"WE'RE ALWAYS GOING TO ARGUE ABOUT ABORTION"[1]
— *International law's changing attitudes towards abortion*

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International human rights law is frequently invoked in relation to the availability (or non-availability) of access to a safe and legal abortion. This article discusses how international law has addressed abortion from the drafting of the Universal Declaration of Human Rights to the present day. The first part of this article closely examines the drafting of human rights treaties to demonstrate the deliberate choice made by the drafters to allow states to regulate abortion as they saw fit through their domestic law. This was a deliberate move to ensure wide consensus among states with different abortion laws. The second part of this article considers how, perhaps in response to increasing rates of maternal mortality, international bodies have, over time, increasingly recognised an international human right to safe and legal abortion, despite the silence of treaties on this matter. Abortion rights have usually been construed as necessary implications of other well recognised rights, including the rights to life and health as well as the freedom from torture and ill-treatment. While international recognition of any human right to a safe and legal abortion was initially tentative, in recent years there has been a greater willingness to recognise such a right. This article concludes that international human rights law has transformed over the years in its attitude towards abortion. It has gone from giving states total discretion to regulate abortion through their domestic laws to increasingly recognising the existence of abortion rights at an international level.

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1 A comment made by Hillary Clinton, former United States Secretary of State, in 2014: Zeke J Miller "Hillary Clinton Calls Hobby Lobby Decision a 'Really Bad Slippery Slope'" (1 July 2014) Time <time.com>.

I INTRODUCTION

In October 2012, Savita Halappanavar, an Indian citizen living in Ireland, died after her requests for an abortion were denied by Irish medical professionals.[2] Though continuing the pregnancy placed her life at risk, and it was obvious the foetus would not survive, Ms Halappanavar was told the requested abortion was illegal.[3] In the immediate aftermath of her death, what happened to Ms Halappanavar was repeatedly characterised as a violation of international human rights law: there were reports that Ms Halappanavar's husband planned to take a case to the European Court of Human Rights,[4] and a United Nations Special Rapporteur publicly criticised Irish abortion law.[5] The Executive Director of Amnesty International in Ireland also considered Irish abortion laws were at odds with international human rights law, commenting "international human rights law is clear about the right of a woman to access a safe and legal abortion where her life is at risk".[6]

Indeed, it is not unusual for international human rights discourses to be invoked in relation to abortion, by parties on both sides of the debate. For example, Rita Joseph, a human rights advocate involved with various United Nations delegations, has argued that the major human rights treaties protect the unborn child's right to life and so prohibit abortion.[7] Human Rights Watch, an international non-governmental organisation, has stated that "[w]here access to safe and legal abortion services are unreasonably restricted, a number of women's and girl's human rights may be at risk".[8] In 2015, Amnesty International produced a report in which, after a comprehensive review of various United Nations treaties and reports, it concluded that restrictive abortion laws violate

2 "Woman dies after abortion request 'refused' at Galway hospital" (14 November 2012) BBC <www.bbc.com>.

3 In this article, "abortion" is used to refer to "the deliberate termination of a human pregnancy": *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2009) at 4.

4 "Savita Halappanavar's family to take case to European Court of Human Rights" *The Times of India* (online ed, Mumbai, 30 November 2012).

5 Sarah Stack "United Nations watchdog expresses concerns following Savita death" *Irish Independent* (online ed, Dublin, 17 December 2012).

6 "Irish govt must clarify on abortion issue: Amnesty" *The Times of India* (online ed, Mumbai, 17 November 2012).

7 Rita Joseph *Human Rights and the Unborn Child* (Martinus Nijhoff Publishers, Leiden, 2009).

8 "Q&A: Human Rights Law and Access to Abortion" (24 July 2017) Human Rights Watch <www.hrw.org>.

international human rights law.[9] As this article demonstrates, what role (if any) international law plays in relation to abortion has been considered during the drafting of treaties, by treaty bodies and international adjudicative bodies, at international conferences and by United Nations special rapporteurs.

All this begs the question of just what international law actually says about abortion. Can groups or individuals legitimately invoke international human rights mechanisms as granting a right to access a safe and legal abortion, and if so, in what circumstances? There are certainly important reasons justifying consideration of access to abortion at an international level. First, unsafe abortions pose a global health issue that has been recognised as a matter of international concern, including by the World Health Organisation, which estimates 21.6 million unsafe abortions occur each year,[10] and the United Nations, which has identified that the rate of maternal mortality in states with restrictive abortion laws is three times greater than other states.[11] If restrictive domestic abortion laws are contributing to high rates of women dying, it is obviously desirable for international law to intervene to the extent it can to deal with what seems to be a public health crisis. Secondly, established human rights recognised in major international treaties, notably rights to life, health, privacy as well as freedom from torture and ill-treatment, appear to be engaged when access to safe and legal abortion is at issue. Such rights provide a useful existing framework for dealing with unsafe abortion on a global level. Finally, as already noted, international law is already frequently invoked in relation to abortion, by individuals, non-governmental organisations and international bodies, so it seems appropriate for international law to respond to the issue.

This article therefore considers how international human rights law has responded to abortion since the drafting of the Universal Declaration of Human Rights, and demonstrates that international law has undergone a transformation in its attitude towards abortion. The first section of this article closely examines the drafting of the major international human rights treaties to show that the drafters made conscious decisions to be ambiguous about

9 Amnesty International *She is not a criminal: the impact of Ireland's abortion law* (Amnesty International, 2015).

10 World Health Organisation *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* (6th ed, 2011) at 1.

11 United Nations Department of Economic and Social Affairs Population Division *Abortion Policies and Reproductive Health Around the World* (2014) at 1.

abortion in treaties. Indeed, this was often the only way to deal with intractable differences between states' positions on abortion, and gave states a great deal of freedom to regulate abortion within their own borders. However, as the second section discusses, developments in international law in more recent times have shown a concerted move towards the recognition of a right to access safe and legal abortions. This has primarily been achieved by interpreting well-established treaty rights to encompass abortion rights.

II THE RIGHT TO LIFE AND ABORTION

The extent to which international law should protect the unborn, and therefore permit or forbid abortion, was the subject of significant debate during the drafting of the right to life provisions in various international instruments. First, this section examines the drafting of the major United Nations human rights instruments to show that, due to states' inability to agree on the issue, those instruments were deliberately drafted to give states maximum freedom in terms of their domestic abortion law. The drafting, and subsequent interpretation, of various regional human rights instruments is then considered, which again reveals a practice of deferral to individual states in respect of abortion.

In order to put the following discussion into context, it is useful to keep in mind the basic characteristics of international law. International law is a fundamentally consensual system and states are not bound by treaties unless, and only to the extent that, they agree to be bound.[12] However, once bound, states must observe the obligations conferred by treaties.[13] International declarations on their own have no binding force, but generally have strong moral force and, over time, can acquire legal force as customary law (if their terms constitute a general practice accepted as law by states).[14]

It is a common criticism of international law that there is no way to ensure states comply with international law — there is "no international police force, and no international prison where states can be locked up".[15] However, there are certainly incentives for states to comply with international law.[16]

12 Jan Klabbers *International Law* (2nd ed, Cambridge University Press, Cambridge, 2017) at 24 and 45–46.

13 At 46.

14 At 38–39.

15 At 11–12.

16 Klabbers, above n 12, at 10–12.

In the context of the human rights discussed in this article, those incentives are primarily political: for example, a breach might result in investigation and condemnation by United Nations bodies, or an adverse decision by an international court or tribunal.[17] Either scenario would detrimentally affect a state's international standing.

A United Nations human rights instruments

The international human rights system, as we know it today, began with the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948 with the intention of enshrining fundamental, universal human rights in law.[18] Unsurprisingly, art 3 declares "[e]veryone has the right to life, liberty and security of person". However, the extent to which the right to life should apply prior to birth was a matter of significant debate during the drafting of the UDHR.

The initial drafting committee was formed in 1946 and consisted of representatives from Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom and the United States.[19] The drafting committee formulated the right to life as simply reading "everyone has the right to life". The committee also noted alternative texts proposed by Chile ("[u]nborn children … shall have the right to life") and Lebanon ("everyone has the right to life … from the moment of conception").[20] The range of proposals suggested from those countries indicate an early acknowledgement that states' different positions on abortion needed to be dealt with by drafting rights broadly enough to be read consistently with all states' domestic laws.[21]

The abortion debate also arose during the drafting of the International Covenant on Civil and Political Rights (ICCPR).[22] The drafting committee

17 More extreme breaches of human rights, such as government sponsored genocide, may have more significant international consequences, such as sanctions, interventions or proceedings before the International Criminal Court.

18 *Universal Declaration of Human Rights* GA Res 217A III (1948); and Klabbers, above n 12, at 109–111.

19 United Nations Economic and Social Council *Report of the Drafting Committee to the Commission on Human Rights* E/CN, 4/21 (1 July 1947) at 1.

20 At 74.

21 For the range of proposals suggested see "Abortion Policies: A Global Review" (2002) United Nations <www.un.org>; and United Nations Economic and Social Council *Commission on Human Rights Drafting Committee Second Session: Summary Record of Thirty-Fifth Meeting* E/CN.4/AC.1/SR.35 (29 May 1948) at 3–5.

22 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December

of the UDHR had produced a draft human rights convention, which formed the basis of the ICCPR.[23] The suggested wording for the right to life was "it shall be unlawful to deprive any person of his life", but Lebanon proposed an alternate text that included the words "from the moment of conception".[24] The ICCPR working group also proposed including protection for life "at any stage of … human development".[25] In response, a revised wording was proposed by the working party: [26]

> It shall be unlawful to procure abortion except in a case in which it is permitted by law and is done in good faith in order to preserve the life of the woman, or on medical advice to prevent the birth of a child of unsound mind to parents suffering from mental disease, or in a case where the pregnancy is the result of rape.

This text was careful not to sanction abortion unless it was permitted by domestic law. It would therefore have no effect in states where abortion was not already legal. It would only have been problematic for states that permitted abortion in wider circumstances than those set out, though in 1947 there were few, if any, such states.[27]

However, the proposed text was criticised when it subsequently came up for debate before the United Nations Commission on Human Rights (UNCHR) as leaning too far in favour of permitting abortion.[28] Panama argued the provision could prevent ratification by states that criminalised abortion.[29] The United Kingdom, where abortion was legal in certain circumstances, defended the provision, arguing its deletion could prevent ratification by those

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1966, entered into force 23 March 1976).

23 *Report of the Drafting Committee*, above n 19, at 82–86.

24 *Report of the Drafting Committee to the Commission on Human Rights*, above n 19, at 82.

25 United Nations Economic and Social Council *Working Group on Convention of Human Rights – Summary Record of the Second Meeting* E/CN.4/AC.3/SR.2 (5 December 1947) at 3.

26 United Nations Economic and Social Council *Commission on Human Rights Second Session: Report of the Working Party on an International Convention on Human Rights* E/CN.4/56 (11 December 1947) at 6.

27 "Abortion Policies: A Global Review", above n 21; and "Country Studies" (9 October 2015) Federal Research Division, Library of Congress <www.loc.gov>.

28 United Nations Social and Economic Council *Commission on Human Rights Second Session: Summary Record of the Thirty-Fifth Meeting* E/CN.4/SR/35 (12 December 1947) at 15–17.

29 At 16–17.

states that had legalised abortion.[30] The matter arose again, at a later session of the UNCHR, when Lebanon tried to amend the right to life to read: "human life is sacred from the moment of conception".[31] This proposal was rejected. Chile, despite its own prohibition of abortion, considered it was important that the ICCPR be signed by as many states as possible and favoured leaving the right vague as to its application to the unborn, a proposal agreed to by the United Kingdom, United States and Australia,[32] all of which permitted abortion in certain circumstances.[33] Australia also considered the Lebanese proposal was a "declaration of religious faith…[that] should not be included in a legal document".[34]

However, that was not the end of the matter. In 1957, when the draft ICCPR came before the Social, Humanitarian and Cultural Committee to the United Nations General Assembly, a number of states with restrictive abortion laws proposed that the right to life be amended to begin from the moment of conception.[35] The suggestion was ultimately rejected, in part, because of states' different domestic laws on abortion. The Committee's report recorded that "[l]egislation on the subject was based on different principles in different countries and it was, therefore, inappropriate to include such a provision in an international instrument".[36] The final text of the ICCPR leaves the position of the unborn ambiguous. Article 6 simply reads: "Every human being has the inherent right to life. This right shall be protected by law".[37]

The debates on the right to life and the unborn during the drafting of the UDHR and ICCPR, prolonged as they were, pale in comparison to the debates which occurred during the drafting of instruments specifically designed to protect children: the Declaration of the Rights of the Child and

30 At 15.

31 United Nations Economic and Social Council *Commission on Human Rights Sixth Session. Lebanon: Proposed Text for Article 5* E/CN.4/398 (3 April 1950).

32 United Nations Economic and Social Council *Commission on Human Rights Sixth Session Summary Record of the Hundred and Forty-Ninth Meeting* E/CN.4/SR.149 (17 April 1950) at [10]–[11].

33 "Abortion Policies: A Global Review", above n 21.

34 *Summary Record of the Hundred and Forty-Ninth Meeting*, above n 32, [12]–[14].

35 The countries were Belgium, Brazil, El Salvador, Mexico and Morocco: United Nations Economic and Social Council *Draft International Covenants on Human Rights: Report of the Third Committee* A/3764 (10 December 1957) at [112]. See also: Marc J Bossuyt *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, Dordrecht, 1987).

36 *Draft International Covenants on Human Rights: Report of the Third Committee*, above n 35, at [112].

37 ICCPR, above n 22.

the Convention on the Rights of the Child.[38] The first draft of the Declaration of the Rights of the Child (DRC), prepared in 1950, did not specify whether it applied to the unborn.[39] During the debate before the United Nations General Assembly, Italy (where abortion was prohibited in all circumstances, except to save a woman's life) proposed the Declaration provide that children required special safeguards, care and legal protection from the moment of conception.[40] That proposal was rejected on the basis it would be at odds with states that had legalised abortion and was too controversial to be included in an instrument intended to be universal.[41] Similarly, a proposal that the DRC protect the child's right to life from the moment of conception was rejected.[42] A compromise was reached by incorporating the following words into the preamble: "Whereas the child by reason of [their] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[43] What constitutes "appropriate" legal protection for the unborn is a matter left to individual states.

In 1978, it was proposed the DRC be given binding force in treaty form. The first draft of the Convention on the Rights of the Child (CRC) was largely similar to the DRC.[44] However, concerns were expressed by Barbados and Austria as to the ambiguity surrounding the protection of the unborn, and particularly what this meant in terms of abortion.[45] As a result, the second draft did not refer to the unborn at all, and defined a "child" as "every human being from the moment of his birth to the age of 18 years".[46]

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38 *Declaration of the Rights of the Child* GA Res 1386, A/Res/14/1386 (1959); Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

39 United Nations Economic and Social Council *Social Council Report of the Sixth Session* E/CN.5/221 (1950) at [55]–[61].

40 United Nations *Yearbook of the United Nations 1959* (United Nations, New York, 1960) at 193. See also: "Abortion Policies: A Global Review", above n 21.

41 *Yearbook of the United Nations 1959*, above n 40, at 193.

42 At 193. The proposal was made by Afghanistan, Argentina, Brazil, Italy, Spain and Uruguay.

43 At 193–194.

44 United Nations Economic and Social Council *Letter Dated 17 January 1978 from the Permanent Representative of Poland* E/CN.4/1284 (1978); and United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Austria, Bulgaria, Colombia, Jordan, Poland, Senegal and Syrian Arab Republic: draft resolution* E/CN.4/L.1366/Rev.1 (14 February 1978) at 1–6.

45 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the Secretary-General* E/CN.4/1324 (1 February 1979) at 7 and 31.

46 United Nations Economic and Social Council *Question of a Convention on the Rights of a Child: Note verbale dated 5 October 1979 addressed to the Division of Human Rights Representation of the Polish People's*

During meetings in 1979 and 1980 of the Working Group formed to draft the CRC, several representatives reiterated that "consideration should be given to … the right to life of the unborn child, abortion [and the definition of] 'child.'"[47] The Holy See proposed the second draft be amended so the preamble read: [48]

> Recognizing that the child due to the needs of his physical and mental development requires particular care and assistance before as well as after birth with regard to health, physical, mental, moral and social development as well as legal protection in conditions of freedom, dignity and security.

A number of states whose domestic laws protected the rights of the child from conception supported the Holy See's proposal, but even those states recognised the text could affect wide ratification of the CRC and argued that the text did not necessarily prohibit abortion.[49] Other states were unconvinced, arguing the preamble should be neutral and not prejudice the interpretation of the definition of child contained within the operative part of the CRC.[50] Ultimately, the Working Group decided to consider the issue after the definition of "child" was adopted.[51]

However, the same issues arose during the drafting of the definition of "child". Some states considered that if the definition of child did not capture the unborn, this was contrary to their domestic laws, but did recognise that explicit protection of the unborn would be equally problematic for other states.[52] The final agreed definition of "child" was therefore left deliberately ambiguous as to when childhood begins: "a child is every human being from the moment of [their] birth to the age of 18 years…".[53]

Republic to the United Nations in Geneva E/CN.4/1349 (17 January 1980).

47 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the Working Group* E/CN.4/L.1468 (12 March 1979) at [6].

48 The proposed paragraph can be seen from the comments in *Note verbale dated 5 October 1979*, above n 46, at [6]; and United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the Working Group* E/CN.4/L.1542 (10 March 1980) at [6].

49 At [6]. This document, and those referred to in the following paragraphs, do not clarify the position of each individual state, but instead record in general terms that there was significant debate around these matters.

50 At [7].

51 At [7]–[8].

52 At [28]–[29].

53 *Question of a Convention on the Rights of the Child: Report of the Working Group*, above n 48, at 2.

States then returned to debating the preamble, in particular, the text proposed by the Holy See. Some states argued that the preamble should remain neutral so as not to taint the interpretation of "child" in the treaty and risk not achieving wide ratification of the CRC.[54] Other states argued that, since the legislation of most states provided at least some protection to the unborn, the Holy See's text should be acceptable to all, as it did not specify the length of the period before birth that was covered.[55] In an attempt at compromise, the Working Group settled on a text that did not explicitly refer to the unborn: [56]

> Recognizing that, as indicated in the Declaration on the Rights of the Child adopted in 1959, the child due to the needs of his physical and mental development requires particular care and assistance with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.

Some states disliked this text and felt it slanted the CRC towards the legalisation of abortion; the United States disagreed, arguing that this wording was neutral and that the CRC needed to be neutral on the topic of abortion in order to be acceptable to the largest number of states.[57]

The wording of the draft CRC's preamble remained unsettled. The debate surrounding whether "child" included the unborn under the CRC was reopened when the Working Group met in 1988 and 1989 and amended the draft convention to include protection of the right to life.[58] The Federal Republic of Germany (West Germany) then suggested that the preamble simply contain the same wording as the DRC, which stated that the child needed "appropriate legal protection, before as well as after birth".[59] A number of states supported this suggestion, while others opposed reopening the debate when consensus was unlikely to be reached.[60] The debate became increasingly

54 At [10].

55 At [11].

56 At [19].

57 At [18].

58 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: Report of the working group on a draft convention on the rights of the child* E/CN.4/1988/28 (6 April 1988) at [14]–[26].

59 Commission on Human Rights *Pre-Sessional Open-Ended Working Group on a Convention on the Rights of the Child: Proposal Submitted by the Federal Republic of Germany* E/CN.4/1989/WG.1/WP.6 (28 November 1988).

60 United Nations Economic and Social Council *Question of a Convention on the Rights of the Child: report*

heated, culminating in West Germany threatening to formally request a vote in the Working Group if the amendment was not incorporated, and Italy declaring that because no state manifestly opposed the DRC, protection of the right to life of the unborn constituted jus cogens (an international legal norm that was accepted by all and could not be derogated from).[61] In an attempt to overcome the stalemate, the Working Group formed a drafting group to deal with the provision, composed of states on both side of the debate.

The drafting group created a compromise text similar to the West Germany's amendment, and — in order to allay the concerns of states that had legalised abortion — urged that a statement be included in the travaux préparatoires (preparatory materials) stipulating that: [62]

> In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 [the definition of the child] or any other provision of the Convention by States Parties.

This was adopted, though states, including Senegal and the United Kingdom, disagreed as to whether the statement could affect the interpretation of the convention.[63] Legal counsel advised that while the interpretive statement could be included in the travaux, the preamble was meant to inform the interpretation of a treaty when there is ambiguity, so it was strange to require recourse to the travaux in order to interpret the preamble.[64] The travaux were supplementary means of interpretation, so the preamble would have priority.[65] However, it is arguable that the wording of the preambular paragraph in question (for example in the use of terms like "appropriate") is so ambiguous that recourse to the travaux is necessary in order to ascertain its meaning.

The Chairman of the Working Group, when reporting to the Commission on Human Rights, explicitly acknowledged that because states had been unable

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of the working group on a draft convention on the rights of the child E/CN.4/1989/48 (2 March 1989) at [35]–[36].

61 At [39]–[40].

62 Commission on Human Rights *Pre-Sessional Open-Ended Working Group on the Convention on the Rights of the Child: Proposal of the Drafting Group on Preambular Paragraph 6* E/CN.4/1989/WG.1/WP.19 (29 November 1988); *Question of a Convention on the Rights of the Child: report of the working group on a draft convention on the rights of the child*, above n 60, at [43].

63 *Question of a Convention on the Rights of the Child: report of the working group on a draft convention on the rights of the child*, above n 60, at [44]–[47].

64 Annex, at 144.

65 Annex, at 144.

to agree, the abortion question was left open to interpretation: [66]

> It had been necessary to reconcile numerous differences relating to traditions, cultures, religions … legal systems and … political attitudes … the Group had been able to reach agreement on … the definition of a child … i.e. on the inclusion into, or exclusion from, that definition of children before birth. Considering the fundamental divergence of views on that issue, the Working Group had preferred not to prejudge the solution that each State party to the convention might adopt.

When the CRC was adopted, a number of parties commented, both formally and informally on its implications in respect of abortion. For example, upon ratification, France and Tunisia issued declarations and Luxembourg issued a reservation, stipulating that the CRC did not affect their laws permitting abortion.[67] On the other hand, Guatemala interpreted the CRC as "consistent" with domestic law, which protected life from the moment of conception.[68] The Holy See stated that the draft convention "recogni[s]ed clearly the right to life of the unborn child."[69] Such diversity of views confirms the CRC's ability to be interpreted in conformity with virtually any national abortion law, an outcome that was clearly intended by its drafters.[70]

The examination of the drafting history of the international instruments discussed above has shown that, time and again, it was simply impossible for states to reach consensus on any formulation of the right to life that made explicit reference to the unborn because of differing individual states' abortion laws. Clearly, states were very uncomfortable with the prospect of adopting or ratifying instruments that conflicted with their domestic law. At the same time, it is obvious that states recognised the need for consensus to ensure adoption and ratification of, and compliance with, the instruments being drafted. Without consensus after all, there cannot be an effective international

66 United Nations Economic and Social Council *Commission on Human Rights forty-fifth session Summary Record of the 54th meeting: Question on a Convention on the Rights of the Child* E/CN.4/1989/SR.54 (15 June 1989) at [5].

67 Committee on the Rights of the Child *Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child* CRC/C/2/Rev.3 (11 July 1994) at 17, 23 and 28.

68 At [55].

69 United Nations General Assembly *Summary record of the 39th meeting: Adoption of a Convention on the Rights of the Child* A/C.3/44/SR.39 (13 November 1989) at [35].

70 Philip Alston "The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child" (1990) 12(1) Human Rights Quarterly 156 at 157.

legal system. The only solution was to ensure international instruments could be interpreted consistently with virtually any domestic law on abortion; to allow states free reign on how they dealt with this matter.

B Regional human rights instruments

The following section considers the extent to which issues similar to those discussed above arose during the drafting of the major regional human rights instruments.

1 American human rights instruments

The American Declaration of the Rights and Duties of Man (ADR) was adopted at the Ninth International Conference of American states in 1948, at the same time the Organisation of American States (OAS) was created.[71] It was the first international human rights instrument, predating the UDHR by seven months. The Inter-American Commission on Human Rights (IACHR), the quasi-judicial body that deals with alleged violations of the ADR, considers that the Declaration has the binding force of a treaty.[72]

Article 1 of the ADR simply protects the right to life of "every human being". The original draft ADR presented to the 1948 Conference read "every person has the right to life, including those who are not yet born". That text was rejected in favour of one that does not refer to the unborn, due to significant concerns raised by states regarding domestic laws permitting abortion. According to the IACHR, it was a deliberate decision, on the part of the drafters, to defer to national law on the issue: [73]

> … the draft which was finally approved is a compromise formula, which even if it obviously protects life from the moment of birth, leaves to each State the power to determine, in its domestic law, whether life begins and warrants protection from the moment of conception or at any other point in time prior to birth.

71 *American Declaration of the Rights and Duties of Man* OAS Res XXX (1948). As at September 2017, the OAS consists of 35 American states.

72 Christina M Cerna "Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man Anniversary Contributions – International Human Rights" (2009) 30 U PA J Intl L 1211 at 1212–1213. The *Baby Boy* case was the IACHR's first statement on the legal obligations of states under the ADR: *White and Potter (Baby Boy) v United States* Inter-American Commission on Human Rights, case 2141, 6 March 1981.

73 *Baby Boy*, above n 72, at [5] per Dr Andres Aguilar M.

In 1969, the OAS met to draft the American Convention on Human Rights (ACHR).[74] It had, before it, a draft prepared by the American Court of Human Rights (ACtHR), which stated that the right to life must be protected by law "and generally from the moment of conception".[75] This wording was already a compromise — the first three drafts of the ACHR did not contain the words "in general". The rapporteur assigned to undertake a comparative study between the draft ACHR and the ICCPR had recommended that the question of the right to life of the unborn be left open, so as not to create a higher threshold than that of the ICCPR.[76]

Before the OAS, Brazil (supported by the United States) proposed the deletion of the words "in general from the moment of conception" on the basis that Brazilian law, while generally protecting the unborn, permitted abortion in cases of rape or to save a woman's life.[77] Brazil argued that the wording appeared to prohibit abortion and could prevent ratification, so it was better not to mention the unborn and permit individual states to decide on the abortion issue for themselves.[78] The Dominican Republic also proposed removal of references to conception in order to ensure the rights in the ACHR were universal.[79] On the other hand, Venezuela opposed Brazil's suggestion, arguing domestic laws should not determine international rights.[80] By majority, the current art 4(1) was adopted. It reads as follows:[81]

i) Every person has the right to have his life respected;

ii) This right shall be protected by law and, in general, from the moment of conception;

iii) No one shall be arbitrarily deprived of his life.

74 American Convention on Human Rights 1144 UNTS 123 (opened for signature 22 November 1969, entered into force 18 July 1978).

75 Organización de los Estados Americanos (Organisation of American States) *Conferencia Especializada Interamericana Sobre Derechos Humanos* (*Inter-American Specialized Conference on Human Rights)* OAS/Ser.K/XVI/1.2 (November 1969) at 14.

76 Organisation of American States *Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and of the Draft Inter-American Conventions on Human Rights* OEA/ Ser.L/V/IL 19, doc. 18 (1968).

77 *Inter-American Specialized Conference on Human Rights*, above n 75, at 121.

78 At 121.

79 Alvaro Paul "Controversial Conceptions: The Unborn and the American Convention on Human Rights" (2010) 9 Loy U Chi Intl L 209 at 223.

80 At 223.

81 At 214–215.

The ACHR is the only treaty that explicitly recognises rights of the unborn and thereby accords less deference to national law on abortion than the United Nations treaties do. This is most likely because there was little divergence of views between the states that drafted the ACHR — the vast majority of the members of the OAS had strong Catholic traditions and, accordingly, restrictive domestic abortion laws.[82] The words "in general", however, do permit states to interpret the text as not to prohibiting abortion, if necessary. The United States for example, which permitted abortion in some circumstances, issued an interpretive declaration at the time art 4 was voted on, stipulating that it would interpret art 4(1) at its own discretion (though it ultimately did not become a party to the treaty).[83]

The IACHR considered the right to life provisions in the OAS instruments in *White and Potter (Baby Boy) v United States*, where the Supreme Judicial Court of Massachusetts acquitted a doctor who had been charged with manslaughter for performing an abortion.[84] A Catholic non-governmental organisation argued arts 1 and 4 of the ADR created a right to life from the moment of conception. As such, the organisation alleged the United States had breached the aborted foetus' rights under arts 1 and 7 (children's rights to special protection) and 11 (right to health) of the ADR. The organisation also referred to the United States court decisions in favour of access to abortion in *Roe v Wade,*[85] and *Doe v Bolton,*[86] as violations of the ADR. The claim was brought as a breach of the ADR, as opposed to the ACHR, because the United States had not ratified the ACHR.

In its decision, the IACHR discussed the circumstances in which art 1 of the ADR was drafted to conclude that states had deliberately decided art 1 should not refer to the unborn. It also discussed the drafting of art 4 of the ACHR and referred to the phrase "in general" as a "compromise". It concluded the drafting history showed states had never intended the ADR to protect the unborn and as such, it did not have that effect — states had discretion to interpret art 1 in accordance with national laws on abortion; this had been the

82 "Abortion Policies: A Global Review", above n 21; and "Country Studies," above n 27.

83 Paul, above n 79, at 228.

84 *Baby Boy*, above n 72.

85 *Roe v Wade* 410 US 113 (1973).

86 *Doe v Bolton* 410 US 179 (1973).

drafters' intention in wording that provision vaguely. The United States had therefore not breached the ADR. However, demonstrating art I of the ADR is capable of wide interpretation, two dissenting opinions held that the lack of explicit mention of the unborn in art I did not necessarily mean the article did not apply from the moment of conception.[87]

2 *European human rights instruments*

The Charter of the Fundamental Rights of the European Union (EU Charter) sets out the human rights which must be observed during the implementation of European Union law, and became legally binding on European Union states and institutions on 1 December 2009.[88] Article 2 of the EU Charter states "everyone has the right to life" with no mention of the unborn. The official commentary to the EU Charter records that during its drafting, there were attempts to explicitly extend the right to life to the unborn however, the drafters ultimately decided it was best the EU Charter remain vague in relation to this point.[89]

Similarly, art 2 of the European Convention of Human Rights (ECHR) provides that "everyone's life shall be protected by law".[90] The European Commission of Human Rights (the Commission)[91] has considered whether art 2 extends to the unborn.[92] In *Paton v United Kingdom*, the Commission considered whether United Kingdom laws permitting abortion breached art 2.[93] The Commission noted that the fact "everyone" was not defined "tend[s] to support a view that it does not include the unborn".[94] This interpretation

87 *Baby Boy,* above n 72, per Dr Luis Demetrio Tinoco Castro and Dr Marco Gerardo Monroy Cabra.

88 Charter of the Fundamental Rights of the European Union [2012] OJC 326. The Charter has 26 states parties which are also member states of the European Union. The background to the Charter can be found at "Fact sheets on the European Union: The Charter of Fundamental Rights" (June 2017) European Parliament <www.europarl.europa.eu>.

89 EU Network of Independent Experts on Fundamental Rights *Commentary of the Charter of Fundamental Rights of the European Union* (June 2006) at 33–34.

90 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 2. As at September 2017, the Convention has 47 states parties.

91 The Commission was a Tribunal which, until 1998, heard cases of alleged breaches of the ECHR. It was replaced by the ECtHR.

92 While no information on the drafting of this article was located by the author, this case provides helpful interpretation of art 2.

93 *Paton v United Kingdom* (1980) 19 DR 244 (ECHR).

94 At [9].

was supported, in the Commission's view, by the fact the rest of the ECHR contained a number of rights that could only be exercised by persons already born.

The Commission also held art 2 could not protect the rights of the unborn absolutely, because that could conflict with the mother's right to life if the pregnancy was life-threatening. The Commission reasoned that this could not have been the drafters' intention because when the ECHR was drafted, almost all contracting parties permitted abortion where a woman's life was at risk. The Commission did not definitively decide whether art 2 still provided some limited protection to the unborn but considered that even if it did, United Kingdom laws permitting abortions for health reasons would be a justified limitation on any right of the unborn.

In *H v Norway*, the Commission considered whether Norwegian laws permitting abortion on request within the first 12 weeks of pregnancy breached foetal rights under arts 2 and 3 (right to freedom from inhuman treatment and torture).[95] Again, the Commission declined to definitively decide the extent to which art 2 protected the unborn:[96]

> The Commission finds that it does not have to decide whether the foetus may enjoy a certain protection under Article 2 … but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 … protects the unborn life.

It went on to state that "in such a delicate area the Contracting States must have a certain discretion".[97] Norwegian law was within this discretion. There was no indication of what type of abortion law would fall outside the discretion.

Subsequently, before the European Court of Human Rights (ECtHR), it was alleged in *Boso v Italy* that Italian abortion law contravened foetal rights to life under art 2 of the ECHR.[98] The Court held that Italian law, which allowed abortions to preserve life and health ("health" including economic, social and familial concerns), did not exceed the state's "discretion in such

95 *H v Norway* (1992) 73 DR 155 (ECHR).

96 At [1].

97 At [1].

98 *Boso v Italy* (50490/99) Grand Chamber, ECHR 5 September 2002. The ECtHR hears alleged breaches of the ECHR.

a sensitive area".[99] The implication that state discretion on abortion can be exceeded suggests that the unborn may have some rights under art 2, but the ECtHR refrained from ruling if, and to what extent, these rights might apply.

In *Vo v France*, the ECtHR, while not dealing explicitly with abortion, ruled that, for the purposes of art 2, states had a "margin of appreciation" when it came to determining when life began.[100] This was for two reasons: first, because the extent to which the unborn should be protected had not been resolved within the majority of contracting states to the ECHR themselves, and second, because there was no European consensus on when life began. It was therefore neither desirable, nor possible, to determine whether the unborn was protected by art 2. According to the ECtHR, the ECHR had been deliberately drafted in a manner that left the abortion question open, because it was inappropriate for international law to impose a single moral code upon states, given the divergence of views on the issue.[101] In a separate opinion of five judges, it was noted that though the unborn may have some interests, this did not necessarily equate to rights under art 2.[102] Three other separate opinions suggested an unborn child could have a right to life, but because most parties to the ECHR had legalised abortion in some circumstances (apparently considering this was not contrary to art 2), legal abortions were an exception to that right.[103]

The decisions discussed above indicate a deliberate choice by European tribunals to defer to state law on the abortion question, by referring to a "discretion" or "margin of appreciation" accorded to states when it comes to regulating abortion through domestic law. In no decision has it been held that state law permitting abortion violates art 2. Neither has the extent to which art 2 protects the unborn (or, indeed, if it actually does) been clarified. The only point clarified is that the ECHR does not confer absolute rights to life on the unborn. However, this is hardly controversial, given virtually all states parties permit abortion in some circumstances (as noted in *Paton*).[104] Beyond this, the matter has been left to individual states as a discretionary

99 At [3].

100 *Vo v France* (2005) 40 EHHR 12 (ECHR) at [55].

101 At [82].

102 Per Rozakis J joined by Caflisch, Fischbach, Lorenzen and Thomassen JJ.

103 Per Costa J joined by Traja J and per Mularoni J joined by Straznica J.

104 *Paton*, above n 93.

matter at international level. The Commission and the ECtHR have clearly been cognisant of the need not to alienate states from the ECHR system by making any definitive decision on the matter, given the differing views and laws of individual states when it comes to abortion.

3 African human rights instruments

The African Charter on Human and People's Rights (African Charter), which is the key human rights instrument in Africa, entered into force in 1986.[105] The travaux preparatoires of the African Charter are not publicly available. However, the protection of life in art 4 of the African Charter is similar to other treaties in making no mention of the unborn. It is unlikely there was any particular intention on the part of the drafters to protect the unborn's right to life, because art 14 of the subsequent Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol) recognises access to abortion as a human right (this is discussed later in this article).[106]

The above discussion of the three regional human rights instruments has shown that, like their United Nations counterparts, these instruments appear to have been deliberately drafted to remain open to interpretation when it comes to abortion. In the case of the American and European systems, the decisions of regional courts and tribunals particularly illustrate the freedom given to individual states to regulate abortion by the relevant regional instruments.

III ACCESS TO ABORTION AS A NECESSARY IMPLICATION OF EXISTING RIGHTS

As discussed above, the major international and regional human rights instruments were drafted so as to remain neutral on the abortion issue. Clearly, the intention of states at the time of drafting was for abortion to remain a matter to be regulated by individual states through their domestic laws, without international interference. However, the position has changed significantly since the drafting of these treaties. In the decades since the drafting of the major international treaties, there has been increased consideration of the

105 African Charter on Human and People's Rights 1520 UNTS 1987 (opened for signature 27 June 1981, entered into force 21 October 1986), art 4. As at September 2017, the Charter was ratified by 53 states of the African Union, an intra-governmental organisation.

106 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (opened for signature 11 July 2003, entered into force 25 November 2005) [Maputo Protocol].

extent to which there is a positive international human right to a safe and legal abortion. There have also been a series of decisions from treaty bodies on the issue of access to abortion.

The following section discusses the most frequently used approach for recognising a positive right to abortion — recognising access to a safe and legal abortion as a necessary implication of, or requirement for the observance of, well-established rights already enshrined in the major treaties. Those rights include the rights to life, health, privacy, enjoyment of scientific progress, the right to determine the number of children a person has, freedom from torture and ill-treatment, and freedom from discrimination. This section will first examine reports produced by major international conferences and, then, in some detail, the recognition of abortion rights by United Nations bodies. It will lastly discuss developments within regional human rights systems.

It is important to note that the consideration of abortion rights discussed below largely conflates two situations in which abortion may pose a risk to a woman's life. The first is when a pregnancy itself poses a risk to a woman's life or health, and she is unable to obtain an abortion due to her state's laws. The second is when a woman seeks an abortion for whatever reason (including, but not limited to health risks) and must undergo an unsafe abortion because of restrictions on access in domestic law. Sometimes, both situations are treated as equally justifying abortion rights. On other occasions, it has been considered that human rights law requires the provision of access to abortion in the first situation, and of decriminalisation of abortion in the second situation.

In this section, the phrase "unsafe abortion" is used to refer to abortions that are unsafe because they are illegal and there is therefore no state regulation of them. For example, such abortions may be carried out by persons lacking the necessary skills, or in an environment that does not conform to minimal medical standards. The phrases "abortion rights" and "right to access to abortion" are used to refer to the right to access a safe and legal abortion.

A International conferences

The earliest suggestions, at the international level, that access to abortion could constitute an aspect of existing international human rights were made at key international conferences. The 1975 Report of the World Conference of the International Women's Year, for example, rather timidly asked governments to provide adequate facilities that enabled women to decide on the number and

spacing of their children "consistent with their national policy",[107] and to adopt programmes to address ill-health caused by unsafe abortion.[108]

Similarly, the 1994 International Conference on Population and Development Programme of Action (ICPD Programme), signed by 179 states, defined the right to the highest attainable standard of health as including "a state of complete physical, mental and social well-being … in all matters relating to the reproductive system … [including] the freedom to decide if, when and how often to [reproduce]".[109] It required that people have access to "methods of their choice for the regulation of fertility which are not against the law".[110] The ICPD Programme also called upon governments to reduce illegal/unsafe abortions, but made clear that it was up to states to legislate in relation to abortion: "Any measures or changes related to abortion within the health system can only be determined at a national or local level according to the national legislative process".[111] These sentiments were re-affirmed in the 1995 Beijing Declaration and Platform For Action, adopted unanimously by 189 countries at the Fourth World Conference on Women.[112]

The comments from these international conferences were early indicators that a right of access to abortion could exist as an aspect of established human rights. These comments impliedly invoked women's equal rights with men to determine the number and spacing of their children (Convention on the Elimination of All Forms of Discrimination Against Women, art 16(e)) and the right to the highest attainable standard of health (International Covenant on Economic, Social and Cultural Rights, art 12). However, the frequent references back to national law continued the tradition of deferring to individual states in respect of abortion. As discussed below, various United Nations bodies, especially treaty monitoring bodies, have not only developed the notion that abortion rights may exist as necessary implications of established rights, they have progressively accorded less deference to national law on the matter.

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107 United Nations *Report of the World Conference of the International Women's Year* E/CONF.66/34 (19 June and 2 July 1975) at 88.

108 At 77 and 81.

109 United Nations *Report of the International Conference on Population and Development* A/CONF.171/13/Rev.1 (1995) at [7.2].

110 At [7.2].

111 At [8.25] and see [8.19]–[8.26].

112 United Nations General Assembly *Implementation of the Outcome of the Fourth World Conference on Women: Action for Equality, Development and Peace* A/50/744 (10 November 1995) at [89]–[97].

B Developments in the United Nations

As mentioned, international human rights bodies have increasingly recognised access to abortion as necessary for the observance of other, long recognised, international human rights. There appear to be a number of reasons for this. In particular, the United Nations has recognised that abortion laws across the world have become more liberalised in recent times. At least since 2005, a large number of states, including the majority of developing countries, consider their domestic rates of maternal mortality are unacceptable.[113] This has, perhaps, made the argument that restrictive abortion rights breach international law a more palatable concept for many states. At the same time, restrictive abortion laws affecting a significant portion of the world's population are a concern that simply cannot be ignored at the international level. The World Health Organisation's most recent statistics are from 2008 and estimated that 21.6 million unsafe abortions, resulting in 47,000 deaths, occurred in that year.[114] In 2011, the average unsafe abortion rate was more than four times greater in countries with restrictive abortion laws, and in 2013, the rate of maternal mortality in states with restrictive abortion laws was three times greater than in other states, with 223 deaths per 100,000 live births.[115] In such circumstances, the matter is so serious that it necessarily warrants attention by international bodies.

1 Committee on the Elimination of Discrimination Against Women

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which monitors compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[116] has emphasised the human rights implications of restrictive abortion laws since the 1990s. In its 1998 report, the CEDAW Committee criticised numerous states for their restrictive abortion laws. The Committee recommended numerous reforms, making a number of comments to the effect that such

113 United Nations Department of Economic and Social Affairs Population Division *Abortion Policies*, above n 11, at 1 and 12–13.

114 World Health Organisation, above n 10, at 1.

115 United Nations Department of Economic and Social Affairs Population Division *Abortion Policies*, above n 11, at 1.

116 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981).

laws impinge on women's "reproductive rights",[117] their rights to life and to health, and their general right to freedom from sex discrimination especially in relation to health.[118] Then, in 1999, the CEDAW Committee stated in General Comment 24 that the right to health required that "when possible, legislation criminalising abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion".[119] The Committee also emphasised that, in order to comply with CEDAW, health services needed to address women's specific health needs, including those related to their reproductive functions.[120]

In 2009, the CEDAW Committee considered abortion rights when it heard the case of *LC v Peru*.[121] LC, a young girl pregnant as a result of rape, attempted suicide leading to serious injuries requiring emergency surgery. Surgery could not be performed unless the pregnancy was terminated. LC's mother requested a legal abortion because the pregnancy posed a serious risk to LC's life and health. The hospital refused to perform the abortion. It was only after LC eventually miscarried that surgery was performed, three and a half months after it was first recommended.

The CEDAW Committee found art 12 of CEDAW (right to equality in healthcare) was breached because LC lacked:[122]

> … access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required. Those services included both the spinal surgery and the therapeutic abortion.

The CEDAW Committee also found art 2(c) and (f) (states to establish legal measures to ensure equal rights for women) had been breached, due to the lack of effective mechanisms to enable the right to an abortion to be exercised

117 Although CEDAW contains no definition of any reproductive rights.

118 United Nations *Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and nineteenth sessions* A/53/38/Rev.1 (14 May 1998) at [109] in relation to Croatia, at [159] in relation to Nigeria, at [201] in relation to Panama, at [284] in relation to New Zealand, at [337] in relation to Peru, at [349] in relation to the Republic of Korea and at [426] in relation to Mexico.

119 Committee on the Elimination of Discrimination Against Women *General Recommendation No 24: Article 12 of the Convention (Women and Health)* A/54/38/Rev.1 (1999) at 7.

120 At 7.

121 Committee on the Elimination of Discrimination Against Women *Views: Communication No 22/2009, LC v Peru* CEDAW/C/50/D/22/2009 (4 November 2011).

122 At [8.15].

under national law. In addition. breaches of art 3 (states to ensure equal enjoyment of rights between women and men) and art 5 (states to eliminate sex-stereotyping) were also found, the latter on the basis that LC was denied an abortion due to gender stereotypes of women as mothers.

The CEDAW Committee's decision confirmed that the denial of abortion could be a breach of recognised treaty rights prohibiting discrimination. However, the CEDAW Committee did point out that LC was entitled to the abortion under Peruvian law. This is important — the decision is less groundbreaking than it seems at first glance, because the CEDAW Committee did not (and was not required to) find a state's abortion law was in breach of international law (and thereby recognise the existence of abortion rights at international level). Instead, all the CEDAW Committee did was find that Peru's failure to observe its *own* abortion law was a breach of treaty rights.

However, over the last few years, the CEDAW Committee has become extremely vocal in the need for states to decriminalise abortion. In 2014, the CEDAW Committee issued a statement in which it interpreted the 1994 ICPD Programme as "recognis[ing] reproductive rights as based on internationally accepted human rights standards … codified in the human rights treaties".[123] It went on to state that the observance of reproductive rights (and, by extension, treaty rights) required the legalisation of abortion "at least in cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment" and the decriminalisation of abortion for other reasons. This was a clear statement to the effect that access to abortion, at least in some circumstances, is a requirement imposed by the major human rights treaties.

These concepts were then applied by the CEDAW Committee in 2015, when it considered whether legal restrictions on sexual and reproductive health services (primarily on access to contraceptives) in the Philippines breached CEDAW.[124] The relevant executive order issued by the Philippines government was couched in terms of protecting "pro-life issues and responsible parenthood", with reference to the constitution, which equally protected the life of the

123 Committee on the Elimination of Discrimination Against Women *Statement of the Committee on the Elimination of Discrimination Against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review* (2014).

124 Committee on the Elimination of All Forms of Discrimination Against Women *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/OP.8/PHL/1 (August 2014).

mother and the unborn from conception.[125] The CEDAW Committee held the order was discriminatory (in breach of art 12), in part because it forced women to seek unsafe abortions (abortion is criminalised in the Philippines). Among other things, the CEDAW Committee called upon the Philippines to decriminalise abortion. In respect of the observance of the right to health, the CEDAW Committee referred to General Comment 24 and stated:[126]

> … it is discriminatory for a state party to refuse to legally provide for the performance of certain health services for women … distinctive health features that differ for women in comparison to men include biological factors such as women's reproductive functions. Given that such factors have a bearing on women's reproductive health needs, the Committee considers that substantive equality requires that States parties attend to the risk factors that predominantly affect women.

The CEDAW Committee therefore went where it was not required to go in *LC v Peru* — it held that a state's domestic abortion laws were contrary to treaty rights. By so doing, it recognised the existence of abortion rights at the international level.

The observations of the CEDAW Committee on periodic reports by states have also repeatedly called for relaxation of abortion laws. The CEDAW Committee has generally requested states legalise abortion in cases of risks to a woman's life/health, rape and incest and foetal deformity, and decriminalise abortion in all other cases. There are many examples of this — in 2016 alone the CEDAW Committee, in its concluding observations on periodic reports, called for the legalisation and decriminalisation of abortion in at least twelve different states.[127] In those concluding observations, the CEDAW Committee

125 At 2.

126 At [32].

127 See, for example: Committee on the Elimination of Discrimination against Women *Concluding observations on the seventh periodic report of Argentina* CEDAW/C/ARG/CO/7 (18 November 2016) at [32]–[33]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined fifth and sixth periodic reports of Burundi* CEDAW/C/BDI/CO/5-6 (25 November 2016) at [38]–[39]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the eighth periodic report of Bangladesh* CEDAW/C/BGD/CO/8 (25 November 2016) at [34]–[35]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined eighth and ninth periodic reports of Bhutan* CEDAW/C/BTN/CO/8-9 (25 November 2016) at [28]–[29]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined eighth and ninth periodic reports of Haiti* CEDAW/C/HTI/CO/8-9 (9 March 2016) at [33]–[34]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined*

did not undertake any analysis of how restrictive abortion laws might breach treaty rights — rather, it treated it as axiomatic that such laws are contrary to CEDAW and rights to health. The CEDAW Committee, therefore, appears to no longer feel the need to closely link discussions of abortion with existing rights. There is a greater tendency to treat access to abortion — or at least, reproductive rights — as *obviously* protected by human rights treaties.

2 *The Human Rights Committee*

The United Nations Human Rights Committee (HRC) protects the rights in the ICCPR. Like the CEDAW Committee, within the last decade the HRC has actively criticised restrictive abortion policies, in this case as breaching ICCPR rights. Again, there are more examples than can be discussed here, but a few will suffice. In 2000, the HRC stated that in order to assess compliance with the right to freedom from torture and ill-treatment, it required states parties to provide safe abortions to women pregnant from rape — suggesting a failure to do so breaches that right.[128] Throughout the 2000s, the HRC has criticised a number of states for their restrictive abortion laws, suggesting on many occasions that such laws could breach rights to life, health, privacy, freedom from discrimination and freedom from torture and ill-treatment.[129]

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seventh and eighth periodic reports of the United Republic of Tanzania CEDAW/C/TZA/CO/7-8 (9 March 2016) at [34]–[35]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined seventh and eighth periodic reports of Japa*n CEDAW/C/JPN/CO/7-8 (7 March 2016) at [38]–[39]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined seventh and eighth periodic reports of the Philippines* CEDAW/C/PHL/CO/7-8 (25 July 2016) at [39]–[40]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined fourth and fifth periodic reports of Myanmar* CEDAW/C/MMR/CO/4-5 (25 July 2016) at [38]–[39]; Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the combined fourth to seventh periodic reports of Trinidad and Tobago* CEDAW/C/TTO/CO/4-7 (25 July 2016) at [32]–[33]; and Committee on the Elimination of All Forms of Discrimination Against Women *Concluding observations on the sixth periodic report of the Netherlands* CEDAW/C/NLD/CO/6 (2016) at [37]–[38].

128 See, for example Office of the High Commissioner of Human Rights *General Comment No 28: Article 3 (Equality of Rights Between Men and Women*) CCPR/C/21/Rev.1/Add.10 (2000) at [11].

129 Office of the High Commissioner for Human Rights *Concluding Observations of the Human Rights Commitee: Poland* CCPR/CO/82/POL/Rev.1 (5 November 2004) at [8]; Officer of the High Commissioner for Human Rights *Concluding Observations by the Human Rights Committee: Mauritius* CCPR/CO/83/MUS (27 April 2005) at [9]; *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant:* United Nations *International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Ireland* CCPR/C/IRL/CO/3 (30 July 2008) at [13]; and United Nations *International Covenant on Civil and Political Rights: Concluding observations on the sixth periodic report of Ecuador* CCPR/C/ECU/CO/6 (11 August 2016) at [15]–[16].

In its adjudicative function, the HRC has heard some notable abortion cases. In 2005, it considered *KL v Peru*.[130] KL, a 17 year old girl, was pregnant with an anencephalic foetus (a foetus missing a major portion of its brain). Her doctor recommended abortion because the pregnancy endangered her life. Medical personnel refused to authorise the abortion, incorrectly stating that it was unlawful under Peruvian law. KL gave birth to the baby, who died four days later. The HRC held Peru breached art 7 of the ICCPR (right to freedom from torture and ill-treatment) in forcing KL to continue the pregnancy, which caused her grave mental distress and depression upon seeing her daughter's deformities and experiencing the baby's death. Breaches of arts 17 (right to privacy) and 24 (right of minors to adequate protection) were also found.

The HRC issued another decision concerning abortion in 2011. In *LMR v Argentina*, a mentally disabled woman (LMR) was taken to an Argentinian hospital where it was discovered that she was pregnant due to rape.[131] Under Argentinian law, LMR was entitled to a legal abortion, but the hospital refused to perform it, forcing LMR to travel 100 km to another hospital. The second hospital was issued with an injunction before the abortion took place and judicial proceedings were commenced to prevent the abortion. The judge ruled that the abortion should be denied because it was unacceptable to remedy the consequences of rape "with another wrongful assault against … the unborn child."[132] This was overturned on appeal, over a month after the abortion was first requested. Under pressure from Catholic groups, hospitals refused to perform the procedure as LMR was now 20 weeks pregnant. She eventually obtained an illegal abortion.

The HRC found the denial of an abortion breached art 7 (right to freedom from torture and ill-treatment) because of the mental and physical suffering experienced by LMR,[133] and breached art 17 (right to privacy) in unlawfully interfering with LMR's legally protected abortion right.[134] The HRC also found a breach of art 3 (freedom from sex discrimination).[135]

130 United Nations Human Rights Committee *International Covenant on Civil and Political Rights Views: Communication No 1153/2003, KL v Peru* CCPR/C/85/D/1153/2003 (22 November 2005).

131 United Nations Human Rights Committee *International Covenant on Civil and Political Rights: Views: Communication No 1608/2007, LMR v Argentina* CCPR/C/101/D/1608/2007 (28 April 2011).

132 At [2.4].

133 At [9.2].

134 At [9.3].

135 At [9.4].

In the cases discussed above, the HRC suggested that abortion rights might exist as an implication of the rights to privacy, freedom from torture and ill-treatment as well as freedom from sex discrimination. No doubt these are powerful indicators towards recognising rights to abortion. However, there is a significant caveat — in both cases, as in the case of *LC v Peru* before the CEDAW Committee, the abortions denied were legal under the state's laws, and the denial was based on an erroneous belief they were illegal. This is particularly obvious in the findings on privacy: the HRC made clear that the refusal to act in accordance with an individual's private decision to terminate a pregnancy was unjustified *because* the abortion was legal. The HRC did not (because it was not required to) find there was a breach of ICCPR rights due to abortion being illegal under a state party's laws.

However, in 2016, the HRC decided the case of Amanda Mellet.[136] Ms Mellet was denied an abortion under Irish law, even though the foetus had serious birth defects and would die in utero or shortly after birth. She was forced to travel overseas to obtain an abortion, and was not eligible for bereavement counselling or aftercare in Ireland because she had obtained an abortion. The HRC held that even though the abortion Ms Mellet sought was illegal in Ireland, Ms Mellet's art 7 right to freedom from torture and ill-treatment was violated due to the physical and mental suffering she underwent in being forced to continue the pregnancy, and obtain an abortion overseas, without access to adequate support. Furthermore, Ms Mellet's art 17 right to privacy was breached because Irish law had arbitrarily made a decision in respect of her reproductive functions. Finally, Ms Mellet's art 26 right to freedom from discrimination was violated because she was denied the care and support women in her position who carried the foetus to terms would have received, which in turn related to gender-based stereotyping of women as 'reproductive instruments'. Crucially, the HRC explicitly stated that Ireland's own position that its abortion laws struck a fair balance between the rights of the mother and foetus did not mean that those laws could not breach international human rights.

The Mellet case took the HRC further than it had gone in previous decisions. The HRC found a legal refusal of abortion nonetheless violated

136 United Nations Human Rights Committee *United Nations International Covenant on Civil and Political Rights: Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2323/2013, Mellet v Ireland* CCPR/C/116/D/2324/2013 (17 November 2016).

ICCPR rights, that is, that a states party's abortion laws had constituted breaches of international human rights. This is a significant indication that access to abortion is now recognised as a necessary implication of other treaty rights and states can no longer expect total freedom in regulating abortion.

3 Reports from Special Rapporteurs and United Nations experts

With the Mellet decision and the reports of numerous treaty bodies in favour of recognising abortion rights, 2016 was a crucial year. That same year saw a number of other statements at the international level which considered access to abortion as an international human right. For example, the January 2016 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment highlights the need to specifically consider gender implications when assessing breaches of that right, particularly since the purpose and intent elements of torture are always satisfied when an act is gender specific.[137] The Report then stated that the criminalisation of abortion, as an offence that is aimed solely at women, constitutes a violation of human rights law and that laws prohibiting abortion in cases of incest, rape, foetal impairment or to safeguard the woman's life or health violate the right to freedom from torture and ill treatment.[138] Furthermore, administrative hurdles to access a safe abortion, when that abortion is legal, amounts to torture and ill-treatment.[139] Finally, the Report concluded that "States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care".[140]

A similar approach was taken by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in the April 2016 report, which explicitly stated denial of access to abortion breached the right to health for adolescent girls, and called on states to decriminalise abortion.[141] Just days later, the report of the Working Group on the issue of discrimination against women in law and in practice referred to restrictive abortion laws as discriminatory and breaching women's

137 United Nations General Assembly *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* A/HRC/31/57 (5 January 2016) at [5] and [8]–[9].

138 At [43] and [72(b)].

139 At [44].

140 At [44].

141 United Nations General Assembly *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* A/HRC/32/32 (4 April 2016) at [92] and [113(b)].

human rights, including the right to freedom from torture and ill-treatment. In a strong condemnation of such laws, the Working Group stated:[142]

> Criminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health in order to preserve their function as reproductive agents and depriving them of autonomy in decision-making about their own bodies. Restrictive laws apply to 40 per cent of women worldwide … Ultimately, criminalization does grave harm to women's health and human rights by stigmatizing a safe and needed medical procedure.

On 27 September 2016, a group of United Nations experts publicly called for the decriminalisation of abortion laws. The powerful statement included the following comments:[143]

> Criminalisation of abortion and failure to provide adequate access to services for termination of an unwanted pregnancy are forms of discrimination based on sex. Restrictive legislation which denies access to safe abortion is one of [the] most damaging ways of instrumentalising women's bodies and a grave violation of women's human rights. The consequences for women are severe, with women sometimes paying with their lives.
>
> […]
>
> We urge States to repeal restrictive laws and policies in relation to abortion, which do not meet the international human rights law requirements and that have discriminatory and public health impacts, and to eliminate all punitive measures and discriminatory barriers to access safe reproductive health services. These laws and policies violate women's human right to health and negate their autonomy in decision-making about their own bodies.
>
> We cannot tolerate the severe violation of women's human rights on the basis of their sex and biological differences. We cannot tolerate the high incidence of women's and girls' preventable deaths resulting from maternity-related issues, including from unsafe abortion.

142 Human Rights Council *Report of the Working Group on the issue of discrimination against women in law and in practice* A/HRC/32/44 at [79]–[80].

143 "'Unsafe abortion is still killing tens of thousands of women around the world' – UN rights experts warn" (27 September 2016) United Nations Human Rights Office of the High Commissioner <www.ohchr.org>.

As can be seen from the above comments, the experts treated it as self-evident that such laws contravene international human rights law, including freedom from discrimination and the right to health.

C Developments outside the United Nations

There have also been developments in this area at a regional level. There have been moves within the American system that indicate a recognition of some right to an abortion. In Europe, there has been a substantial body of case law that has recognised limitation on access to abortion might contravene treaty rights. However, the most dramatic development has occurred in Africa where abortion rights have been given treaty recognition.

1 The American system

In 2008, the IACHR and IACtHR considered the case of "Beatriz", a pregnant El Salvadorian woman who was denied an abortion. The pregnancy endangered her health due to pre-existing medical conditions and because the foetus was anencephalic.[144] The IACHR ordered Beatriz be granted an abortion; El Salvador did not comply with the order, so the IACtHR issued a decision requiring the state to take "all necessary medical measures" to protect Beatriz's right to life and physical integrity.

Similarly, in 2010, the ACHR ordered Nicaragua to treat "Amelia", a pregnant cancer patient, though treatment would induce a miscarriage.[145]

In neither case were the human rights implications of the abortion issue discussed. However, the issuing of orders arguably demonstrates recognition, in both cases, of abortion rights as a requirement of the rights to life and health.

2 The European system

In the 1981 case of *Bruggemann v Federal Republic of Germany*, two women from West Germany applied to the Commission concerning the repeal of liberal abortion laws by a domestic court.[146] The ruling stated that abortions were only permissible within 12 weeks of conception and where the pregnancy

144 Camila Gianella Malca "Upcoming Decision of the Inter-American Court of Human Rights on Access to Therapeutic Abortion?" (21 October 2013) PluriCourts Blog <www.jus.uio.no>.

145 Inter-American Commission on Human Rights "PM 43-10 "Amelia" Nicaragua" Organization of American States <www.oas.org>.

146 *Bruggemann v Federal Republic of Germany* (1978) 10 DR 100 (ECHR).

resulted from rape or caused distress to a woman that could not be averted in any other way. This was based on the recognition of a foetal right to life. The applicants alleged this breached art 8 of the ECHR (right to privacy) by forcing them either to use contraception or abstain from sexual intercourse.

The Commission held that pregnancy, abortion, and sexual life were aspects of private life,[147] but there were limits to private life when it interfered with the rights or interests of others.[148] Pregnancy could not pertain solely to an individual's privacy, because pregnant women's private lives were connected with the foetus.[149] The Commission considered it unnecessary to rule on the question whether the unborn had a right to life under the ECHR, so as to justify an interference in privacy "for the protection of others" under art 8. It noted that international treaties protect certain interests of the unborn (such as the prohibition of execution of pregnant women under art 6(5) of the ICCPR), so a balancing exercise between a woman's right to privacy and the interests of the foetus was necessary.[150] Not every restriction on abortion would constitute a breach of the right to privacy. West Germany's abortion provisions were not sufficiently restrictive to interfere in private life because there were still circumstances where abortions were legal.[151]

This decision recognised restrictions on access to abortion could breach the right to privacy, but there was no indication of when this would be so. Instead, by finding in favour of West Germany, the Commission continued the traditional approach of deferring to domestic law on the issue. By stating that the interests of the foetus were relevant, the Commission implied that the unborn may have some rights, but left it up to national law to decide if this included a right to life and to what extent.

A dissenting opinion held that while it was not conclusive that the right to life did not cover the unborn, the rights and freedoms in the ECHR could not apply to the unborn, as they are of a nature that can only be exercised by born persons, and the West Germany court ruling was an interference of the right to privacy.[152] In a joint separate opinion, three members of the Commission stated

147 At [55].

148 At [59].

149 At [59].

150 At [60].

151 At [61]–[62].

152 Per Mr T Opsahl, joined by MC Nørgaard and L Kellberg.

that "personally" they felt that abortion in the early stages of pregnancy should be a woman's private choice, but could not read this as a requirement for compliance with art 8, partly because the art reflected a viewpoint of privacy that "has been formed mainly by men" and was thus not necessarily suitable to deal with the abortion question.[153] This last point suggests women's rights are only protected to the extent that they overlap with men's rights, so specifically female issues, such as abortion, occupy a grey area in human rights law and are left to be decided by individual states.

In 2007, the ECtHR considered *Tysiac v Poland*, in which a woman was not provided an abortion despite serious risk to her health (the pregnancy resulted in permanent disability).[154] Unlike the HRC cases discussed, the ECtHR did not find that her rights to freedom from inhuman or degrading treatment (art 3) were breached.[155] However, the ECtHR did find that there had been a breach of privacy (art 8), arising from the state's failure to ensure that the complainant was able to undergo an abortion on the basis that the abortion was permissible under state law.[156] Importantly, the required abortion was legal in Poland — the ECtHR therefore did not find that access to abortion would be required under the right to privacy even when the state prohibited that abortion.

A, B and C v Ireland concerned three Irish women who travelled to England to obtain abortions, as they were unable to do so in Ireland.[157] Before the ECtHR, A and B alleged that Irish laws, which did not allow abortion to preserve heath and wellbeing, breached art 8 (right to privacy). The ECtHR held that art 8 did not confer a right to abortion, but reiterated that pregnancy is part of private life and restrictions on abortion interfered with private life.[158] To determine if the interference was unjustified (and so a breach of art 8), the ECtHR examined whether the interference was in accordance with the law and pursued a legitimate aim or was necessary in a democratic society.[159] The ECtHR found that the interference was in accordance with law as the abortions

153 At [3].

154 *Tysiac v Poland* (2007) 45 EHRR 42 (Grand Chamber, ECHR).

155 At [68].

156 At [132].

157 *A, B and C v Ireland* (2011) 53 EHRR 13 (Grand Chamber, ECHR).

158 At [212]–[213].

159 At [218]–[241].

were prohibited under Irish law.[160] The abortion laws pursued a legitimate aim: the protection of Irish moral beliefs.[161] In spite of reviewing national polls and reports that suggested moral beliefs on abortion had changed since the law's enactment, the ECtHR declined to find the beliefs supporting the law were no longer prevalent in Irish society.[162] The ECtHR also found that although Irish abortion laws were more restrictive than is the trend among states parties to the ECHR, the ECtHR would allow a broad discretion to states in legislating on a sensitive and morally charged issue such as abortion.[163] This discretion was not unlimited, but the Irish law still fell within it, and did not violate A and B's art 8 rights.[164] The ECtHR did find a violation of art 8 in relation to C, a cancer patient who had been concerned about the pregnancy's effects on her health, but only because the state had not set up appropriate mechanisms to enable her to determine the risks of her pregnancy and if she would be eligible for a legal abortion under Irish law.[165]

The decision in respect of A and B illustrates the level of deference given to states to legislate on abortion. The test used was inherently paradoxical: abortion laws reflecting Irish moral beliefs pursued a legitimate aim and were permissible in a democratic society because they reflected Irish moral beliefs. Denials of abortion under state law were in accordance with law because state law did not permit those abortions. Using this test, it is hard to envision a circumstance where restrictive abortion laws would ever breach art 8. In spite of appearing to consider abortion laws under the ECHR, the ECtHR in effect simply ruled that the denial of abortion to A and B were legal under Irish law. This decision stands in stark contrast to the HRC's later decision in *Mellet*, in which the HRC did not shy away from finding Irish abortion laws breached the ICCPR, despite the moral beliefs behind those laws.[166]

In *RR v Poland*, RR was informed the foetus she was carrying was likely malformed.[167] Polish law allowed abortions where there was a high risk the foetus

160 At [219]–[221].

161 At [222].

162 At [226].

163 At [235]–[237].

164 At [238]–[241].

165 At [267]–[268].

166 *Mellet,* above n 136.

167 *RR v Poland* (2011) 53 EHRR 31 (Section IV, ECHR).

was severely damaged and could not yet survive outside the mother's body. RR's repeated requests for the relevant genetic tests — and as the pregnancy progressed, an abortion — were denied. When she eventually obtained the tests and discovered the foetus was malformed, it was too late in the pregnancy for a legal abortion to be performed. The Court found a breach of art 3 (right to freedom from torture and ill-treatment) of the ECHR, because RR was in a position of great vulnerability, suffered significant anguish, and was forced to wait for genetic testing (to which she was legally entitled) due to the delay of medical professionals.[168] A breach of art 8 (right to privacy) was also found — the state had interfered in RR's private decision to undergo genetic testing and an abortion to which she should have been legally entitled.[169] The Court stated that while states had discretion under the ECHR to formulate their own abortion laws, once these laws were created, states had to ensure that they were followed.[170] As with the HRC cases, the Court did not suggest that a right to an abortion existed as an implication of other rights. Rather, it simply found that Poland had failed to act in accordance with its own abortion laws.

Despite the conservative approach taken in the decisions discussed above, in 2008 (interestingly, three years before the decision in *RR v Poland*), the Council of Europe took what appears to be a significant step in the direction of recognising abortion rights.[171] First, the Rapporteurs of the European Committees on Equal Opportunities for Women and Men and on Social, Health and Family Affairs recommended that restrictive abortion laws be relaxed because they may cause women to seek illegal, unsafe abortions.[172] The Parliamentary Assembly of the Council of Europe (PACE) then passed a resolution inviting member states to decriminalise abortion "within reasonable gestational limits" and ensure legal abortions were accessible.[173] Both the

168 At [153]–[162].

169 At [192]–[214].

170 At [200].

171 A body overseeing the enforcement of the ECHR, consisting of 47 member states.

172 Gisela Wurm *Access to Safe and Legal Abortion in Europe: Rapporteur of the Committee on Equal Opportunities for Women and Men* Doc. 11537 (Council of Europe, Parliamentary Assembly, 8 April 2008) at [8] and [34]; Christine McCafferty *Access to Safe and Legal Abortion in Europe: Rapporteur of Committee on Social, Health and Family Affairs* Doc. 11576 (Council of Europe, Parliamentary Assembly, 15 April 2008).

173 *Resolution 1607: Access to Safe and Legal Abortion in Europe* (Council of Europe, Parliamentary Assembly, 2008) at [7.1]–[7.4].

Rapporteurs and the Resolution refer to access to abortion as part of the rights of women to personal integrity and autonomy — but make no explicit link between abortion laws and any right in the ECHR or any other human rights instrument. This was perhaps to avoid the implication that becoming a party to a human rights treaty may impose upon states an obligation inconsistent with its national law. While the majority of member states of the Council of Europe do permit abortion in circumstances such as to preserve the life or health of the woman, or in cases of rape or foetal impairment, the specifics of criteria that must be satisfied, and the availability of abortion on wider grounds, such as for social or economic reasons, still vary widely.[174] It would have been politically unattractive to imply the ECHR (or some other treaty) imposed obligations in respect of abortion laws on states. On the other hand, the comments of the Rapporteurs and the Resolution do show some recognition that access to safe and legal abortion can be a right in and of itself.

3 The African system

The Maputo Protocol to the African Charter on Human and People's Rights is the first international treaty recognition of abortion as a human right, both as a necessary implication of existing rights and as a freestanding right.[175] As part of this recognition, the Protocol, unlike the cautious approach of the Council of Europe discussed above, does not merely invite the relaxation of abortion laws; it requires it. Article 14, entitled "*Health and Reproductive Rights*", requires states parties to:

> … protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

The Protocol was adopted by the African Union in 2003 and entered into force in 2005. As at September 2017, 36 of the 54 parties to the African Charter have ratified the Protocol; an additional 15 states have signed but not ratified the Protocol.[176]

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174 "Abortion Policies: A Global Review", above n 21.

175 Maputo Protocol, above n 106.

176 "Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2017) African Commission on Human and People's Rights <www.achpr.org>.

The wording of art 14 clearly indicates access to abortion is a necessary aspect of the right to health. The interpretative document to art 14 issued by the African Commission on Human and People's Rights further refers to restrictions on abortion as breaches of the right to enjoy the benefits of scientific progress, the right to freedom from cruel, inhuman and degrading treatment and the rights to life and health.[177] Both this document and the plans of action in respect of the Protocol emphasise the discriminatory impact of restrictive abortion laws; that is, such laws prevent women's enjoyment of existing human rights on the same level as men.[178] On 20 January 2017, the Africa Leaders' Summit on Safe Legal Abortion issued the *Africa Leaders' Declaration on Safe, Legal Abortion as a Human Right* (*Africa Leaders' Declaration)* which, as the title suggests, confirmed the existence of "the right to a safe, legal abortion as a fundamental women's human right in Africa" and required states to decriminalise abortion.[179] This declaration is another bold move in this area — it refers to access to abortion as a human right in and of itself, and not simply necessary for the observation of other human rights.

Why has Africa taken such a decisive step in recognising a right to abortion? According to the *Africa Leaders' Declaration*, the reason is, in part, to address the alarming rate of unsafe abortions on the continent: an estimated six million unsafe abortions in Africa occur each year, resulting in around 29,000 deaths.[180] Sub-Saharan Africa has the highest statistics of maternal mortality in the world, with 987 deaths per 100,000 live births in 1990, since reduced to 846 deaths in 2000 and 546 deaths in 2015.[181] It is important to note the Maputo Protocol and associated documents make clear that women's rights are breached both when the pregnancy itself threatens a woman's life and when a woman is forced to seek an unsafe abortion for any reason. The Protocol is a ground-breaking document — not only the first international

177 African Commission on Human and Peoples' Rights *General comment No 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* at [31]–[40].

178 African Union *Draft Maputo Plan of Action 2016–2030 for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights*. At this time, only the draft plan of action is available.

179 *The Africa Leaders' Declaration on Safe, Legal Abortion as a Human Right* (Africa Leaders' Summit on Safe Legal Abortion, 20 January 2017).

180 "Maternal mortality fell by almost half between 1990 and 2015" (February 2017) UNICEF <https://data.unicef.org>.

181 "Maternal mortality", above n 180.

treaty recognition of a positive right to abortion, but also one that protects the right to abortion in relatively wide terms.

D Conclusions on the development of abortion rights

The discussion in the second part of this article has shown significant movement towards recognition of abortion rights at an international level. The United Nations has made clear indications that restrictive abortion laws do breach a number of existing, well-recognised treaty rights, particularly through the decisions and reports of the CEDAW Committee and HRC. This is consistent with the decisions of adjudicative bodies in the Americas and Europe. Finally, and most dramatically, the step of enshrining abortion rights in a treaty has been taken in Africa. The movement towards recognising abortion rights indicates that the traditional approach of leaving contentious issues like abortion to states' discretion has been qualified by public health concerns; in particular, maternal mortality.

Certainly, abortion rights have developed in a back door manner. It is unlikely states considered, when they ratified treaties containing rights such as to health, privacy and freedom from torture, that those rights also required access to safe and legal abortions. Furthermore, when states did directly consider abortion while drafting treaties, they deliberately left the matter ambiguous on the plain wording of those treaties. It is therefore potentially unattractive to now interpret treaties in a manner that binds states to obligations they did not expect to have when they ratified the relevant treaties. Surely the drafters of the ICCPR, who took such care in leaving the abortion question ambiguous on the plain wording of the rights to life, would be surprised to find other rights in the same treaty require access to a safe and legal abortion.

On the other hand, given the grim statistics of maternal mortality and unsafe abortion, reading abortion rights as incidental to other rights, which the majority of states are already bound by, is a useful way for international bodies to require action to be taken in this area, especially by states that would never sign up to a treaty that explicitly provided for abortion rights. There is also nothing inherently wrong with applying the international human rights treaties to address current global concerns; the drafters of those treaties could never have expected that they had considered every single scenario to which the treaty would apply.

IV CONCLUSION

The role international law should play in regulating abortion has been a live issue since the inception of the modern human rights system; it continues to be contentious and frequently raised, particularly given the global health issue posed by unsafe abortion.

International law's attitude towards abortion is a case study in the flexibility of international human rights law and its ability to change over time to address current concerns. As the first part of this article has discussed, the drafters of the major human rights treaties deliberately left the question of abortion open through ambiguous wording — in particular, the extent to which the right to life applies before birth. Whether abortion was to be permissible under international law was originally a matter left up to individual states. The American and European human rights case law emphasised this. The travaux préparatoires of the various treaties are replete with concerns that if treaties explicitly took a stance on the matter, this would be a barrier wide ratification. International law, after all, is a consensual system — worthless if states do not agree to be bound by treaties.

However, over time, international bodies have been unable to stay silent in the face of the growing push for the recognition of women's rights and alarming global statistics of maternal mortality and unsafe abortion. This developed from an interpretation of existing treaty rights — such as to life, health, privacy and freedom from torture and ill-treatment — as requiring access to a safe and legal abortion. Though it means reading abortion rights into existing rights, which was likely never intended, at the time treaties were concluded, international bodies will not shy away from doing so.

Given that there has been wide recognition, at the international level, of restrictive abortion laws breaching existing rights, it appears appropriate that an international treaty enshrining this position should be enacted at the United Nations level. This would prevent the need for international bodies to reference various documents (including treaties, periodic reports or previous statements) for the proposition that abortion rights exist. Of course, there is no guarantee a treaty containing abortion rights would be widely ratified (or observed by ratifying states). However, it would at least have the advantage of clarifying the position at international level — something that appears to be sorely needed, given the amount of attention given to this matter within the past few decades. It would also address the potential disingenuousness of

interpreting existing treaties, which do not explicitly mention abortion, as protecting abortion rights. Specific treaty recognition of abortion rights would also provide such rights greater legitimacy and moral force, and political pressures may indeed entice otherwise unwilling states to ratify the relevant treaty. This is particularly important given the increasing global trend towards the relaxation of abortion laws and the clear concerns about abortion repeatedly raised at international level.

Whether it continues to treat abortion rights as aspects of existing rights, or takes the step of enshrining such rights in a treaty, it is important that international human rights law continues to address issues around access to abortion. After all, how can access to abortion be anything but a human rights issue, so long as people like Savita Halapannavar continue to suffer, and die, due to restrictive domestic abortion laws.