

# Abortion in Latin America in International Perspective: Limitations and Potentials of the Use of Human Rights Law to Challenge Restrictions

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When the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to . . . a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.<sup>1</sup>

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## INTRODUCTION

The Zika virus epidemic has brought into focus the harsh impact of restrictions on abortion in Latin America. Published medical research has confirmed that the disease, when contracted by pregnant women,<sup>2</sup> results in “brain

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1. Women’s Link Worldwide, *Excerpts of the Constitutional Court’s Ruling that Liberalized Abortion in Colombia*, 1, 36 (2007), available at <https://perma.cc/X9SB-RYJP>.  
2. References to “women” throughout this article should be read as denoting women and/or girls unless otherwise stated.

calcifications at the junction between cortical and subcortical white matter associated with other malformations” which can cause severe brain damage<sup>3</sup> and arthrogyposis, a serious joint condition.<sup>4</sup> This, in turn, raises the possibility that the virus could be linked to a whole range of other adverse health effects in children.<sup>5</sup> The response of some governments in the region, including El Salvador, Brazil and Colombia, has been simply to advise women to “avoid getting pregnant.”<sup>6</sup> Such exhortations are problematic because steps to facilitate access to reproductive health services do not accompany them. This is especially troubling in a region with a striking pattern of either complete bans on abortion or heavily restricted access to abortion. In light of the difficulties faced by women in the region who become pregnant, the UN High Commissioner on Human Rights has called for women in affected areas to be allowed to access abortion and birth control.<sup>7</sup>

Restrictive abortion laws are by no means confined to Latin America: in 2016, for example, there were attempts to ban abortion in Poland,<sup>8</sup> the criminalization of a young woman in Northern Ireland for taking abortion medication,<sup>9</sup> and attempts at increasing restrictions in parts of the United States.<sup>10</sup> In addition, some research suggests that of the thirteen percent of maternal deaths caused by complications from unsafe abortions, the most severe complications occur in Africa.<sup>11</sup> While the issue is international in scope, Latin America is nonetheless an insightful case study because it is the region “where international pressure for liberalization has led to the most repeated collisions with right-wing religion,”<sup>12</sup> and the onerous nature of the resulting restrictions is exceptionally important in light of the Zika virus. Over the past eleven years, there have been a series of lawsuits in international and regional courts by victims of some of the

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3. Maria de Fatima Vasco Aragao et al., *Clinical Features and Neuroimaging (CT and MRI) Findings in Presumed Zika Virus Related Congenital Infection and Microcephaly: Retrospective Case Series Study*, 353 *BMJ* i1901, 1 (2016), available at <https://perma.cc/JUA5-9ZSQ>.
  4. *See generally* Vanessa van der Linden et al., *Congenital Zika Syndrome with Arthrogyposis: Retrospective Case Series Study*, 354 *BMJ* i3899 (2016), available at <https://perma.cc/Y78C-ACQB>.
  5. Nicola Davis, *Zika Virus Could Be Linked with ‘Whole Spectrum’ Of Disorders*, *The Guardian*, 9 Aug. 2016, available at <https://perma.cc/R9PY-6QM3>.
  6. Josh Hafner, *Women Advised to Avoid Pregnancy as Zika Virus Spreads*, *USA Today*, 2016, available at <https://perma.cc/2T5P-H9UF>.
  7. Jonathan Watts, *UN Tells Latin American Countries Hit by Zika to Allow Women Access to Abortion*, *The Guardian*, 5 Feb. 2016, available at <https://perma.cc/UEU9-6NZV>.
  8. “Polish Prime Minister Backs Call for Full Abortion Ban,” *LifeSiteNews*, 2016, available at <https://perma.cc/9YRP-QLHD>.
  9. Henry McDonald, *Northern Irish Woman Given Suspended Sentence Over Self-Induced Abortion*, *The Guardian*, 4 Apr. 2016, available at <https://perma.cc/MK7F-BL8S>.
  10. Although a number of such attempts have been defeated in the courts. *See generally Whole Woman’s Health v. Hellerstadt*, Commissioner, 136 S. Ct. 2292 (2016), available at <https://perma.cc/VNN4-S8HZ>.
  11. Michelle Goldberg, *The Means of Reproduction: Sex, Power, and the Future of the World*, 10 (2009).
  12. *Id.* at 17.

most detrimental impacts of these restrictions in different countries in Latin America. This includes a 2005 finding against Peru by the UN Human Rights Committee (“UNHRC”), which gave the victim monetary compensation.<sup>13</sup>

Assuming universal access to abortion within the first 24 weeks—up until the point at which the fetus is considered independently viable<sup>14</sup>—is a desirable goal, this article assesses the impact of international human rights law (“IHRL”) in challenging restrictions to abortion access in Latin America, and situating shortcomings in the broader context of women’s rights as well as factors specific to abortion. The article argues that, recent and partial successes notwithstanding, IHRL’s impact in challenging restrictions has been late in coming and relatively limited. This is particularly the case with respect to women who are not critically endangered in health terms by a pregnancy, not bearing a non-viable fetus, and not victims of rape. The causes of IHRL’s shortcomings in this arena include the historically uneasy relationship between IHRL and women’s rights, divisions regarding the desirability of, and priority to be afforded to, abortion access, and notions of fetal rights shaped by regional, religious, and cultural influences. The reforms that have been won against this challenging background have been due, in large part, to the efforts of women’s groups who have fought in population conferences and brought claims under international and regional systems.

The article contains five further sections. Part One highlights notable impacts of restrictions in Latin America and discusses four key cases brought on behalf of women in the region who were denied abortions in severe circumstances. The first case was considered by the UNHRC, responsible for monitoring compliance with the International Covenant on Civil and Political Rights (“ICCPR”), the second by the committee monitoring the Convention on the Elimination of all forms of Discrimination against Women (“CEDAW”). The third and fourth cases were within the regional system, at the Inter-American Commission of Human Rights (“IACoMHR”) and the Inter-American Court of Human Rights (“IACtHR”). Part One makes initial observations about the success and impact of these cases.

Part Two addresses “mainstream human rights,” including the UNHRC. This section considers arguments about the UNHRC’s historical undervaluing of women’s rights and hesitancy to interfere with the private sphere. This article argues that legal debates about abortion rights highlight the interdependence of rights, given that the denial of abortion access can prevent or curtail the enforceability of other rights. Furthermore, there are difficulties in establishing a freestanding right to abortion. Part Two argues that IHRL instruments already provide a basis for the right to abortion so the issue lies in how IHRL instruments

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13. For example, there was a 2005 finding against Peru by the UN Human Rights Committee (“UNHRC”), which gave the victim monetary compensation. “Peruvian Government Gives Monetary Reparations As Part of Historic United Nations Abortion Case,” Center for Reproductive Rights (2015), available at <https://perma.cc/YD7J-4YAX>.

14. Trees A.M. te Braake, *Late Abortion and the European Convention for Human Rights*, 18 *Medicine and Law* 607, 607–8 (1999).

are interpreted.

Women's groups have led the efforts to have reproductive rights recognized as human rights. Part Three discusses the impact of CEDAW by making some observations about the success and impact of different cases. This section also assesses controversies that arose from a conflict between population control interests, particularly associated with Western states during the Cold War period, and divisions within women's groups. This conflict resulted in a declaration at the International Conference on Population and Development of 1994 in Cairo that left abortion to regulation at the national or regional level.<sup>15</sup> The ultimate failure of the Cairo conference to produce stronger guidance on abortion rights is indicative of the excessive deference to state bodies and cultural factors. It is also a cautionary tale against treating abortion as a concern purely of Western women, which can have the impact of strengthening forces opposed to women's rights on religious grounds.

Part Four focuses on the influence of regional factors on abortion rights given the lack of a strong international framework and the substantial deference based on the margin of appreciation. Such factors include the particular formulation of the "right to life" in Article 4(1) of the American Convention of Human Rights ("ACHR")<sup>16</sup> and the influence of religious beliefs. This article argues that, in some cases, such religious beliefs are not only about fetal rights, but also present a particular conception of women's roles. Part Four notes that the Catholic doctrine, which heavily influences predominant opinions in the region, arguably misconstrues the right to life to the detriment of women's rights. Catholicism tends to be seen as capable of accommodation within the human rights framework, in contrast to practices based on other religions which are more likely to be seen as backwards and needing to be eradicated. This article also acknowledges the need to constructively examine religious arguments by considering the importance of ensuring socio-economic rights are protected so that women have a genuine choice of whether or not to continue pregnancies.<sup>17</sup>

Part Four considers issues of implementation and current events, which may impact the region. These events include pressure related to the spread of the Zika virus, the development of new embryo technology, and a recent General Comment of the Committee for Economic, Social and Cultural Rights ("CESCR") which, finally, makes an unequivocal demand for the decriminalization of abortion and sets out a number of measures to protect the right to abortion.<sup>18</sup> The article argues

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15. United Nations, *Report of the Internat'l Conference on Population and Development*, UN Doc. No. A/CONF.171/13, Sept. 1994, ¶ 8.25.

16. Organization of American States, *American Convention of Human Rights*, 22 Nov. 1969, O.A.S.T.S. No 36, 1144 U.N.T.S 144, 145, available at <https://perma.cc/6X92-9YDZ>.

17. An example of the contrast in treatment is demonstrated by Maja Kirilova Eriksson, *Reproductive Freedom: in the Context of International Human Rights and Humanitarian Law*, 46, 185–87 (2000).

18. UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the Internat'l Covenant on Economic, Social and Cultural Rights)*, Advance Unedited Version, UN Doc. E/C.12/GC/22

that this clear statement of principle can assist in challenging the deferential treatment heretofore enjoyed by national courts and legislatures that limits access to abortion.

### I. ABORTION IN LATIN AMERICA – SETTING THE SCENE AND KEY CHALLENGES FROM THE REGION

Latin America has not only lagged behind global progress towards more relaxed abortion laws, but has also increased restrictions.<sup>19</sup> In 2013, of the seven countries in the world with a total ban on abortion even where needed to save a woman's life, four—El Salvador, Nicaragua, Chile and the Dominican Republic—were in Latin America or the Caribbean.<sup>20</sup> At the time of writing, only Chile has changed legislation on abortion access with legislation approved by the Senate in January 2017<sup>21</sup> that would allow abortion in cases of rape, non-viability, and health risk to the woman.<sup>22</sup> Steps have been taken elsewhere in the region to tighten restrictions: in the Mexican state of Veracruz, for example, the governor passed legislation to make abortion illegal, in effect, in all situations.<sup>23</sup>

There is no sign of eased restrictions in Nicaragua or El Salvador. Though abortion had been legal in Nicaragua for more than a century, a series of restrictive changes beginning in 2006<sup>24</sup> culminated in the imposition of prison sentences for women who have abortions and practice bans for doctors who perform them.<sup>25</sup> As a result, women who have suffered miscarriages have delayed seeking medical treatment out of fear they may be accused of inducement, while rape victims are forced to carry pregnancies to term unless they are willing and able to obtain an illegal abortion.<sup>26</sup> The Committee Against Torture has expressed concerns that the situation causes “serious traumatic stress and a risk of long-lasting psychological problems.”<sup>27</sup>

In El Salvador, one of the countries with the highest Zika infection rates, abortion with consent is punishable by two to eight years of imprisonment.<sup>28</sup> Such

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(2 May 2016).

19. Amnesty International, *The Total Abortion Ban in Nicaragua - Women's Lives and Health Endangered, Medical Professionals Criminalized*, 1, 8 (2009), available at <https://perma.cc/Y7GK-RDCZ>.
20. United Nations Population Division, *World Abortion Policies*, 2013, available at <https://perma.cc/2SEP-37YB>.
21. Ana Muñoz Padrós, "Disrupting the Solitude of Women," hosted by Ms. Magazine Blog, 2017, available at <https://perma.cc/A622-7BX2>.
22. BBC, *Chile lawmakers lift abortion ban introduced by Pinochet*, BBC News, 2016, available at <https://perma.cc/ZC6E-JSW2>.
23. David Agren, *Abortion banned by controversial Mexican state governor*, *The Guardian*, 29 July 2016, available at <https://perma.cc/Z8QQ-6XML>.
24. Amnesty International, *The Total Abortion Ban in Nicaragua*, at 7–15.
25. Penal Code of Nicaragua, Article 143, Law No. 641 (2007).
26. Amnesty International, *The Total Abortion Ban in Nicaragua*, at 23–27.
27. United Nations Committee Against Torture, *Concluding Observations of the Committee Against Torture: Nicaragua*, UN Doc. CAT/C/NIC/CO/1 (10 June 2009), ¶ 16.
28. Penal Code of El Salvador, Decree No. 1030, Article 133 (1998).

restrictions do not have the effect of making abortion less widespread: in El Salvador, where the ban dates back to 1998, an estimated 19,290 abortions took place from 2005 to 2008, of which 27.6% were on adolescents.<sup>29</sup> The overall abortion rate in Latin America is thirty-two per thousand women, compared to twelve per thousand in Europe where most countries allow abortion on a number of grounds.<sup>30</sup> On the contrary, the bans exacerbate both legal and health risks: maternal mortality has become the second most common cause of female death in El Salvador, with 40.6% of indirect maternal mortality cases involving suicides by teenagers.<sup>31</sup> The ban has also seen “countless women with pregnancy complications being arrested” on suspicion of having induced an abortion,<sup>32</sup> and there is a danger that the situation could become even more severe, with proposals from the opposition party in July 2016 to increase the sentence for women having abortions to as much as 50 years.<sup>33</sup> Even in those countries that have not imposed outright bans, access in the region tends to be heavily restricted, with differential access compounding social inequality. For example, Brazil only allows abortion in cases of rape and health risk to the woman.<sup>34</sup> This law impacts economically disadvantaged women more severely because they depend on public healthcare, while middle-class and upper-class women are able to access a network of private providers, usually without interference from law enforcement.<sup>35</sup>

Three of the four cases studied in this paper took place against a similar legal framework, i.e. restricted access as opposed to a total ban. In Peru, while abortion is legal in principle to save a woman’s life or to avoid serious or permanent damage to her health, access has often been blocked in practice by, *inter alia*, lack of clarity in the criteria for a legal abortion, fear of prosecution or disciplinary proceedings by healthcare providers, and a lack of sanctions for failure to deliver legal abortion.<sup>36</sup> Exemplary is the case of *KL v. Peru*. In 2001, KL, a pregnant 17-year old, was informed that her fetus had developed an abnormality and that her

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29. Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion* (2011), available at <https://perma.cc/3DFY-N7F2>.

30. Verónica Undurraga, “Proportionality in the Constitutional Review of Abortion Law,” 77, 84 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

31. Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences, on her follow-up mission to El Salvador*, United Nations, General Assembly, UN Doc. A/HRC/17/26/Add.2, 17–18, (2011).

32. Center for Reproductive Rights, “Inter-American Commission on Human Rights Holds Hearing on Wrongful Imprisonment of Salvadoran Women Who Miscarry,” 19 Oct. 2015, available at <https://perma.cc/22DH-ZNNE>.

33. Amnesty International, *El Salvador: Scandalous proposal to increase jail terms for women accused of abortion*, 12 July 2016, available at <https://perma.cc/BR5T-ZGBF>.

34. Luís Roberto Barroso, “Bringing abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy,” 258, 260–61 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

35. *Id.*

36. Human Rights Watch, *My Rights, and My Right to Know- Lack of Access to Therapeutic Abortion in Peru* (2008), available at <https://perma.cc/RRH5-DLMR>.

life was in danger if the pregnancy continued.<sup>37</sup> Despite a doctor's recommendation to terminate the pregnancy, the hospital director refused the woman an abortion, claiming that it would be unlawful since it did not fit into any of the exemptions from criminal punishment: where it was required to save the pregnant woman's life or avoid serious and permanent health damage, or where the child was likely to suffer serious physical or mental defects.<sup>38</sup> The baby was born anencephalic and died four days after birth. KL suffered psychiatric damage.<sup>39</sup>

The UNHRC found that the hospital breached a number of KL's rights contained in the ICCPR, including Article 7 (torture, cruel, inhuman or degrading treatment)<sup>40</sup> and Article 17 (privacy).<sup>41</sup> Luisa Capal of the Center for Reproductive Rights hailed the court's decision as meaning "[e]very woman who lives in any of the 154 countries that are [a] party to this treaty . . . now has a legal tool to use in defense of her rights."<sup>42</sup> While the case was undoubtedly a positive development, optimism regarding its effects must be tempered by the continued restrictions on abortion access in Latin America, even in severe situations.

Continuing obstacles to access are demonstrated by a second case, *LC v. Peru*,<sup>43</sup> heard by the Committee responsible for enforcing CEDAW. At age 13, LC was raped, impregnated and later attempted suicide.<sup>44</sup> After the attempt, she required an operation to her spinal column.<sup>45</sup> The operation was delayed because of her pregnancy.<sup>46</sup> Despite a clear medical opinion that continuing the pregnancy would pose a serious risk to her physical and mental health, an abortion was not provided.<sup>47</sup> She subsequently miscarried and was left paralysed from the neck down, requiring a wheelchair, a catheter, and constant care from her family.<sup>48</sup> The committee found breaches of numerous CEDAW provisions, including Article 12 (discrimination in healthcare) and Article 5 (prejudices regarding the roles of men and women), noting that LC "was a victim of exclusions and restrictions . . . based on a gender stereotype that understands the exercise of a woman's reproductive capacity as a duty rather than a right."<sup>49</sup> As such, the case can be viewed as a positive development in moving to understand lack of access to abortion as a

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37. *KL v. Peru*, UN Human Rights Committee Communication No. 1153/2003, UN Document CCPR/C/85/D/1153/2003 (22/11/2005) (2005) ¶ 2.1-2.2.

38. *Id.* at ¶ 2.3.

39. *Id.* at ¶ 2.6.

40. *Id.* at ¶ 6.3.

41. *Id.* at ¶ 6.4.

42. Tatyana A. Margolin, *Abortion as a Human Right*, 29 *Women's Rights Law Report* 77, 87 (2007).

43. *LC v. Peru*, CEDAW Committee Communication No. 22/2009, UN Document CEDAW/C/50/D/22/2009 (2011).

44. *Id.* at ¶ 2.1-2.4.

45. *Id.*

46. *Id.*

47. *Id.* at ¶ 2.5-2.8.

48. *Id.* at ¶ 2.9-2.11.

49. *Id.* at ¶ 7.7.

matter of discrimination, as well as leading to a number of general recommendations including amendments and clarifications to laws on abortion.<sup>50</sup> Peru's recent issuance of guidance confirming the circumstances where a therapeutic abortion can be performed<sup>51</sup> may be seen as a positive cumulative result of these cases, albeit one which has taken a long time to develop and the impact of which is not yet clear.

There are some similarities in the background to the third case, a settlement between a 14-year-old rape victim, Paulina del Carmen Ramírez Jacinto, and Mexico, approved by the IAComHR.<sup>52</sup> Paulina requested an abortion, which was permitted in her circumstances in the state in Mexico where she lived. Despite this, Paulina's procedure was long delayed. In the meantime, a priest and a hospital director provided misleading information about the health risks of the procedure. Unknown women were also sent to speak to her in the hospital.<sup>53</sup> The combination of these efforts led Paulina to cancel the abortion. While the eventual settlement resulted in a number of benefits, including financial assistance for Paulina and her baby, the IAComHR's report has been criticized for failing to directly tackle the connection between religious beliefs held by medical practitioners and the denial of reproductive rights.<sup>54</sup> As discussed in Part Four, this connection is a significant obstacle to reform. The necessity of bringing this case, read in context with *KL v. Peru* and *LC v. Peru*, demonstrates that access to abortion goes far beyond the question of legalization alone and is heavily influenced by other factors, such as the prevalence of attitudes against abortion at a local level as well as lack of available specialist resources in the area.<sup>55</sup>

In contrast, the fourth case arose against the background of El Salvador's total ban on abortion. The provisional measures ordered by the IACtHR in *B v. El Salvador*<sup>56</sup> stemmed from the Supreme Court of El Salvador's refusal to approve a therapeutic abortion for a 22-year old woman, "Beatriz." Beatriz's anencephalic pregnancy threatened her life.<sup>57</sup> The IACtHR ordered El Salvador to adopt, as a matter of urgency, all measures necessary to ensure that appropriate medical procedures were carried out to avoid damaging B's life, health or personal integrity.<sup>58</sup> An early caesarean was performed five days later.<sup>59</sup> As with the other

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50. *Id.* at ¶ 9(b).

51. Amanda Klasing, *Dispatches: New Abortion Rules in Peru*, Human Rights Watch, 1 July 2014, available at <https://perma.cc/QK2K-68FP>.

52. *Paulina del Carmen Ramírez Jacinto v. México*, Inter-American Commission on Human Rights, Friendly Settlement, Petition 161-02, Report No. 21/07 (2007).

53. *Id.* at ¶¶ 9–13.

54. Ciara O'Connell, *Litigating Reproductive Health Right in the Inter-American System: What Does a Winning Case Look Like? (Special Issue on Health Rights Litigation)*, 16 *Health and Human Rights Journal* 116, 121 (2014).

55. Eriksson, *Reproductive Freedom*, at 294.

56. *B v. El Salvador*, Order of the Inter-American Court of Human Rights, Provisional Measures with regard to El Salvador (2013).

57. *Id.* at ¶ 2–10.

58. *Id.* at ¶ 17.

59. Amnesty International, *El Salvador: After Beatriz, No More Women Must Suffer*



cases, however, the conceptual underpinnings of the Salvadoran court's resistance to performing the procedure were not specifically addressed by the IACtHR. The court declined to assess the legality of El Salvador's abortion ban<sup>60</sup> and the issue was considered solely as a question of life-saving treatment for Beatriz. Beatriz brought her case to the IAComHR based on the lateness of the procedure, and the emotional damage she suffered while waiting for treatment and in the wake of her baby's death.<sup>61</sup>

These cases constitute excellent efforts to challenge abortion restrictions, and their impact has been to highlight the issue of abortion rights and to do justice for individual victims. In some cases, they also at least raise the prospect of wider reform. At the most basic level, all of these cases have been successful in that they were decided in favor of the woman seeking an abortion. They establish that the denial of abortion can constitute a violation of well-established rights, including rights to privacy and health care, and rights to be free from cruel, inhuman, and degrading treatment and discrimination. Notably, each surveyed case involved an extreme situation: three out of four of the women were teenagers, two were impregnated as a result of rape, and all of the pregnancies were either nonviable or posed serious health risks to the woman. Advocates may view extreme cases as more likely to be met with sympathy, and thus to be successful, but extreme cases inevitably limit success in challenging restrictions in a more general sense. By making such selections, "advocates risk reinforcing narrow conceptions of the reasonable or deserved abortion" thus neglecting the needs of women who, for example, have had consensual sex, have economic reasons for terminating, or have conflict with their partners.<sup>62</sup> This, in turn, can perpetuate the idea that acceptable abortions stem from good reasons while unacceptable abortions stem from bad ones.<sup>63</sup>

Furthermore, pursuing only extreme cases limits the applicability of some of the findings of violations. For example, it does not appear to create a precedent for arguing that a denial of abortion *without* such serious accompanying circumstances amounts to torture or inhuman or degrading treatment. This limitation in the types of cases dealt with dovetails with the wider issue of hesitancy in calling for decriminalization in general terms, such that by 2011 only one UN human rights expert had advocated an autonomous right to abortion in the interests of preventing gender discrimination.<sup>64</sup> Without a general right, the

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*Discrimination and Torture*, 4 June 2013, available at <https://perma.cc/5X2M-VYJG>.

60. *B. v. El Salvador*, Order of the Inter-American Court of Human Rights, at ¶ 4(ii)(c).

61. IPAS, *Inter-American Commission on Human Rights to hear Beatriz case against El Salvador*, 2015, available at <https://perma.cc/5GZ6-CZKP>.

62. Lisa M. Kelly, "Reckoning with Narratives of Innocent Suffering in Transnational Abortion Litigation," 303 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

63. Rebecca J. Cook, "Stigmatized Meanings of Criminal Abortion Law," 347 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

64. UN General Assembly, *Interim Report of the Special Rapporteur on the right of everyone to*

availability of abortions remains limited, with the state and/or judges retaining the final say on whether given criteria are met. Even in severe cases, this can lead to adverse results. For example, in a recent Mexican case, a 13-year-old girl was denied an abortion based on a judicial finding that she had been subjected to “sexual coercion” rather than rape.<sup>65</sup> Although the General Comment of the Committee for Economic, Social and Cultural Rights (CESCR) recently began requiring respect for “the right of women to make autonomous decisions about their sexual and reproductive health,”<sup>66</sup> the fact that it has taken until 2016 for this General Comment to occur raises the question: is the mainstream human rights system adequate to protect women’s rights, including reproductive rights?

## II. MAINSTREAM HUMAN RIGHTS – ADEQUATE FOR PROTECTING WOMEN?

Given that the impact of restrictions on abortion fall overwhelmingly on women, it is instructive to locate abortion in the wider context of women’s rights. This section considers women’s rights with regards to the mainstream IHRL system, of which the UNHRC is a part. One reason for the inadequacy of IHRL to address women’s rights is that violations specifically affecting women, such as “rape, forced motherhood . . . and sexual murder” were not the impetus for the creation of modern human rights principles.<sup>67</sup> Rather, the IHRL system began as a reaction primarily to the horrors of fascism, and therefore was one in which women’s status was “largely beneath notice.”<sup>68</sup> On a more practical level, women have had a minimal role in the creation of the key international instruments as well as limited inclusion on national delegations responsible for the negotiation of such instruments, with the majority of UN human rights bodies remaining male-dominated. The body responsible for monitoring CEDAW has been criticized for its gender imbalance<sup>69</sup>—at the time of writing, 22 of 23 members of CEDAW were women.<sup>70</sup> Criticism of the relatively high number of women on this one particular body indicates a significant failure to understand the importance of

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*the enjoyment of the highest attainable standard of physical and mental health*, UN Doc A/66/254, 3 Aug. 2011, 19, available at <https://perma.cc/C9XD-W72H>.

65. Nina Lakhani, *Mexican rape victim, 13, denied access to abortion*, *The Guardian*, 1 Aug. 2016, available at <https://perma.cc/ZVQ5-A3YS>.

66. CESCR, *General comment No. 22 (2016) on the right to sexual and reproductive health*, at ¶ 28.

67. Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 *UCLA Women’s Law Journal* 59, 62 (1993).

68. *Id.* at 71–72.

69. Hilary Charlesworth, et al., *Feminist Approaches to Internat’l Law*, 85 *The American Journal of Internat’l Law* 613, 624 (1991).

70. Committee on the Elimination of Discrimination Against Women (CEDAW), *Membership*, United Nations Human Rights, Office of the High Commissioner, available at <https://perma.cc/YH4A-SHHB>. As of March 2017, nine of eighteen members were women at the Committee on the Rights of the Child (“CRC”), with some terms to be reviewed imminently. CRC, “Membership,” United Nations Human Rights, Office of the High Commissioner, last visited 20 Mar. 2017, available at <https://perma.cc/T8HB-4HBL>.

redressing the disparity existing elsewhere.

Another distinction between IHRL and women's rights is that the former is traditionally seen as concerned with the public sphere and the latter with the private sphere, particularly with regard to violence against women.<sup>71</sup> With regard to abortion, the separation between the private and public sphere is not clear-cut because non-interference by the state is required for a woman to be free from criminal or other sanctions as a result of abortion procedures. Nonetheless, non-interference is not sufficient in itself to bring about abortion access. For example, the above discussion of *KL v. Peru* demonstrates how the moral judgement of individuals, such as doctors, can impact access to abortion. In the case of Paulina, individuals with even less official state roles, a priest and some unknown women, pressured Paulina not to have an abortion.<sup>72</sup> The roles played in these cases by non-state actors underline the importance of challenging the public versus private dichotomy in IHRL, a distinction that has significantly waned in importance with the development of the positive obligation concept.

The establishment of the positive obligation paradigm has entailed a shift from the traditional understanding of public international law, in which states rarely have a responsibility vis-à-vis individual conduct. Increasingly, states bear responsibility for "ensuring" human rights fulfilment, including the investigation and punishment of individuals who commit violations,<sup>73</sup> in addition to the more traditional obligations to respect and protect human rights.<sup>74</sup> Therefore, the establishment of the positive obligation provides a valuable opportunity to remedy an earlier limitation of IHRL in relation to women's rights. In the context of abortion, states would have positive obligations to provide not only abortion access but also education to counter negative beliefs about abortion, and to ensure sanctions were imposed for the refusal of abortion procedures permitted by law.<sup>75</sup> A later UNHRC case demonstrates this approach: *LMR v. Argentina* criticized the fact that, despite having committed criminal offences in failing to procure an abortion permitted by law, health professionals were not subject to administrative or judicial investigation.<sup>76</sup>

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71. Jutta M. Joachim, *Agenda Setting, the UN, and NGOs: Gender Violence and Reproductive Rights*, 122 (2007).

72. *KL v. Peru*, Communication No. 1153/2003, UN Document CCPR/C/85/D/1153/2003.

73. Claudio Grossman, *The Inter-American System: Opportunities for Women's Rights*, 44 *American University Law Review* 1305, 1306-07 (1995).

74. As discussed in the next section, the development of the positive obligation concept is encapsulated in the declaration of the 1993 Vienna Conference. United Nations Office of the High Commissioner, *Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993*, available at <https://perma.cc/P37A-FVLD>.

75. This would be subject to the exception of legitimate conscientious objection, which attaches to individual doctors rather than to institutions or administrative staff. See Bernard M. Dickens, "The Right to Conscience," 210, 214-15 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

76. *LMR v. Argentina*, UN Doc. CCPR/C/101/D 1608/2007, ¶ 7.2 (UN Human Rights Committee 28 Apr. 2011).

This more expansive approach is not universally accepted. Criticism of IHRL's extension into the sphere of private relationships<sup>77</sup> reflects the persistence of previous attitudes about IHRL's reach, which constitute one reason for its limited and delayed success in relation to abortion. A further difficulty with IHRL vis-à-vis women's rights is its perceived over-emphasis on civil and political rights to the detriment of socio-economic questions.<sup>78</sup> The danger of focusing on civil and political rights alone is relevant to the question of abortion access. Even where the procedure has been partially or fully legalized, there may be practical impediments for women seeking an abortion, such as financial barriers, lack of information or difficulty reaching a clinic.<sup>79</sup> Yet, the importance of the civil and political aspects of abortion access should not be downplayed. It is noteworthy that, compared to middle-class and upper-class women who access private providers "usually undisturbed by the legal prohibition or enforcement agencies,"<sup>80</sup> working class women are more likely to face legal penalties if, for example, they are compelled to visit public hospitals because of unsafe or self-induced abortions.<sup>81</sup> This highlights the indivisibility of the civil and socio-economic aspects of abortion access. In light of this, one should question "the common simple dichotomy between economic rights and political rights."<sup>82</sup>

As such, while it is certainly true that a lack of emphasis on socio-economic rights is one reason for the limited success of IHRL in women's rights, it is important that the response to these problems should not be a one-sided move away from civil and political rights. It is therefore encouraging that the recent General Comment refers to sexual and reproductive health as "indivisible from . . . other human rights . . . [and] intimately linked to civil and political rights."<sup>83</sup>

Another issue arises from the indivisibility of rights in this context. Just as physical security has been described as "a precondition for the exercise of any other right,"<sup>84</sup> one could argue that women's reproductive rights are necessary to enable the exercise of other rights related to democratic and economic participation in society. The description of reproductive rights as "not the whole of women's rights, but . . . a precondition of them"<sup>85</sup> is therefore apt.

In light of the central importance of reproductive rights, the argument Margolin raises for the creation of a new, freestanding right to abortion,

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77. Theodor Meron, *Human Rights Law-making in the United Nations: A Critique of Instruments and Process*, 62 (1986).

78. Charlesworth, et al., *Feminist Approaches*, at 634–635.

79. Joan C. Chrisler, *Introduction: A Global Approach to Reproductive Justice—Psychosocial and Legal Aspects and Implications*, 20 *William & Mary Journal of Women & the Law* 1, 2 (2013).

80. Barroso, "Bringing abortion into the Brazilian Public Debate," at 260–61.

81. Kelly, "Reckoning with Narratives," at 307–8.

82. Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 57 (2nd ed. 1996).

83. CESCR, *General comment No. 22 (2016) on the right to sexual and reproductive health*, at ¶ 10.

84. Henry Shue, *Basic Rights*, at 21–22.

85. Goldberg, *The Means of Reproduction*, at 11–12.

exercisable for any reason whether or not related to health,<sup>86</sup> initially appears attractive in helping to overcome restrictions. Certainly, such an approach is preferable to the requirement of exceptional circumstances, or a situation like that prevailing in Germany where “[a] burden is placed on women to justify their reasons for abortion, when the burden should be on the state to justify its imposition on the fundamental rights of women.”<sup>87</sup> Margolin’s argument in favor of shifting this burden is based on Alston’s concept of “quality control” standards for the creation of new rights.<sup>88</sup> In this framework, a newly created right should meet a number of criteria including relevance, correspondence with values of central importance and a reasonable level of consistency with state practice.<sup>89</sup> The rights must also be consistent with existing international human rights law and capable of recognition based on its general principles, customary law or obligations under the UN Charter, as well as be “capable of achieving a very high degree of international consensus.”<sup>90</sup>

Of these criteria, the requirement to “be capable of achieving a very high degree of international consensus” is particularly problematic. Whilst courts in numerous different countries have referred to “an emerging consensus on the liberalization” of abortion law,<sup>91</sup> it is also undeniable that abortion is an extremely divisive issue such that, at least at present, “no significant societal consensus” exists on the matter.<sup>92</sup> Indeed, public opinion in some countries is deeply opposed.<sup>93</sup> Margolin concedes this, but argues that efforts by the women’s rights community could create more consensus. While this is an important challenge for those seeking reform, there are also serious obstacles to consensus, particularly within Latin America. However, making abortion access dependent on public opinion perpetuates the effects of abortion restrictions. As a matter of principle, increased access to abortion through IHRL should not be dependent on consensus.

There are additional reasons to question the appropriateness of creating a new right. As Alston argues in relation to “third generation rights,” it is necessary to show “that the desired result cannot be achieved through the progressive development of existing norms” to justify the creation of new conceptual approaches.<sup>94</sup> While the violations of the norms against cruel, inhuman and

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86. Margolin, *Abortion as a Human Right*, at 79, 83.

87. Rebecca J. Cook, *Internat’l Protection of Women’s Reproductive Rights*, 24 N. Y. University Journal of Internat’l Law & Politics 645, 705 (1992).

88. Margolin, *Abortion as a Human Right*, at 79.

89. Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 American Journal of Internat’l Law 607–621, 615 (1984).

90. *Id.*

91. Rachel Rebouché, “A Functionalist Approach to Comparative Abortion Law,” 98 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

92. Barroso, “Bringing Abortion into the Brazilian Public Debate,” at 275.

93. Goldberg, *The Means of Reproduction*, at 20 (describing public support for a total abortion ban in El Salvador in the late 1990s).

94. Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of Internat’l Human Rights Law?*, 29 Netherlands Internat’l Law Review 307,

degrading treatment may necessarily be confined to the more extreme restrictions on abortion cases, existing rights to privacy, health, and non-discrimination<sup>95</sup> are all capable of progressive development to challenge these restrictions if they are reconceptualized to better relate to women's issues. The fact that these rights have not been reconceptualized in this way results not from any fundamental deficiency in their content, but from weaknesses in conceptual approaches and excessive deference to national systems. Creating a separate right instead of directly challenging these approaches, risks letting the mainstream system "off the hook" by allowing it to remain unconcerned with an issue central to women's rights. As such, the relevant failing is a limited interpretation of existing rights as opposed to the lack of a separate one.

The final part of this section contains a brief discussion of two existing rights that may be used as the basis for recognition of abortion rights: the right to privacy and the right to health. The US Supreme Court recognized nearly a half century ago that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," albeit with limitations.<sup>96</sup> However, disputes over qualifications of the right to privacy limit its utility in challenging restrictions, since the right to privacy is subject to a balancing act. A Slovak Constitutional Court decision provides an example of a court qualification of the right to privacy. The Court noted that the right to decide whether to conceive a child is not waived by becoming pregnant, and that any balancing of a woman's rights and the constitutional value of unborn life could only protect the latter to the extent "that this protection does not cause an interference with the essence of a woman's freedom and her right to privacy."<sup>97</sup>

Meanwhile, the substantive right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") was confirmed by a General Comment in 2000 as including non-discrimination and "the removal of all barriers interfering with access. . . including in the fields of sexual and reproductive health" for all women.<sup>98</sup> This language strongly suggests inclusion of abortion access in the right to health. The fact that this comment was issued almost a quarter of a century after the ICESCR took effect is, however, demonstrative of mainstream IHRL's hesitancy to embrace abortion rights. The eventual shift to acceptance of reproductive rights as part of the right to both health

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321 (1982).

95. CESCR notes the fundamental interrelationship between reproductive and other human rights. CESCR, *General comment No. 22 (2016) on the right to sexual and reproductive health*, at ¶ 10.

96. *Roe v. Wade*, 410 US 113, 153 (1973). The right to privacy in this case was based on federal case law rather than IHRL but is nonetheless considered to be a relevant comparator.

97. Adriana Lamačková, "Women's Rights in the Abortion Decision of the Slovak Constitutional Court," 56, 70 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014) (quoting Ústavný Súd [Constitutional Court], PL. ÚS 12/01, II.A Pt. (2.4.) n.1 (4 Dec. 2007), in *Collection of Laws of the Slovak Republic*, No. 14/2008, vol. 8 (unofficial trans. Adriana Lamačková)).

98. UN CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4, ¶¶ 12(b), 21, (11 Aug. 2000).

and non-discrimination owes much to the efforts of the women's and reproductive rights movements in the late 20<sup>th</sup> century, which are discussed in the following section.

### III. CEDAW AND THE MOVEMENT FOR WOMEN'S AND REPRODUCTIVE RIGHTS

The 1970s saw numerous developments in women's rights, which, while focused mainly on other issues, such as violence against women, were subsequently used by activists as a building block to mobilize around controversial issues like reproductive rights.<sup>99</sup> The history of reproductive rights in the IHRL setting commences with the 1968 International Conference on Human Rights in Tehran, which first established parents' "right to determine freely and responsibly the number and the spacing of their children."<sup>100</sup> The 1970s saw the International Women's Year of 1975 and the adoption of CEDAW. Under CEDAW, the right to freely determine the number and spacing of children shifted to a woman's basic right to control her fertility.<sup>101</sup> Further, CEDAW explained that the right required "access to the information, education and means . . . to exercise these rights,"<sup>102</sup> and has been described as the first instance of "[r]eproductive rights as a binding aspect of human rights."<sup>103</sup>

CEDAW represents a shift to a more discrimination-focused approach to reproductive rights. In *KL v. Peru* the UNHRC stressed the painful impacts of denying abortion.<sup>104</sup> In *LC v. Peru*, by contrast, the CEDAW Committee discussed that the causes of lack of abortion access are rooted in sex discrimination and "grounded its analysis of abortion denial as a human rights violation in women's biological differences from men and a critique of the state's use of gender stereotypes."<sup>105</sup> CEDAW's discrimination-focused approach was also used at the national level. For example, the Colombian Constitutional Court decision C-355/06 found that criminalization of abortion violated the right to sexual non-discrimination contained at Article 12.<sup>106</sup> CEDAW is also helpful because of its explicit concern with the regulation of private behaviour,<sup>107</sup> making it important

99. Joachim, *Agenda Setting*, at 132 ("[T]he experiences gained by activists in connection with the campaign concerning gender violence . . . created opportunities to mobilize state support for more contested women's issues, including reproductive rights and health.")

100. Proclamation of Teheran, Final Act of the Internat'l Conference on Human Rights, Teheran, U.N. Doc. A/CONF. 32/41 at 3, 4 ¶ 16, 1968, available at <https://perma.cc/QU22-BU57>.

101. Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, 15 Human Rights Law Review 569, 570 (2015).

102. United Nations, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Article 16(1)(e).

103. Miller & Roseman, *Sexual and Reproductive Rights*, at 106.

104. *KL v. Peru*, Communication No. 1153/2003, UN Document CCPR/C/85/D/1153/2003.

105. Kelly, "Reckoning with Narratives of Innocent Suffering," at 312.

106. See Women's Link Worldwide, *Excerpts of the Constitutional Court's Ruling*, at 9.

107. Eriksson, *Reproductive Freedom*, at 44-45 ("Private rights are essential to women's equality. The fact that the Convention encompasses even interpersonal, private relations is one of the

in the development of the positive obligation concept discussed in the preceding section. One example is the requirement in *LC v. Peru* that the state takes measures to ensure the knowledge and observance of relevant Convention provisions and the General Recommendation including “education and training programmes to encourage health providers to change their attitudes and behaviour.”<sup>108</sup>

As noted above, the expansion of IHRL into the sphere of private relationships has not been without criticism. Some argue that regulating conduct between individuals requires “inquiry into political and religious beliefs,”<sup>109</sup> and that a more restrictive definition similar to that used in the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) would have been preferable.<sup>110</sup> This argument is problematic for several reasons. Prior to the expansion into the private sphere, the outcome of IHRL for women’s rights was much more limited. In addition, the comparison to CERD must be contextualized because it was passed almost 14 years earlier, at a time when conceptions of human rights obligations were much more strictly delineated. The fundamental problem with such an approach is the questionable suggestion that holding certain political and religious beliefs justifies an individual’s discrimination against women. In light of this, it is important that those seeking reform defend the extension of rights in opposition to a traditional, minimalist conception, as well as recognize that the persistence of such attitudes is one reason for the limited success to date of IHRL in challenging restrictions on abortion.

It is also necessary to analyze CEDAW’s practical successes. Despite the positive aspects discussed above, it is unfortunately undeniable that many of the states with the most restrictive abortion legislations have ratified CEDAW—including Nicaragua and El Salvador, both in 1981—and CEDAW’s overall success in implementing women’s rights and/or the right to abortion is questionable. This reflects a broader conceptual question of whether the human rights of women should be pursued by IHRL or whether women’s rights should be pursued by laws that are particularly relevant to women’s situation.<sup>111</sup> CEDAW has been criticized both for providing a justification for mainstream human rights to ignore women’s issues and also for having weaker enforcement mechanisms compared to other treaties, such as the ICCPR.<sup>112</sup> The significant number of reservations compared with other treaties like CERD, appear to reflect a lower priority than the urgency afforded to other categories of minority rights. Further, CEDAW contains greater deference to states. Together, these provisions suggest “that discrimination against women is somehow regarded as more ‘natural’ and

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critical elements of its potential strength with regard to gender equality.”).

108. *LC v. Peru*, CEDAW Committee Communication No. 22/2009, at 20.

109. Meron, *Human Rights Law-making*, at 62.

110. *Id.*

111. Karen Engle, *Internat’l Human Rights and Feminism: When Discourses Meet*, Michigan Journal of International Law 517, 535 (1992).

112. See Charlesworth et al., *Feminist Approaches*, at 632.



acceptable than racial discrimination.”<sup>113</sup> While historical problems related to funding and physical distance from other organizations have since been ameliorated, with methods now mirroring those of other treaty bodies, the “legacy of marginalization” remains visible in the CEDAW committee’s work.<sup>114</sup> Delays in mainstream women’s issues within the IHRL field are therefore one reason for shortcomings in abortion access.

It is also possible to question the extent of the committee’s level of commitment to abortion access in its earlier days. CEDAW’s recommendation on women and health, which includes a number of suggestions on abortion,<sup>115</sup> was only issued 18 years after CEDAW came into force. While the recommendation to amend legislation criminalizing abortion “to withdraw punitive measures imposed on women” is broadly helpful, its overall impact is weakened by the use of the words “where possible.”<sup>116</sup> Furthermore, the country-specific sections within the report from the same session express concerns about high levels of abortion.<sup>117</sup> While the reasoning behind this concern, and the desire to ensure that other, more preventative forms of birth control are also available, is understandable, this leads to a somewhat contradictory approach. This approach simultaneously portrays abortion as a negative practice but encourages decriminalization. While criticisms relating to abortion restrictions have been included in country reports, since 2011 there had been no further General Comments, which bear greater authority, on the issue,<sup>118</sup> except for a more recent document on women in conflict, which “recommends” that state parties provide access to safe abortion services.<sup>119</sup>

The CEDAW committee’s tentativeness in this area reflects the contentious nature of abortion even compared with other women’s rights. This contentiousness can be situated in the context of fissures that emerged during conferences on women’s issues, reproduction and population in the 1980s and 1990s. The relevant conferences on abortion access included a conference on population in Mexico City in 1984, a conference on women in Nairobi in 1985, and the Vienna Conference of 1993. The latter tends to be seen as a watershed for bringing women’s rights into the IHRL narrative, with its statement stressing the “importance of working towards the elimination of violence against women in public *and private* life.”<sup>120</sup> This represented a move away from viewing the private sphere as outside the influence of IHRL, which is in line with the “positive

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113. *Id.* at 632–34.

114. Miller & Roseman, *Sexual and Reproductive Rights*, at 108.

115. CEDAW, *Report of the Committee on the Elimination of Discrimination Against Women, including General Recommendation 24*, Supplement No. 38 A/54/38/Rev.1 3–7 (1999).

116. CEDAW, *Report of the Committee on the Elimination of Discrimination Against Women, including General Recommendation 24*, at 7.

117. *See e.g., id.* at 21–23 (offering analysis on Greece).

118. Miller & Roseman, *Sexual and Reproductive Rights*, at 109.

119. CEDAW, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, CEDAW/C/GC/30 (2013), 14/24 ¶ 52(c).

120. United Nations, Vienna Declaration, at ¶ 38 (emphasis added).

obligation” concept. Also of great significance was the International Conference on Population and Development of 1994 in Cairo, described as the “culmination of a long struggle by the international women’s health movement to transform the public agenda” following a series of preparatory meetings.<sup>121</sup> The preparations included a declaration entitled “Women’s Voices ‘94,” which framed women’s control of their own reproduction as a human right.<sup>122</sup>

The conference saw a shift from a view of birth control as primarily related to the regulation of population to a notion that it was a matter of women’s rights.<sup>123</sup> The resulting perspective aligned with CEDAW’s approach. This approach was further developed at the 1995 World Conference on Women in Beijing, with a final declaration calling on states to consider reviewing punitive measures related to illegal abortion.<sup>124</sup>

At the same time, however, the developing movement for abortion and reproductive rights was the subject of a growing opposition to its attempts to change the status quo. The coalition of opposition included the Vatican, other conservative religious governments and representatives of certain NGOs.<sup>125</sup> Ensuing controversies developed not just because of disagreement between the women’s movement and conservative forces, but also because of divisions within the former. The women’s movement was divided by significant internal skepticism as to whether abortion should be prioritized, or even considered a positive medical procedure.

Distrust of abortion within the women’s movement can be traced back to the “population control” agenda during the Cold War, where a view of birth control as “a bulwark against anticapitalist chaos” led to the creation of very significant family planning initiatives by Western states, such as the United States.<sup>126</sup> The concept of population control was further discredited by extremely disturbing reports of compulsory sterilization from India and China.<sup>127</sup> Far from speaking out against these, the UN Family Planning Association gave the first UN population awards to those allegedly responsible for the sterilization.<sup>128</sup> Attendees of the Vienna conference exemplified this population-oriented view. Participants included both women’s rights activists and a contingent of scientists who evaluated programs based on their likely impact on overall population and the interests of wider society.<sup>129</sup> This approach overlooked the primacy of women’s

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121. Martha Alter Chen, “Engendering World Conferences: The International Women’s Movement and the UN,” in *NGOs, the UN and Global Governance*, 139–155, 147 (2007).

122. Joachim, *Agenda Setting*, at 149.

123. Elisabeth Jay Friedman, *Gendering the agenda: the impact of the transnational women’s rights movement at the UN conferences of the 1990s*, 26 *Women’s Studies International Forum*, 313, 322 (2003).

124. United Nations, *Report of the Fourth World Conference on Women*, 71, ¶ 106(k) (1995).

125. Friedman, *Gendering the Agenda*, at 323–25.

126. Goldberg, *The Means of Reproduction*, at 10.

127. *Id.*

128. *Id.* at 82–100.

129. Joachim, *Agenda Setting* at 141–43.

rights to decide whether to benefit from birth control, rendering birth control both utilitarian and sinister.

It is also necessary to situate the debate in an emerging division at these conferences. Broadly speaking the debate was between advocates from the Global North who viewed the subordination of women as based on sexism or unequal treatment, versus those from the Global South whose approach took into account inequalities between nations.<sup>130</sup> Some accounts of these conferences have tended to depict latter groups as divisive, suggesting, for example, that governments of the Global South used the 1980 World Conference on Women in Copenhagen for the promotion of separate causes than women's interests, such as anti-colonialism and anti-racism.<sup>131</sup> This account is questionable because it rests on an assumed and unexplained denial of the significant impact of such issues on the interests of women, particularly in less prosperous countries. Indeed, the failure to appreciate this could, conversely, be considered a key difficulty in uniting women's movements. For example, the decision of nine governments of the Global North, including the United Kingdom and United States, to enter reservations to a resolution at Copenhagen condemning colonialism, neo-colonialism, and Zionism<sup>132</sup> could be seen as reflecting this lack of unity. These countries put their own political interests ahead of structural changes sought by less economically developed countries and women's groups from these countries. Global South countries may have viewed the Global North's prioritization of self-interest with suspicion. This suspicion later translated into the abortion debate.

This background helps to explain why many women of the Global South are suspicious of the pro-choice agenda. There are very valid criticisms to be made regarding the lack of attention paid by many feminists and human rights activists to issues such as involuntary sterilization.<sup>133</sup> Nonetheless, these concerns should not extend to the point of suggesting that abortion is not a significant issue for women in the Global South, particularly bearing in mind the high level of deaths from abortion in some Global South countries.<sup>134</sup> Furthermore, these reservations on the part of some women's organizations had the unfortunate effect of playing into the hands of establishment anti-abortion critics such as the Vatican and United States. This led to the formation of an "anti-abortion, pro-family coalition," which "attempted to block what it considered the Western feminist thrust" at Cairo, with arguments based on universal rights including the right to have a large family.<sup>135</sup> Although the ability of this coalition to promote its agenda was stymied by lack of unity,<sup>136</sup> it no doubt had some influence on the limited declaration that ultimately

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130. Friedman, *Gendering the Agenda*, at 314.

131. Joachim, *Agenda Setting*, at 84.

132. *Id.* at 85.

133. Eriksson, *Reproductive Freedom*, at 256.

134. Estimated as 500,000 in the year 2000. *Id.* at 13.

135. Margaret Keck & Kathryn Sikkink, *Activist Beyond Borders: Advocacy Networks in International Politics*, 189 (1998).

136. Joachim, *Agenda Setting*, at 156–58.

resulted. After a hard-fought debate at Cairo about whether abortion should be included in the conference's programme of action, it was ultimately left as a matter for domestic legislation.<sup>137</sup>

The final declaration stated that women with unwanted pregnancies need only have access to appropriate counselling, and that, while abortion should be safe where it is legal, "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process."<sup>138</sup> The decision to give significant deference to national legislatures, while ostensibly justifiable on the grounds of democratic decision-making, can become more problematic given the tendency for women's voices to be silenced or be underrepresented in the dominant culture.<sup>139</sup> Even formally democratic states tend to "exclude women from elite positions and decision-making roles" while concentrating power in an elite.<sup>140</sup>

A similar process occurs in international organizations. The principle of limiting deference to a political majority is generally accepted in relation to, for example, ethnic minorities because of the importance of accommodating minority rights.<sup>141</sup> That this is not the case in relation to women underscores a difference in perception in the primacy of these rights, in parallel with the discussion in the previous section about the greater number of reservations entered to CEDAW compared to CERD. Leaving regulation to national legislatures places greater reliance on regional systems, yet it is only Africa that is subject to a regional instrument, the Maputo Protocol, which specifically provides for a right to abortion in given circumstances.<sup>142</sup>

It is evident that abortion's controversial nature is responsible for the recurrent limitations on attempts to challenge restrictions on abortion access through the aforementioned specialist instruments and conferences. Questioning the traditional view that motherhood is women's primary role is viewed as a threat to the overall social order, which is strongly based on controlling women's fertility.<sup>143</sup> From this perspective, the issue of abortion is especially contested even when compared with other women's rights. While violence against women is a means of social control, and conservatives may challenge the interference in the private sphere, ultimately a call for the cessation of such violence does not challenge traditional views of women's roles. As discussed in the following

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137. Cosentino, *Safe and Legal Abortion*, at 570–71.

138. United Nations, *Report of the Internat'l Conference on Population and Development*, UN Doc. No. A/CONF.171/13, ¶ 8.25.

139. Cook, "Stigmatized Meanings of Criminal Abortion Law," 663–4 in *Abortion Law in Transnational Perspective Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

140. *Id.*

141. Charlesworth, et al., *Feminist Approaches*, at 622.

142. African Commission on Human and Peoples' Rights, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, Article 14 (2003), available at <https://perma.cc/QXC2-5PU8>.

143. Friedman, *Gendering the Agenda*, at 327.

section, this controversy is particularly pronounced in Latin America where regional human rights treaties frequently hinder rather than assist access to abortion.

#### IV. REGIONAL, RELIGIOUS, AND CULTURAL FACTORS

For the reasons discussed in the preceding section, the regulation of abortion has been deferred to a large degree to individual states. This affords significant weight to regional factors that in Latin America tend to work against the protection of abortion rights. First, many countries in the region have tragically suffered large-scale human rights violations at the hands of dictatorships, such as extra-judicial executions, torture, and arbitrary arrest and detention, which means that, until recently, breaches of rights relating to gender were deprioritized or even ignored by the regional IHRL system.<sup>144</sup> Second, given its proximity and links to the United States, the region was heavily impacted by the ‘global gag rule’ implemented in 1984 under the Reagan administration.<sup>145</sup> This rule prevented NGOs from receiving US funds if they carried out or promoted abortion, even if they relied on separate finances and complied with national laws,<sup>146</sup> thus inescapably limiting the ability of civil society to bring challenges to restrictions on the basis of IHRL. The policy, repealed under the Clinton administration, reinstated by Bush, again repealed by Obama, and re-instated by Trump just days after his inauguration in January 2017,<sup>147</sup> has had a significant negative impact on the availability of abortion in at least twenty countries, as well as driving women to seek unsafe abortions and increasing maternal mortality.<sup>148</sup>

Even more significant than these factors, however, is the particular formulation of the “right to life” language in the ACHR, which states that “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.”<sup>149</sup> The ACHR’s *prima facie* language suggests a higher degree of protection for a fetus than definitions in the ICCPR and the African and European regional treaties, which do not make reference to unborn life. The ACHR definition is not necessarily incompatible with abortion access. The words “in general” suggest that an unborn life does not

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144. Eriksson, *Reproductive Freedom*, at 118. In addition, the IAComHR is suffering an under-resourcing crisis, which threatens around 40% of its employees’ roles, and has already led to the suspension of hearings. See *Concern over the financial crisis faced by the Inter-American Commission on Human Rights*, Front Line Defenders (2016), available at <https://perma.cc/8CDQ-S4HF>.

145. Melissa Upreti, *The impact of the “global gag rule” on women’s reproductive health worldwide*, 24 Women’s Rights Law Reporter 191, 193–94 (2003).

146. *Id.*

147. Molly Redden, “Global gag rule” reinstated by Trump, curbing NGO abortion services abroad, *The Guardian*, 23 Jan. 2017, available at <https://perma.cc/32CF-8KT5>.

148. Chrisler, *Introduction: A Global Approach to Reproductive Justice*, at 15.

149. Organization of American States, American Convention of Human Rights, O.A.S.T.S. No 36, 1144 U.N.T.S 144, 145, Article 4(1) (emphasis added).

take precedence over the life or health of a living person.<sup>150</sup> Furthermore, there are indications that the drafters of the Convention had no intention of altering the more conventional idea of the right to life found in the earlier American Declaration of Human Rights,<sup>151</sup> which simply provides that every human being has the right to life without making specific reference to the unborn.<sup>152</sup>

In addition, framing the argument as *respecting* a fetus is substantially different from the idea of granting *rights* to an unborn life. As one text on medical ethics and human rights notes, it is important not to concede that a fetus is a person, because refusing to do so acknowledges that “we owe it no duties, *even if we may offer it some respect*.”<sup>153</sup> This difference between “rights of” and “respect” for a fetus is supported by the Supreme Court of Colombia’s pronouncement that, “[h]uman life passes through various stages and manifests in various forms, which are entitled to different forms of legal protection. Even though the legal system protects the fetus, it does not grant it the same level or degree of protection it grants a human person.”<sup>154</sup> Accordingly, it is not inevitable that the language “from the moment of conception” should lead to rights being granted to unborn life, at least in a way that would outweigh those of the woman bearing it.

Nonetheless, in practice the definition has been used nationally and locally to limit access to abortion. For example, conservatives in Argentina, while arguing against abortion in cases of rape or as the only possible means of preventing danger to the life or health of a woman, contended that the provision had become “prospectively unconstitutional”<sup>155</sup> in light of the Convention on the Rights of the Child (“CRC”) and the ACHR.<sup>156</sup> This is striking in that the provisions of these IHRL instruments were cited in support of a directly regressive step against more permissive legislation that had been in force for many decades. From 2002, steps were taken to allow enforcement of existing abortion rights, followed by a decriminalization bill in 2006,<sup>157</sup> and thereafter by the aforementioned case in which the UNHRC found the denial of an abortion to a young disabled woman to

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150. Cook, *Internat’l Protection of Women’s Reproductive Rights*, at 694.

151. J. S. Davidson, *The Inter-American Human Rights System*, 264–65 (1997).

152. American Declaration of the Rights and Duties of Man, Organization of American States, Article 1, (1948).

153. Sheila McLean, *Old Law, New Medicine: Medical Ethics and Human Rights*, 57 (1999) (emphasis added).

154. Women’s Link Worldwide, *Excerpts of the Constitutional Court’s Ruling*, at 21. This is also mirrored in the Slovakian case referred to above: “unborn human life” is described as a constitutional “value” which, albeit deserving of protection from the state, warrants less intense protection than would be appropriate in relation to a “right,” despite the country’s federal constitution bearing some resemblance to Article 4(1) ACHR in stating that “human life is worthy of protection even prior to birth.” Lamačková, “Women’s Rights in the Abortion Decision” in *Abortion Law in Transnational Perspective* at 60 (quoting Ústavný Súd [Constitutional Court], PL. ÚS 12/01).

155. Paolo Bergallo, “The Struggle Against Informal Rules on Abortion in Argentina,” 147 in *Abortion Law in Transnational Perspective: Cases and Controversies* (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

156. Criminal Code of the Argentine Nation Article 86, Law 11,179 (1921).

157. Bergallo, “The Struggle Against Informal Rules,” at 147–48.

violate a number of rights, including non-discrimination.<sup>158</sup>

The following year, the Supreme Court of Argentina clarified that all rape victims (as opposed to only those with a disability) would be entitled to an abortion without complex judicial proceedings.<sup>159</sup> Despite this, most provinces have failed to implement compliant protocols.<sup>160</sup> An extreme example was the Salta province, where a provincial protocol referring to international treaties that protect the right to life from conception led a judge to refuse an abortion to a 14-year old girl raped by her stepfather, which contradicted the Supreme Court's ruling.<sup>161</sup> Apart from illuminating constitutional problems that may arise from a local court providing its own interpretations of international law rather than following those of the national Supreme Court, this case also underscores that the wording of Article 4(1) in the ACHR provides a further tool that can be mobilized by courts and other public authorities to justify the denial of abortion, even if it is contrary to domestic law. In this context, obligations to take positive steps beyond decriminalization to ensure that rights are delivered in practice are particularly important, bearing in mind that attempts to enforce these rights are being made against a cultural background that is, broadly speaking, hostile to abortion rights. The final paragraphs of this section will discuss the issue of culture, while the problem of implementation is considered in the concluding section.

There are strong indications that prohibitions on abortion based on fetal rights are not only about the protection of unborn life, but also about confirming particular religious or moral conceptions, which aim to protect the virtue of women and abortion providers.<sup>162</sup> Abortion poses a challenge to a number of assumed characteristics of women, such as being bound to become a mother, having a tendency to nurture the vulnerable, and desiring sex only for reproductive ends.<sup>163</sup> As such, having to continue with childbearing despite having made no conscious choice to do so does not tend to be considered a significant problem, except where exceptional factors are present, such as those seen in the case studies discussed above. The specific regional context for these assumptions can be traced to the concept of *marianismo*, which teaches that women are semi-divine, morally superior to, and spiritually stronger than men, such that they are venerated in a way similar to the Virgin Mary.<sup>164</sup> This veneration leads to an expectation that women will be resigned to their fate and bear circumstances, such as unwanted

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158. *LMR v. Argentina*, UN Doc CCPR/C/101/D/1608/2007, at ¶ 10.

159. Robin Minchom, *Supreme Court in Landmark Abortion Decision*, The Argentina Independent, 13 Mar. 2012, available at <https://perma.cc/G7CV-6DYT>.

160. Celina Andreassi, *Majority of Provinces not Complying with Abortion Rights*, The Argentina Independent, 13 Mar. 2015, available at <https://perma.cc/BR4W-MJL6>.

161. Lucy Adler, *Judge in Salta Denies Abortion to 14-Year-Old Rape Victim*, The Argentina Independent, 17 Dec. 2013, available at <https://perma.cc/UWK8-YDTA>.

162. Undurraga, "Proportionality in the Constitutional Review," at 83.

163. Cook, "Stigmatized Meanings of Criminal Abortion Law," at 353.

164. Evelyn P. Stevens, "Marianismo: The Other Face of Machismo," in *Confronting Change, Challenging Tradition: Women in Latin American History* 3, 4–8 (ed. Gertrude M. Yeager) (1994).

childbearing, for the greater good.

Given that these assumptions are heavily influenced by Catholic doctrine,<sup>165</sup> it is clear that religious views impact attitudes and practices in Latin America. However, this influence is underplayed in discussions of cultural factors that impede compliance with IHRL abortion standards.<sup>166</sup> For example, a text by Eriksson raises concerns about documents that attempt to “reformulate human rights in an Islamic framework.”<sup>167</sup> In the text’s subsequent discussion of Catholicism,<sup>168</sup> however, Eriksson does not appear to see Catholicism as having an equivalent, negative cultural significance. This article argues that the discrepancy is significant. Catholic doctrine has misconstrued the right to life by granting it to the unborn, and in doing so, limits the rights of women. Still, it is accepted as broadly reasonable and requiring accommodation within the IHRL framework. The opposite is true in the case of other religious, e.g. Islamic, or what are broadly considered traditional, e.g. African, cultural practices. For example, Tamale discusses a tendency to see African culture as being in opposition to women’s rights, a feature which is not specific to any particular region of the continent despite its diversity, and which belies a reliance on an essentialized view of culture as shaped by colonialism.<sup>169</sup>

This inconsistency between viewing certain cultural practices as harmful as opposed to viewing others as capable of accommodation could well arise from the relative distances of the countries where the practices are prevalent to the centers where key IHRL instruments have been drafted or where implementation-bodies are based. While the non-Catholic practices, often based far from the centres of IHRL drafting and implementation, are seen as alien and requiring change, the sphere of influence of Catholic thought has much greater overlap with the Western countries with longstanding power in the IHRL system. If a more consistent approach were applied, the IHRL system would need to recognize Catholic views on unborn life as similarly harmful cultural practices, and therefore be mandated not to allow them to interfere with abortion rights. This would stem, for example, from the requirement to change “social and cultural patterns . . . with a view to achieving the elimination of prejudices and customary and all other practices which are based on . . . stereotyped roles for men and women”<sup>170</sup> and to ensure “that harmful social or traditional practices do not interfere with access to . . . family planning.”<sup>171</sup>

As long as such views remain prevalent, there is an obligation to engage with

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165. Chrisler, *Introduction: A Global Approach to Reproductive Justice*, at 15.

166. See Eriksson, *Reproductive Freedom*, at 46.

167. *Id.* at 185.

168. *Id.* at 186–7.

169. Sylvia Tamale, *The right to culture and the culture of rights: a critical perspective on women’s sexual rights in Africa*, 16 *Feminist Legal Studies* 47, 47–51 (2008).

170. United Nations, CEDAW art. 5(a).

171. CESCR, *General Comment No. 14*, at ¶ 35.



them in a sophisticated way.<sup>172</sup> This can be seen as a key challenge for those seeking reform given that without changing perceptions on abortion, there is a danger that even positive changes in the law will not fully translate into a practical change. In particular, it is necessary to critique the idea that modern feminism is harmful to women because it forces them to conform to demands of economic productivity, which results in hostility to motherhood. In opposition to this, Pope John Paul II argued for a “new feminism” based upon recognition of intrinsic differences, mirroring the arguments about the right to have a large family that were raised by some anti-abortion groups during the Cairo Conference.<sup>173</sup> On the face of it, this argument can be easily rebutted, since the availability of abortion does not force any woman to undergo the process and is simply an option for those who require it. However, the position is actually less straightforward in light of criticism of the state for failing to provide sufficient support for pregnant women,<sup>174</sup> which disproportionately—although certainly not exclusively—affects women of the Global South.

Taken together with the legacy of the population control agenda discussed above, these concerns could push women towards having abortions, even where it would not be their choice. Advocates of abortion reform must properly address socio-economic rights related to support during pregnancy and motherhood to encourage acceptance of abortion as a genuine choice for women. Tackling this issue requires human rights advocates to critically engage with the way that political liberalism, with its emphasis on individual autonomy, has failed to fully address women’s exclusion and social issues arising in areas such as distribution of wealth, working practices, and the burden on those with family-caring responsibilities.<sup>175</sup> If these wider issues of social justice are not considered and abortion is presented as merely a question of choice, disconnected from other factors that may push women in particular directions, there is a clear risk that it will be seen as a way of absolving the state of its responsibilities in supporting women.

Furthermore, the liberal emphasis on issues such as the right to own property has the effect of defining human rights on the basis of criteria that are often unachievable for women.<sup>176</sup> These considerations provide another prism through which to view the contention, discussed above, that early IHRL failed women by being overly focused on civil and political rather than social and economic rights, and on the public rather than the private sphere.<sup>177</sup> The question is not just about which rights are more important to women, but also about how the lack of

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172. Julia Lemaitre, “Catholic Constitutionalism on Sex, Women, and the Beginning of Life,” in *Abortion Law in Transnational Perspective: Cases and Controversies*, 253 (eds. Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens) (2014).

173. *Id.* at 241–43.

174. *Id.* at 243–44.

175. *Id.* at 253.

176. MacKinnon, *Crimes of War*, at 72.

177. Charlesworth, et al., *Feminist Approaches*, at 619–635.

fulfillment of socio-economic rights impacts the right to abortion by making abortions coerced and less of a choice, providing a pretext for their denial to other women. For abortion to be a genuine choice and not a threat to women, particularly those of the Global South, but including those in the Global North from ethnic minority and/or poor backgrounds, socio-economic rights are fundamental.

### CONCLUSION – THE PROBLEMS OF IMPLEMENTATION AND PROSPECTS FOR CHANGE

The above discussion has demonstrated that, in addition to restrictive legislation, a key impediment to reform in many countries is the continued gap between the formal legal position and the reality on the ground for women, particularly those from less privileged backgrounds. This problem is not unique to Latin America—the distinction between formal legal rules and the rules of access remain a significant problem in East Africa as well, where unsafe abortions remain prevalent despite permissive laws.<sup>178</sup> However, the litigation within the Inter-American system has been specifically criticized for a lack of inclusion of remedies designed to ensure non-repetition in some cases, and for failing to implement these remedies in many cases where they are included.<sup>179</sup> For example, the *Paulina* settlement included a number of important non-repetition remedies such as the submission of legislative proposals, scheduling of training courses,<sup>180</sup> and drawing up a circular to public health services designed to “strengthen their commitment towards ending violations of the right of women to the legal termination of a pregnancy.”<sup>181</sup> However, these remedies have been criticized for being designed in a way that prevents effective measurement of their implementation. For example, the remedies mandate training by local government, but without any specification as to what the training should contain or how long it will last.<sup>182</sup>

These remedies impacted the continued “confusing patchwork of legislation” on abortion in Mexico, with significant discrepancies between states.<sup>183</sup> Ongoing impediments to abortion services and ethical and medical differences reflect a lack of societal understanding of court rulings,<sup>184</sup> as evidenced by Colombia’s reaction to the 2006 decision discussed above. The wider societal context existing outside of court judgments and legislation highlights the need for a legal realist argument “urging mindfulness of the law’s interpretation and import

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178. Rebouché, “A Functionalist Approach to Comparative Abortion Law,” at 101–8.

179. O’Connell, *Litigating Reproductive Health Right*, at 117–8.

180. *Paulina del Carmen Ramírez*, Petition 161-02, Report No. 21/07, at ¶ 11.

181. *Id.* at ¶ 12.3.

182. O’Connell, *Litigating Reproductive Health Right*, at 122–4.

183. Kari Paul, *The Criminalization of Abortion Continues in Mexico*, Ms. Magazine, 2013, available at <https://perma.cc/73JU-G9E6>.

184. Eduardo Díaz Amado et al., *Obstacles and challenges following the partial decriminalisation of abortion in Colombia*, 18 *Reproductive Health Matters* 118, 119–121 (2010).

in the real world.”<sup>185</sup> Beyond respecting rights to abortion in courts, it is important to protect and fulfil them by taking steps to progressively change prevailing attitudes. It is therefore encouraging that the recent General Comment of the CESCR, in addition to requiring reform of laws criminalizing abortion,<sup>186</sup> contains a number of obligations to protect the right. These obligations include regulating the exercise of permissible conscientious objections to prevent it impeding access.<sup>187</sup> The obligations also include the eradication of practical economic and physical barriers to abortion,<sup>188</sup> and a requirement to take “affirmative measures . . . to eradicate social barriers in terms of norms or beliefs that inhibit . . . women [and] girls from autonomously exercising their right to sexual and reproductive health.”<sup>189</sup> Other significant aspects of the General Comment include the recognition of the need to challenge gender stereotypes<sup>190</sup> and the framing of the abortion rights in terms of personal autonomy.<sup>191</sup>

The contents of this General Comment are potentially of great assistance to those seeking reform. This is particularly true for states, such as El Salvador and Argentina, which have ratified the Optional Protocol to the ICESCR,<sup>192</sup> which allows for individual communications to be brought regarding violations. The General Comment could be used to support a claim based on the ICESCR, perhaps on behalf of a woman seeking an abortion in less extreme circumstances than those in the case studies discussed above. Another factor which may favor reform is increased pressure towards liberalization as the Zika epidemic continues: while potentially limited in relating only to therapeutic abortions, even minor liberalizations in the most restrictive countries could contribute to destabilizing the assumption that the state should regulate this area of life. In the slightly longer term, progress in embryo techniques can challenge these perceptions by leading to the breakdown of divisions between different types of “potential life” and, perhaps, helping birth to become “the definite threshold for personhood and protection under IHRL.”<sup>193</sup> In time, this progress may displace the view of a fetus as having rights in itself that must be weighed against, or prioritized over, those of the woman, in favor of the concept of respect for unborn life that provides for its protection to the extent that it does not encroach upon a woman’s autonomy and decision-making.

Ultimately, the foundation for this view already exists within well-established principles of IHRL—the right to privacy, to health, and to non-

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185. Mae C. Quinn, *Feminist Legal Realism*, 35 *Harvard Journal of Law & Gender* 1, 4 (2012).

186. CESCR, *General comment No. 22 (2016) on the right to sexual and reproductive health*, at ¶ 40.

187. *Id.* at ¶ 43.

188. *Id.*

189. *Id.* at ¶ 48.

190. *Id.* at ¶ 27.

191. *Id.* at ¶ 28.

192. United Nations, *Optional Protocol to the Internat’l Covenant on Economic, Social and Cultural Rights*, G.A. Res A/RES/63/117, 12 Oct. 2008.

193. Margolin, *Abortion as a Human Right*, at 97.

discrimination. IHRL has clearly had successes in relation to challenging restrictions on abortion, but these have come many decades after ratification of the relevant instruments, and have remained limited vis-à-vis the types of circumstances in which abortion has been legalized, and the ability to enforce rights. These limits have a variety of historical causes, including the disjuncture between women's rights and IHRL, the 'second class' status of socio-economic rights and the reluctance to interfere in the private sphere—all of which have delayed IHRL in fully addressing women's issues. But limited success relating to abortion has more specific causes grounded in the controversies raised by abortion, which are of concern not only to the religious right, but also to some women's groups in the Global South. Even if widespread consensus may be difficult to reach in the foreseeable future, it is important to work towards, at least, the development of a higher level of agreement within the feminist and women's rights movements on the degree to which abortion services should be available.

Concerns about the fear that abortion can be used as a tool to suppress populations of certain nations or ethnic groups, or as a way to absolve the state of its responsibility to provide support to mothers, should be addressed head on to develop agreement within the feminist and women's rights movements. Removing the fear of coercion by ensuring that women are able to have as many children as they want as well as limiting births can address the previously mentioned concerns, thus facilitating the view that abortion is an option that should be available as a free choice. This would strengthen the argument that control over women's bodies through abortion restrictions, even on the basis of religious convictions, is discrimination that should be held in non-compliance of IHRL standards. A move to this conception requires a significant departure from the perception of women—and their treatment in law—as primarily mothers and caregivers, whose autonomy must be balanced against the rights of an unborn child, to a view where they are genuinely equal subjects of international law.