations on the seventh periodic report of Poland,* CAT/C/POL/CO/7, August 29, 2019, paras 33–34.

107 See Gabriela García Escobar, "The Normative Value of Human Rights Treaty bodies' Interpretations at the International Court of Justice," in *Revista Tribuna Internacional*, 23 (2023).

108 See Johanna Harrington, "The Human Rights Committee, Treaty Interpretation, and the Last Word," *EJIL:Talk!*, 2015, https://www.ejiltalk.org/the-human-rights-committee-treaty-interpretation-and-the-last-word/, consulted on January 10, 2024.

109 Besson, "Sources of International Human Rights Law: How General is General International Law?," p. 860.

110 See for example Michael O'Flaherty, "Towards Integration of United Nations Human Rights Treaty Body Recommendations: The Rights-Based Approach Model," in Mashood Baderin and Robert McCorquodale (eds.),

legal basis for their statements, these five treaty bodies use treaty provisions (such as the right to health, the prohibition of torture, the right to privacy, and even the protection of children) without explaining why these rights should be interpreted in terms of an obligation to legalize abortion, which contradicts other relevant intergovernmental agreements on the topic (the ICPD) and treaties (the ACHR).

In some cases, the conclusions of these TMBs seem to be taken completely out of context. For example, the CAT stated that denying access to abortion violates the obligation to take internal measures to prevent acts of torture,[111] which is defined in its mandate treaty as

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[112]

Under this legal definition, the prohibition of abortion is hardly comparable to this crime.[113] The CAT has not demonstrated that denial of access to abortion constitutes an "intentionally inflicted" severe pain or suffering by a public official or other person acting in an official capacity to obtain a confession or as punishment for the acts of another, to intimidate, or to discriminate.

The same problem is seen in the CCPR's categorization of the criminalization of abortion as cruel, inhuman, or degrading treatment. This treaty body has recognized no definition of what constitutes cruel, inhuman, or degrading treatment. However, it has stated that "the nature, purpose and severity of the treatment applied"[114] should be analyzed in each case to determine whether a particular practice qualifies as such. In both the *Mellet* and *Whelan* cases, the CCPR did not conduct a legal analysis (according to the parameters set by this mechanism itself) to justify why the criminalization of abortion amounted to cruel, inhuman, or degrading treatment.

Economic, Social and Cultural Rights in Action, Oxford, Oxford University Press, 2007; and Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights," in *Vanderbilt Journal o Transnational Law*, 42 (2009).

111 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2.

112 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1.

113 See an analysis in this regard in María Carmelina Londoño Lázaro, "La noción de tortura, tratos crueles, inhumanos y degradantes en el derecho internacional de los derechos humanos: consideraciones a propósito del caso 'Beatriz y otros vs. El Salvador'," in Débora Ranieri de Cechini, Sofía Calderone and Lucía María Traverso (eds.), *El aborto ante la Corte IDH: A propósito del caso "Beatriz vs. El Salvador,"* Buenos Aires, El Derecho, 2024, pp. 211–247.

114 HRC, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment),* thirty-second session, 1988, para 4.

Moreover, the *travaux préparatoires* of the ICCPR indicate that the drafters understood this cruel, inhuman, or degrading treatment in terms of serious crimes such as slavery, compulsory labor, or forced servitude.[115] In this context, it is difficult to maintain that the denial of abortion fits into this categorization, especially when no legislation considers the prohibition of abortion under this criminal category.

The same applies to the assumption that the denial of access to abortion constitutes an arbitrary and unreasonable interference with the right to privacy because of the suffering that it may cause to some women. In order to justify such a conclusion, the CCPR had to carry out a test according to the parameters set by this mechanism itself, which establishes that "the concept of arbitrariness" can refer to interference provided by law if it is not "in accordance with the provisions, aims, and objectives of the Covenant" or if it is not "reasonable in the particular circumstances."[116] This TMB did not provide any justifications as to why Ireland's abortion regulation was inconsistent with the aims and objectives of the ICCPR (especially in light of the drafting history of that treaty, which left the issue of abortion to be decided by each state)[117] or unreasonable.

In some cases, TMBs do not even develop a clear and structured argument at all, but only a bold self-referential affirmation,[118] as the Norwegian scholar Birgit Schlütter points out in her critique:

> Treaty bodies use their own jurisprudence and General Comments to interpret their covenant's provisions even further, or to confirm their own interpretations. Ultimately, this method may alienate human rights interpretations from national state practice and implementation. When referring mainly to General Comments and their own jurisprudence, human rights interpretation is only concerned with the treaty body's own perception of the rights enshrined in 'its' convention.[119]

This situation can be seen in the work of the CEDAW, the CCPR, the CESCR, and the CRC, whose interpretations that the right to health includes access to abortion are based on their own self-referential concluding observations. None of them developed a legal argument or parameters to support their conclusions. They simply assume that the right to health includes reproductive rights, which they interpret to include a right to abortion.

Looking at the Cairo and Beijing agreements (the sources of this notion of reproductive rights), it is difficult to maintain, first, that reproductive rights are

115 See Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, pp. 161–176.
116 HRC, *General Comment No. 16: Article 17 (Right to privacy)*, para 4.
117 See Section 2.1 of this article.
118 See as an example HRC, *Whelan v. Ireland*, para 7.8.
119 Birgit Schlütter, "Aspects of Human Rights Interpretation by the UN Treaty Bodies," in Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge, Cambridge University Press, 2012, p. 292.

internationally recognized human rights (and part of the right to health) and second, that access to abortion is part of its definition (which was explicitly excluded by states as a method of family planning).

It is also important to note that the methodology used by some treaty bodies to develop this argument on abortion does not include a thorough analysis of all the positions and a legal assessment of the global consensus. For example, the discrepancies between civil society, states, academics, and treaty body members created tensions during the CCPR's adoption of General Comment No. 36 on the right to life in 2018. This General Comment was controversial because part of the debate centered on the inclusion of abortion as a human rights obligation. In order to define the content of this document, the CCPR held a General Discussion Day with broad participation from states, NGOs, and academics. There were 23 submissions from states, seven from UN agencies, 33 from academics, and 117 from NGOs.[120]

Several state submissions,[121] for example, from Austria, Japan, and Malta, insisted that there was no international obligation to legalize the practice. Poland criticized the General Comment's exclusive reference to the right to life of pregnant women in the context of abortion without mentioning the right to life in the context of motherhood and other everyday concerns. Russia criticized the inclusion of abortion, arguing that the CEDAW should discourage abortion rather than promote it. The United States insisted that abortion was not part of the mandate of the ICCPR and that the issue was explicitly excluded from its provisions, in line with its drafting history. The only state submissions supporting abortion were from Denmark, Sweden, and the Netherlands.

Of the academic submissions,[122] at least 19 out of 33 opposed including abortion in the General Comment. Several academics insisted that there is no right to abortion, that it violates the right to life, and that this statement is an ultra vires act on the part of the CCPR. Others insisted that the document was meant to be a consensus document, so controversial and sensitive issues had no place in it. One submission insisted that abortion violated the ICCPR's recognition of unborn life, given the prohibition of the death penalty for pregnant women in Article 6(5). Medical associations from Romania and the United Kingdom also submitted their professional opinions opposing abortion.

As for the NGO submissions, at least 55 out of 117 opposed the inclusion of abortion.[123] Nevertheless, the CCPR ignored all these dissenting voices and

120 All the submissions can be consulted at Office of the High Commissioner of Human Rights, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life," United Nations, https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx, consulted on January 25, 2024.

121 All state submissions can be consulted at Office of the High Commissioner of Human Rights, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life."

122 All academic submissions can be consulted at Office of the High Commissioner of Human Rights, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life."

123 All NGO submissions can be consulted at Office of the High Commissioner of Human Rights, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to Life."

decided to include abortion as part of the right to life of women with confusing and vague language.[124]

There was a similar disagreement among the members of the CCPR. During the adoption of this General Comment, the chairman of the session, Egyptian diplomat Ahmed Amin Fathalla, accused the treaty body of "permitting abortion with no criteria or restrictions or conditions and leaving such a decision to the free will of a woman and a girl under the cover of respecting their free choice and privacy," which he argued would deny the right to life of the unborn child and contradict the primacy of this right as recognized by the CCPR itself.[125] Mr. Fathalla further stated that the CCPR should not prioritize the right to privacy over the right to life and the scientific evidence of the life of the unborn child.[126] Mr. Fathalla's comments were strongly criticized by the French, Tunisian, and American members of the CCPR.[127]

Thus, although some TMBs have taken the view that states must provide access to abortion as an international human rights obligation, such pronouncements cannot be seen per se as creating a new human right because of all the factors mentioned. Nor can these pronouncements be considered as setting international standards for the regulation of abortion, as they do not provide any guidelines, tests, or assessments that national authorities can use.

2.4.2 Regional Courts

There is another international source of guidance for examining the status of abortion under IHRL, which refers to the rulings of two regional human rights systems: the Inter-American system of human rights and the European one. The first system comprises the Inter-American Commission on Human Rights (IACoHR) and the Inter-American Court of Human Rights (IACtHR). The European Court of Human Rights (ECHR) constitutes the European system.

The pronouncements of the IACoHR, as in the case of treaty bodies, are non-binding, and similar criticisms apply due to the lack of legal rigor in their inter-

124 HRC, *General Comment No. 36: Article 6 the right to life,* CCPR/C/GC/36, September 3, 2019, para 8: "Restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable (…) States parties should remove existing barriers to effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers, and should not introduce new barriers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions."

125 UN Web TV, "(Part Four) General Comment - 3561st Meeting 124th Session of Human Rights Committee," United Nations, http://webtv.un.org/meetings-events/human-rights-treaty-bodies/human-rights-committee/watch/part-four-general-comment-3561st-meeting-124th-session-of-human-rights-committee/5855729620001/?term= starting in 46:25, consulted on January 16, 2024.

126 UN Web TV, "(Part Four) General Comment - 3561st Meeting 124th Session of Human Rights Committee."

127 UN Web TV, "(Part Four) General Comment - 3561st Meeting 124th Session of Human Rights Committee."

pretations, as will be discussed. On the other hand, the IACtHR and the ECHR judgments are binding decisions, but only between the parties to the concrete case.[128] Therefore, keeping in mind these caveats, for this article, these rulings will be examined, as they can provide parameters for the regulation of abortion.

Concerning the Inter-American system of human rights protection, in its 2019 report on violence and discrimination against women, the IACoHR declared that women should have access to abortion as part of their reproductive rights.[129] However, as explained, this concept, as agreed by states, does not include a right to access abortion. Moreover, this statement directly contradicts the ACHR (the IACoHR's mandate treaty), which is the only human rights convention that explicitly protects the right to life from conception.[130]

In this report, the IACoHR acknowledges that there is no treaty guaranteeing a human right to access abortion, but it insists on the existence of such an obligation (just as treaty bodies do) based on a self-referential statement that such a right has been affirmed by the TMB mentioned above and by the IACoHR itself.[131] In support of this latter source, the IACoHR refers to its own reports in which it has ordered El Salvador,[132] Honduras,[133] the Dominican Republic,[134] and Nicaragua[135] to decriminalize abortion as a human rights obligation.

Similar to the situation among TMBs, the IACoHR's internal position appears to be far from settled. In a Twitter post in June 2022, the IACoHR congratulated Mexico on the decriminalization of abortion in the state of Guerrero and the recent rulings of the Mexican Supreme Court that declared the criminal-

128 American Convention on Human Rights, Art. 68.1; and European Convention on Human Rights, Art. 46. With respect to the IACtHR, there is a debate about the legitimacy of the "conventionality control," a tool created by this court that affirms that its precedents are binding on all state parties to the American Convention on Human Rights. To explore this debate, see Ariel Dulitzky, "An Inter-American Constitutional Court? The Intervention of the Conventionality Control by the Inter-American Court of Human Rights," *Texas International Law Journal*, 1 (2015); and Ingrid Suárez Osma, *Control de convencionalidad y autoprecedente interamericano*, Bogota, Universidad de la Sabana, 2015.

129 IACoHR, *Violencia y discriminación contra mujeres, niñas y adolescentes: Buenas prácticas y desafíos en América Latina y en el Caribe*, OEA/Ser.L/V/II, November 14, 2019, paras 200–208.

130 American Convention on Human Rights, Art. 4.1: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

131 IACoHR, *Violencia y discriminación contra mujeres, niñas y adolescentes: Buenas prácticas y desafíos en América Latina y en el Caribe*, paras 205–210.

132 IACoHR, *Anexo al Comunicado No. 011/18. Conclusiones y observaciones sobre la visita de trabajo de la Comisión Interamericana de Derechos Humanos a El Salvador*, January 29, 2018, http://www.oas.org/es/cidh/prensa/comunicados/2018/011.asp, consulted on October 4, 2023.

133 IACoHR, *Comunicado de Prensa No. 171/18. CIDH concluye su visita a Honduras y presenta sus Observaciones Preliminares*, Organization of American States, August 3, 2018, https://www.oas.org/es/cidh/prensa/comunicados/2018/171.asp, consulted on January 15, 2024.

134 IACoHR, *Informe Anual 2018 - Capítulo IV.B República Dominicana*, Organization of American States, 2018, https://www.oas.org/es/cidh/docs/anual/2018/docs/IA2018cap.5RD-es.pdf, paras 91–106, consulted on January 23, 2024.

135 IACoHR, *Informe Anual 2018 – Capitulo IV.B Nicaragua*, Organization of American States, 2018, para 219, http://www.oas.org/es/cidh/docs/anual/2018/docs/IA2018cap.4B.NI-es.pdf; and IACoHR, *Anexo al Comunicado No. 011/18;* IACHR, *Comunicado de Prensa No. 171/18;* IACoHR, *Informe Anual 2018 - Capítulo IV.B República Dominicana*, paras 91–106.

ization of abortion unconstitutional.[136] In response, the IACoHR's Colombian commissioner, Carlos Bernal Pulido, took to his Twitter account to express his disagreement with the IACoHR's statement[137] and, in a separate opinion,[138] insisted that there is no internationally recognized right to abortion and recalled the obligation to protect life from conception under the Inter-American system's founding treaty.

Something similar happened at the IACtHR in 2021, with the decision in *Manuela vs. El Salvador*. This was a polemic case because it involved a mother who committed infanticide against her newborn,[139] but the issue of the criminalization of abortion in El Salvador was raised several times by the IACoHR and the IACtHR, according to them, in order to provide a context for the commission of infanticide (referred to as an "obstetric complication").[140]

In this decision, Judge Eduardo Vio Grossi, in his dissenting opinion, affirmed that the IACtHR is duly bound to resolve disputes in accordance with International Law and in light of the fact that "*no existe norma jurídica interamericana ni internacional alguna, sea convencional, costumbre internacional o principio general de derecho, que reconozca al aborto como un derecho*."[141] He also insisted that the only pronouncements that support the idea of abortion as a right are non-binding resolutions of international bodies composed of international functionaries rather than state representatives, who do not interpret existing International Law but rather seek to change it.[142]

As this article is being written, there is another case pending at the IACtHR (*Beatriz vs. El Salvador)*[143] that will examine access to abortion as a human rights obligation. An *amicus curiae* brief was submitted to the IACtHR with the support of 119 lawyers from Latin America and Europe, arguing that there is no human right to abortion under International Law and, therefore, no interna-

136 The tweet is available at https://twitter.com/CIDH/status/1532853712653324290.

137 The tweet is available at https://twitter.com/carloslbernal/status/1532857383793397763?s=20&t=-NNLANkaE-58ayU_K4AMMqw.

138 The full separate opinion is available at https://centrodebioetica.org/en-la-comision-interamericana-de-derechos-humanos-un-voto-razonado-defiende-el-derecho-a-la-vida-desde-la-concepcion/.

139 As the autopsy report of the newborn found in a septic tank revealed: "the corpse was at a stage of accelerated putrefaction owing to the fecal material, the heat of the tank, and the humidity. Internally, it was found that excreta obstructed the upper airway, the optic dosimasia revealed total expansion of both lungs in the thoracic cavity; the hydrostatic dosimasia was positive for air, which shows that the infant was born alive and breathed. The cause of its death was mechanical asphyxia due to obstruction of the upper airway with excreta, and severe umbilical hemorrhage". IACtHR, *Manuela v. El Salvador* (2017) Preliminary objections, merits, reparations and costs, Serie C No. 441, footnote 128. A detailed analysis of Manuela's and other similar cases in El Salvador can be seen in Ligia de Jesús Castaldi, "El caso manuela y las 17+ contra El Salvador: Un fraude ante la Corte Interamericana de Derechos Humanos y la comunidad internacional," in *Derecho Público Iberoamericano*, 17 (2020).

140 IACtHR, *Manuela v. El Salvador,* para 27–30 and 52–63; and IACoHR, *Informe 153/18, Caso 13.069, Informe de fondo, Manuela y familia v. El Salvador*, OEA/Ser.L/V/II.170, December 7, 2018, para 32–68.

141 IACtHR, *Manuela v. El Salvador* (partially dissenting opinion of Judge Eduardo Vio Grossi), para 13.

142 IACtHR, *Manuela v. El Salvador,* para 13.

143 IACoHR, *Informe No. 9/20, Caso 13.378, Informe de fondo, Beatriz v. El Salvador*, OEA/Ser.L/V/II.175, March 3, 2020.

tional obligation to decriminalize it.[144] Hearings in the case took place in March of 2023,[145] so the Court's decision will be published in the coming months.

On the other side of the Atlantic Ocean, the ECtHR has ruled that there is no human right to abortion as such,[146] but that there are several rights and interests at stake in the practice.[147] It has also ruled, contrary to the CCPR, that the prohibition of abortion, even if it may cause inconvenience and suffering to the petitioner, cannot be considered cruel, inhuman, or degrading treatment.[148]

However, in the 2010 case of *A, B, C vs. Ireland*, the ECtHR framed its analysis of access to abortion within the scope of the right to privacy. Although, it recognized that

> Article 8 [on the right to privacy] cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.[149]

This premise implies that when a practice falls within the scope of protection of a human rights norm, the Court is called upon to apply a proportionality test to determine whether or not the state interference constitutes a human rights violation. The ECHR's test requires analyzing whether the interference pursued a legitimate aim and was "necessary in a democratic society."[150] The latter step requires the ECHR to determine whether there is a "pressing social need" for the measure and whether it is proportionate to the aim pursued, which requires a fair balancing of the interests at stake and an analysis of the breath of the margin of appreciation depending on the circumstances.[151]

With regard to whether the prohibition of abortion in Ireland pursued a legitimate aim, the ECHR affirmed that this regulation "was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum."[152] Thus, this restriction pursued the legitimate aim of "the protection of morals of which the protection in Ireland of the right to life of the unborn was one

144 The content of the amicus curiae brief can be consulted at https://drive.google.com/file/d/1vZwWwxIMsjFxOU2NxbCtdGJoIkVtHFge/view.

145 The hearings are available at the Youtube channel of the IACtHR: https://www.youtube.com/@corteinteramericanadederec8049.

146 See ECtHR, *Silva Monteiro Martins Ribeiro v. Portugal*, N° 25038/06, 26/10/2004; ECtHR, *P. and S. v. Poland*, N° 57375/08, 30/01/2013; and ECtHR, *B.B. v. Poland*, N° 67171/17, 18/10/2022.

147 See a detailed analysis of this in Grégor Puppinck, "Abortion on Demand and the European Convention on Human Rights," *EJIL: Talk!*, 2013, https://www.ejiltalk.org/abortion-on-demand-and-the-european-convention-on-human-rights/, consulted on January 30, 2024.

148 ECtHR, *A, B, C v. Ireland*, N° 25579/05, 16/12/2010, para 239.

149 ECtHR, *A, B, C v. Ireland*, para 213.

150 ECtHR, *A, B, C v. Ireland*, para 222–228.

151 ECtHR, *A, B, C v. Ireland*, para 229.

152 ECtHR, *A, B, C v. Ireland*, para 222.

aspect."[153] The ECHR also emphasized that, because of the lack of a uniform concept of morality among European states, then the margin of appreciation granted to states is greater than in other cases, since "state authorities are in principle in a better position than the international judge to give an opinion on the exact content of the requirements of morals."[154]

As to the necessity of the restriction in a democratic society, the ECtHR analyzed whether Ireland had struck a fair balance between the interests at stake: "On the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn."[155]

Given the sensitive moral nature of the issue, even though the majority of European states have legalized abortion to some extent, the state of Ireland enjoys a wide margin of appreciation in deciding how to strike a fair balance between the competing interests at stake.[156] Moreover, the ECHR held that the restrictions, in this case, did not violate the applicants' right to privacy because they resulted from a decision made by the Irish people after a "lengthy, complex and sensitive debate in Ireland."[157]

Thus, the elements considered by the ECHR in conducting its proportionality test are consistent with the prevailing international consensus on the regulation of abortion. Moreover, these parameters provide useful guidelines for states to conduct their own standard of review when faced with challenges to their regulation of abortion.

3. A Comparison between the *Dobbs* Case and IHRL Standards on Abortion

The analysis conducted in Section 2 provides a general overview of the situation of abortion in IHRL. Although soft law instruments are non-binding, they present the international consensus on the topic and guidance on how states should approach the issue from a human rights perspective. First, according to the formal sources of International Law, there is neither a treaty obligation nor a customary norm recognizing access to abortion as a human right. However, it is important to remember that the preparatory works of the ICCPR and the

153 ECtHR, *A, B, C v. Ireland,* para 222. According to Article 8.2 of the European Convention on Human Rights, the right to privacy can be restricted "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

154 ECtHR, *A, B, C v. Ireland,* para 223.

155 ECtHR, *A, B, C v. Ireland,* para 230.

156 ECtHR, *A, B, C v. Ireland,* para 232–238.

157 ECtHR, *A, B, C v. Ireland,* para 239.

UDHR indicate that this exclusion is not an accidental omission but that the drafters explicitly intended to exclude the issue from IHRL regulation due to the lack of consensus among states.

Thus, states expressed their explicit will to leave this complex matter to the local consideration of each state, according to the diverse views of each society. Moreover, it is important to remember that the preamble of the CRC and the ACHR explicitly recognize the obligation to protect unborn life, which cannot be disregarded by states when drafting their abortion regulations.

Second, when searching for other parameters or guidelines for regulating abortion in IHRL, we found several soft law instruments in which states and human rights mechanisms discussed the issue. In this regard, the agreements reached at the World Population Conferences (albeit with the caveat that they are non-binding instruments and full of reservations) provide an insight into the position of states on abortion. Here, states decided that abortion should never be considered a method of family planning and, again, that the regulation of the issue should only be decided locally by each society according to its national legislative process. In line with these agreements, states decided that the definition of "reproductive rights" does not include access to abortion.

It is also important to note that the ICPD explicitly stated that it did not create new human rights and that its content should be interpreted with full respect for different cultural, religious, and ethical views and with respect for internationally recognized human rights. Therefore, if reproductive rights do not have the status of internationally recognized human rights, then reproductive rights are not on an equal footing with other human rights norms but are subordinated to them. This means that any interpretation of their content and scope must be made with full respect for each country's cultural, religious, and ethical views and internationally recognized human rights norms.

Thirdly, the pronouncements of TMB can guide the issue, but they must consider their non-binding nature and the criticism that has followed their interpretations. The five TMBs that have argued that access to abortion is a human rights obligation do not provide clear and structured legal reasoning to support this conclusion. In the case of the CCPR and the CAT, which have held that denial of access to abortion is tantamount to torture, cruel, inhuman, or degrading treatment, there has been no assessment of how the various elements and parameters of these legal figures are met to support these conclusions.

Other TMBs assume that the right to health includes reproductive rights, which includes access to abortion. However, such a statement is inconsistent with the current state of applicable customary law and the agreements reached by states in treaty negotiations and at the World Population Conferences. Thus, the pro-

nouncements of TMB on this issue do not provide helpful guidance on the parameters that states must meet in regulating abortion.

Fourth, the same criticism of treaty bodies applies to the pronouncements of the IACoHR. However, the IACtHR and the ECHR judgments deserve a different analysis. Regarding the former, we must await the decision of the Court in the case of *Beatriz vs. El Salvador* to have more elements to scrutinize the standard of review set by the IACtHR. Nevertheless, a ruling that recognizes access to abortion as a human rights obligation will be problematic because of the explicit protection of unborn life contained in the ACHR.

As for the ECHR, it appears to be the only international human rights mechanism that has provided a clear standard of review and parameters compatible with states' agreements on abortion (apart from its assessment that abortion falls within the scope of protection of the right to privacy). According to the ECHR, restrictions on access to abortion may be compatible with human rights norms if they pursue a legitimate aim (an aim recognized by human rights treaties) and if they are necessary in a democratic society (if they meet a pressing social need and they are proportionate to the aim pursued). In conducting this analysis, the ECHR took excellent account of the local views and choices of the Irish people regarding the nature of unborn life and the lack of European consensus on sensitive moral issues. Both parameters have been agreed upon by states (in the ICPD) as important standards to be considered in regulating abortion.

Now, in the *Dobbs* decision, the majority ruled that a right to access abortion could not be derived from the right to privacy, which is a premise that does not contradict the content of any human rights treaty or customary norm. SCOTUS then ruled that rights not explicitly contained in the American Constitution could be developed if they were part of the concept of "ordered liberty," as understood by the history and traditions of the United States. As the agreements reached at the World Population Conferences show, such a parameter is compatible with the agreements of states on abortion because states are allowed to interpret the content of reproductive rights with full respect for their own cultural and ethical worldviews.

As for the standard of review used by SCOTUS (the rational basis review), which requires that the restriction pursue a legitimate aim, this parameter is consistent with the proportionality test commonly used by regional human rights courts, such as the ECHR. For this purpose, SCOTUS took into account the prevailing state consensus on abortion (customary law), which showed that most states have restrictive abortion laws, and thus, there is no international trend toward the crystallization of abortion as a human right. On the other hand, the legitimate aim pursued by the Mississippi law could be framed in terms of the protection of unborn life (i.e., within the protection of morals)

and women's health, which are grounds recognized as legitimate aims under most human rights treaties.[158]

Finally, SCOTUS ruled that the regulation of abortion must be decided at the local level, by each state, according to its legislative process, rather than by a judicial body. This assertion is the same agreement reached in the ICPD, and one of the critical parameters the ECHR considers in its proportionality test. At the same time, it is compatible with the views of states that such a controversial and sensitive issue should not be included in a human rights treaty (due to the lack of consensus) but should be decided locally by each society according to its ethical, cultural, and religious worldview and in full respect of internationally human rights norms.[159]

At first glance, such a decision does not seem to contradict internationally recognized human rights norms, but this will depend on how each state adopts each regulation. Accordingly, the *Dobbs* decision does not contradict the current status of abortion as found in IHRL. On the contrary, the parameters used by the majority in the *Dobbs* case are consistent with the prevailing international consensus on abortion.

Conclusions

Given this analysis, we can conclude that according to the classical sources of IHRL, the legalization of abortion cannot be considered a human rights obligation. This is because no treaty contains such a right, and there is no consistent practice and no clearly constituted *opinio iuris* to support the existence of an emerging customary norm toward its recognition as a human right. Nevertheless, in order to explore the position of states on this issue and the agreements reached at the international level, other instruments have been examined, including the reports of the World Population Conferences, the Fourth World United Nations Conference on Women of 1995, and the pronouncements of human rights mechanisms (TMBs and regional systems).

From this analysis, we can conclude that while there is no internationally recognized human right to access abortion, there are some guidelines that states should follow in regulating this matter. First, according to the ICPD, the concept of reproductive rights does not involve the creation of a new human right, and it does not include access to abortion. Second, the agreement reached on abortion consists of leaving it up to each state to decide how it wants to regu-

158 See for example ICCPR, Arts. 12.3, 14.1, 18.3, and 19.3; European Convention on Human Rights, Arts. 6.1, 8.2, 9.2, and 10.2; American Convention on Human Rights, Arts. 12.3, 13.2, and 15; African Charter on Human and People's Rights, Arts. 11 and 12.

159 As argued in Gabriela García Escobar, *Plurality as the Core of Human Rights Universality: Rediscovering the Spirit of the Universal Declaration of Human Rights of 1948 through the Right to Self-Determination*, New York, Peter Lang, 2024, chaps. 4 and 6.

late abortion according to its own legislative process. Several states expressed explicit reservations that abortion should not be considered a method of family planning and that their legislation would protect life from conception. Third, the ICPD also stated that these agreements must be interpreted with full respect for each society's cultural, religious, and ethical backgrounds and under internationally recognized human rights.

In addition, the ECHR provided possible guidelines for the standard of review of abortion regulations that are compatible with the agreements reached by states. In this context, the protection of unborn life constitutes a legitimate aim for restricting access to abortion, as it does not contradict internationally recognized human rights norms. Moreover, the proportionality test performed by the judicial interpreter must take into account, firstly, whether the decision to regulate abortion has been debated by the society concerned through its legislative process. Second, due to the sensitive moral nature of the issue, each state enjoys a wide margin of appreciation to decide how best to regulate abortion and to balance the interests at stake.

Under these understandings and parameters, the *Dobbs* case is consistent with IHRL. Here, SCOTUS ruled that the protection of unborn life is a legitimate aim for restricting access to abortion in the United States, based on scientific research on the beginning of life, the history and tradition of American society, and comparative law. Then, the standard of review (rational-basis review) was applied and incorporated into its test of the status of the abortion debate in American society and its history. Given the sensitivity of the situation, SCOTUS decided that the regulation of abortion should be decided locally by each state according to its ordinary legislative process. Thus, both the parameters and the conclusions reached by this Court did not violate international agreements entered into by states nor internationally recognized human rights norms regarding abortion.

The debate on abortion from an international perspective is far from settled, but this analysis provided some light on its current status according to the parameters set by IHRL. States should examine and take into account these sources and agreements in order to know the status of abortion in IHRL and to avoid bold claims that possess no legal basis.

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